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

Consultation on draft regulations

June 2011

DWP Department for Work and Pensions

Contents

ISBN 978-1-84947-626-3

Introduction

This consultation document seeks views on new **draft regulations** on employer debt – **The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2011**.

It also seeks your views on the **Impact Assessment** on the effect of the draft regulations.

This document is on the Department's website at www.dwp.gov.uk/consultations/2011/employer-debt/

About this consultation

Who this consultation is aimed at

This consultation is aimed at pension scheme trustees, their advisers and employers who sponsor defined benefit pension schemes.

Purpose of the consultation

The purpose of the consultation is to seek views on draft regulations and on the Impact Assessment.

Scope of consultation

This consultation applies to England, Wales and Scotland.

Duration of the consultation

The consultation period runs until **10 August 2011**.

How to respond to this consultation

Please send your consultation responses **(preferably by email)** to:

Mike Rochford
Department for Work and Pensions
7th Floor
Caxton House
Tothill Street
London SW1H 9NA

Email adelphi.winding-up@dwp.gsi.gov.uk

Please ensure your response reaches us by **10 August 2011**.

When responding, please state whether you are doing so as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents, and where applicable, how the views of members were assembled.

How we consult

Freedom of information

The information you send us may need to be passed to colleagues within the Department for Work and Pensions (DWP), 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 (FoI) and how it is applied within DWP, please contact:

Central Freedom of Information Team
The Adelphi
1-11, John Adam Street
London WC2N 6HT

Freedom-of-information-request@dwp.gsi.gov.uk

The Central FoI team cannot advise on specific consultation exercises, only on Freedom of Information issues. More information about the Freedom of Information Act can be found at www.dwp.gov.uk/freedom-of-information

The consultation criteria

The consultation is being conducted in line with the Government Code of Practice on Consultation – Government Code of Practice on Consultation - Department for Business, Innovation and Skills (BIS). The seven consultation criteria are:

- **When to Consult**. Formal consultation should take place at a stage when there is scope to influence the outcome.
- **Duration of consultation exercises**. Consultations should normally last for at least 12 weeks, with consideration given to longer timescales where feasible and sensible.
- The Government Code of Practice on Consultation recommends a minimum 12 week consultation period for public consultations, unless there are good reasons

for a limited consultation period. In this case there has been a continued engagement with stakeholders over a number of years, they are familiar with the subject matter of the draft regulations and the changes are permissive only. The Government has therefore decided that a limited consultation of 6 weeks is appropriate.

- **Clarity of scope and impact**. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence, and the expected costs and benefits of the proposals.
- **Accessibility of consultation exercises**. Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is designed to reach.
- **The burden of consultation**. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- **Responsiveness of consultation exercises**. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- **Capacity to consult**. Officials running consultation exercises should seek guidance in how to run an effective consultation exercise, and share what they have learned from the experience.

Feedback on the consultation process

We value your feedback on how well we consult. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact our Consultation Coordinator:

Roger Pugh
DWP Consultation Coordinator
1st floor, Crown House
2, Ferensway
Hull HU2 8NF

Phone 01482 584681

Email: roger.pugh@dwp.gsi.gov.uk

In particular, please tell us if you feel that the consultation does not satisfy the consultation criteria. Please also make any suggestions as to how the process of consultation could be improved further.

If you have any requirements that we need to meet to enable you to comment, please let us know.

We will publish a report on the consultation in the consultations section of our website www.dwp.gov.uk/consultations. The report will summarise the responses to the consultation and will set out the action we will take as a result of them.

Chapter 1 – Background to employer debt

Introduction

1. The Employer Debt Regulations[1] are intended to provide protection for members of defined benefit pension schemes where the employer ceases to participate actively in the scheme.

2. Employer debt is broadly the amount the employer must pay into the scheme when it ceases to participate at a time when there is a shortfall between the scheme's assets and liabilities, calculated on a buy-out basis[2].

3. Amounts of employer debt can be very significant. But there are a number of ways in which employers ceasing to participate in a multi-employer scheme (i.e. a scheme with more than one participating employer) can reduce the amount of debt they are required to pay, for example by entering into a scheme apportionment arrangement[3] (if permitted by scheme rules), withdrawal arrangement[4], or approved withdrawal arrangement[5], or avoid triggering a debt by satisfying the conditions of the general[6] or de minimis[7] easements.

Issue under consideration

4. Some commentators argue that the Employer Debt Regulations continue to unnecessarily inhibit corporate activity, in particular to hinder the ability of companies to restructure in order to be better able to deal with changes in the economic environment.

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[1] The Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678).

[2] The amount of liabilities on a buy-out basis is the cost of purchasing insurance which will cover all the pensions the scheme is required to pay.

[3] Where an employer debt triggers a departing employer pays an amount to the scheme, and the balance of the employer debt is apportioned to one or more employers in the scheme.

[4] The departing employer pays an amount to the scheme at, or above, the scheme specific funding level, with the balance (up to full buy-out level) to be met by a guarantor.

[5] The departing employer pays (with the agreement of the Regulator) an amount to the scheme below the scheme specific funding level, with the balance (up to full buy-out level) to be met by a guarantor.

[6] The general easement allows a restructuring to take place without triggering an employer debt, so long as a number of steps are followed and various conditions are met e.g. all the assets and liabilities of the departing employer are transferred to one employer in the scheme.

[7] The de minimis easement allows a restructuring to take place without triggering an employer debt, so long as a number of conditions are met.

Recent history

5. Two new procedures (the general and de minimis easements) were introduced in April 2010, which provide that no employer debt is payable where two employers merge in a corporate restructuring, providing certain conditions are met. In the consultation on these two procedures, respondents said that in certain circumstances allowing for restructurings across multiple employers within a wholly owned corporate group could also be achieved without compromising member security. The Government's response to the consultation[8] said that it intended to explore these issues further with stakeholders.

6. An informal consultation was conducted during December 2010 and January 2011 on a proposal that an employer debt would not trigger if a group guarantee was put in place as part of a corporate restructuring, so long as certain conditions were met. Broadly, the trustees would have to be satisfied that (i) the remaining employers could meet the scheme's technical provisions (i.e. scheme funding requirements) after the restructuring; and (ii) the guarantor had sufficient financial resources to pay the guarantee. Trustees would regularly review the terms of the guarantee and the ability of the guarantor to support it. If there was a "material adverse change" in the strength of the guarantor, the trustees could demand payment of the debt.

7. Although most respondents to the informal consultation welcomed the fact that the Government was looking again at the employer debt rules, some suggested that the take up of group guarantees would be limited because the proposed arrangements were not sufficiently flexible. In particular, some respondents said employers would not use this easement if, having put a group guarantee in place (and possibly agreeing to put a significant amount of cash into the scheme as part of the agreement), the trustees could call in the debt shortly afterwards on the occurrence of a material adverse event. In addition it could prove very difficult to adequately define a "material adverse event" in a way that would be acceptable to the industry.

8. Stakeholders suggested that the Government should try to do something that would be more straightforward to use - based on the existing scheme apportionment arrangements.

9. In light of the feedback from the informal consultation about the difficulties there could be with group guarantees, the Government has therefore developed an option based on the existing scheme apportionment arrangements. The Government has looked again at the arguments for and against the apportionment of liabilities. To make the new arrangements easier to operate, the proposals would require *liabilities* to be apportioned, rather than a *sum of debt*. Also, in response to feedback on the "material adverse event" issue, the Government does not intend to take forward that proposal. Instead safeguards

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

will be built around the usual ongoing covenant reviews as part of the routine scheme valuation process. The detail of this new proposal is in **Chapter 2**.

Other issues

10. The draft regulations also make some changes to the period of grace requirement and some technical amendments and these are in **Chapters 3** and **4**. The Impact Assessment is discussed in **Chapter 5**.

Statement of policy

11. The commentary on the regulations in this document is intended to describe the policy. It is not to be taken as an authoritative interpretation of the law. Such an interpretation can only be provided by a court.

Chapter 2 – Employer debt and corporate restructurings

Introduction

1. Notwithstanding the introduction of the general and de minimis easements in April 2010, some commentators continue to express concern that the Employer Debt Regulations are not sufficiently flexible to address the issues raised by corporate restructurings. Commentators argue that where a restructuring takes place amongst a group of associated employers participating in a multi-employer scheme, this should not trigger an employer debt.
2. The issue which gives rise to particular concern is that a corporate restructuring can trigger an employment-cessation event[9] if the general or de minimis easement is not used. The occurrence of an employment-cessation event normally gives rise to the triggering of an employer debt.
3. The Government accepts that there are circumstances where the triggering of an employer debt on a corporate restructuring is not appropriate. The draft regulations, which are the subject of this consultation, will introduce greater flexibility for employers, whilst at the same time maintaining member protection.

New arrangements

4. The Employer Debt Regulations already make provision for scheme apportionment arrangements. The draft regulations introduce new requirements which are based on these arrangements. Under the existing arrangements, where an employer ("Employer A") undergoes an employment-cessation event an employer debt is calculated; the debt is then passed over or apportioned to another employer ("Employer B"), with their agreement and the consent of the trustees of the pension scheme and the employers. The trustees in particular have to be satisfied that the apportionment will not have any adverse effect on the future funding of the scheme.
5. Pension schemes' trustees and advisers have for some time commented that the existing scheme apportionment arrangements are quite limited. To address this issue, the draft regulations introduce a new arrangement called the "Flexible Apportionment Arrangement". Under the draft regulations the liabilities of the departing employer (as above, Employer A) are reapportioned to one or more

[9] 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.

employers remaining in the scheme. There are no restrictions on the number of employers who may take on the liabilities of the departing employer.

6. This reapportionment of liabilities is commonly described as Employer B "stepping into the shoes" of Employer A. (Employer B may be part of a corporate group so would be willing to undertake this obligation because it would be for the benefit of the group overall.) The effect of this reapportionment of liabilities is that if, at some future time, Employer B ceases to participate in the scheme and its employer debt is triggered, it would be calculated by reference to the liabilities in respect of the members of the scheme Employer B had actually employed plus those members who had been employed by Employer A. It should be noted that this reapportionment is for employer debt purposes – it does not affect a scheme member's benefits or their employment record.

7. Under the draft regulations, a Flexible Apportionment Arrangement is provided for where the following conditions[10] are satisfied:

   - the funding test is met;
   - all of the pensions liabilities of the "leaving" employer are reapportioned to another employer or employers "staying" in the scheme;
   - the trustees and the employers who are parties to the Flexible Apportionment Arrangement consent in writing to the arrangements; and
   - where an employment-cessation event has already occurred, no part of the debt must have been paid.

   In addition the scheme must not be in a Pension Protection Fund assessment period or be likely to start such a period in the next 12 months.

8. Both limbs of the funding test need to be satisfied. The first limb is about the ability of all the staying employers to fund the scheme. The second limb considers whether the Flexible Apportionment Arrangement would have any adverse affects on the security of members' benefits.

9. Where a number of employers cease to employ active members of the scheme at broadly the same time, perhaps as part of a corporate restructuring, only one funding test may be needed. It will be for the trustees to decide if a single funding test can be used to cover a number of transactions.

10. The Government's view is that the funding test will be a sufficient condition for the Flexible Apportionment Arrangement, and trustees can consider the future outlook of all the staying employers when undertaking the test.

11. Although this Chapter exemplifies the loss of the last active member as occurring as part of a corporate restructuring, the Flexible Apportionment Arrangement can be used in other circumstances too, for example where an employer's last active member retires or resigns from the employment.

12. The advantages of the Flexible Apportionment Arrangement are that an employer debt need not be calculated for each occasion on which an employer ceases to

[10] See draft regulation 10

employ an active member of the scheme. In fact a debt may only need to be calculated when an employer becomes insolvent or when the scheme winds up. The new proposal builds on existing apportionment procedures which are familiar to pension scheme trustees and advisers. This will also give greater certainty to employers. Under this proposal, a corporate group could undertake restructuring exercises safe in the knowledge that an employer debt would not be payable.

13. An example of how a Flexible Apportionment Arrangement might work is as follows:

- In a corporate group, Employers A and B are to be merged with Employer C at a future date. To avoid employment-cessation events occurring to Employers A and B, the group asks the trustees whether they would be content to use a Flexible Apportionment Arrangement.
- The group proposes to the trustees that the pensions liabilities of leaving Employers A and B are reapportioned to staying Employer D, another participating employer.
- The group tells the trustees that leaving Employers A and B will cease to employ any active members of the pension scheme on the same date.
- As leaving Employers A and B will cease to employ active members on the same date, the trustees decide that only one funding test needs to be carried out.
- The trustees conduct the funding test contained in regulation 2(4A) of the Employer Debt Regulations.
- A legally enforceable agreement is entered into under which all of the pensions liabilities of leaving Employers A and B are reapportioned to staying Employer D. Staying Employer D effectively ‘steps into the shoes’ of leaving Employers A and B.
- The trustees, leaving Employers A and B, and staying Employer D must all consent to the arrangements.
- Provided all of the conditions are met, when leaving Employers A and B cease to employ active members of the scheme, no employment-cessation event occurs.
- Leaving Employers A and B are not counted as “former employers” for the purposes of regulation 9 of the Employer Debt Regulations.
- No intermediate monitoring of staying Employer D’s covenants is necessary, other than the usual monitoring and reviews in line with the trustees’ covenant monitoring plans and procedures.
- If at some future time the group want to use a Flexible Apportionment Arrangement again with respect to another employer in the group, the procedure has to be carried out again.

Main difference from the 2010 general easement

14. The general easement requires the pensions liabilities and the corporate assets of the exiting employer to be passed over to the receiving employer. Under the Flexible Apportionment Arrangement there will be no requirement for all corporate assets to be transferred over from one employer to the other.

Consequential amendments

15. A number of consequential amendments to the Employer Debt Regulations are being made as a result of the introduction of new regulation 6E. In this paragraph, a reference to "the Regulations" is a reference to the Employer Debt Regulations.

- **Draft regulation 2** amends the Pension Protection Fund (Multi-employer Schemes) (Modification) Regulations 2005 (SI 2005/441). The amendment provides that a person is not an employer where a Flexible Apportionment Arrangement has taken effect in accordance with regulation 6E of the Regulations and that employer is the leaving employer.
- **Draft regulation 3(2)** amends the Pension Protection Fund (Entry Rules) Regulations 2005 (SI 2005/590). The amendment also provides that a person is not an employer where a Flexible Apportionment Arrangement has taken effect in accordance with regulation 6E of the Regulations and that employer is the leaving employer.
- **Draft regulation 3(3)** makes a further amendment to the "Entry Rules Regulations". It provides that a scheme is not excluded from being an eligible scheme because a Flexible Apportionment Arrangement has been entered into.
- **Draft regulation 4(2)(a)** inserts a definition of "Flexible Apportionment Arrangement" into regulation 2(1) of the Regulations.
- **Draft regulation 4(4)** amends the requirements for the "funding test" in regulation 2(4A) of the Regulations, so that it has application for Flexible Apportionment Arrangements.
- **Draft regulation 6(b)** inserts new regulation 6(4)(ab) into the Regulations. The new sub-paragraph provides that where a staying employer takes over responsibility for the pensions liabilities of a leaving employer, those liabilities are to be attributed to that staying employer in any subsequent application of regulation 6(4).
- **Draft regulation 7** inserts a cross reference to regulation 6E(2) into regulation 6ZA(1) of the Regulations.
- **Draft regulation 8** inserts a new sub-paragraph (h) into regulation 6ZB(17) of the Regulations. The amendment provides that liabilities in relation to the scheme include liabilities for which the employer has taken over responsibility under a Flexible Apportionment Arrangement.

- **Draft regulation 11** amends regulation 9 of the Regulations. The effect of the amendments is that a person is not included as a former employer where a Flexible Apportionment Arrangement takes effect in respect of that person.
- **Draft regulation 13** amends the Pensions Regulator (Financial Support Directions etc.) Regulations 2005 (SI 2005/2188). The amendment provides that a person is not an employer where a Flexible Apportionment Arrangement has taken effect in accordance with regulation 6E of the Regulations and that employer is the leaving employer.

Consultation questions

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

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

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

Chapter 3 – Period of grace provisions

1. The “period of grace” is a provision whereby an employer who temporarily ceases to employ an active member of the pension scheme does not trigger a debt if he tells the trustees he intends to employ an active member within 12 months, and in fact does so. The requirements are contained in regulation 6A of the Employer Debt Regulations.
2. The draft regulations make two amendments to the period of grace requirements.
3. **Draft regulation 9** provides that the current 12 month period of grace can be extended to a maximum of 36 months from the date of the original cessation event. The extension is at the discretion of the trustees. The trustees’ discretion covers the following areas:
   - whether the 12 month period should be extended;
   - how long the extension should be (subject to the overriding 36 months requirement);
   - whether, within the overriding 36 months maximum, more than one extension should be granted.
4. Another issue which has been raised is that the one month notification period that employers have to write to trustees (to seek permission to use the period of grace) is too short. Draft regulation 9 increases the notification period from one to two months.
5. **Draft regulation 14** makes an amendment to the Occupational Pension Schemes (Scheme Funding) Regulations 2005 (SI 2005/3377) in relation to the period of grace. New paragraph 3A is being inserted into Schedule 2 to make clear that an employer in a period of grace is still an employer for scheme funding purposes.
6. Similar consequential amendments are not considered necessary to the Pension Protection Fund (Multi-employer Schemes) (Modification) Regulations 2005 (SI 2005/441) or to the Pension Protection Fund (Entry Rules) Regulations 2005 (SI 2005/590). An employer in a period of grace continues to be an employer for the purposes of these regulations.

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

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

Chapter 4 – Minor technical amendments to the regulations

Introduction

1. The draft regulations issued for consultation in 2009[11] contained a number of proposed technical amendments. These amendments attracted a large number of comments. In the event, it was decided not to include some of these amendments in the amending regulations which came into effect on 6 April 2010[12]. The response to the consultation published in March 2010[13] set out the reasons for not making these amendments.
2. Since March 2010, the landscape for making these kinds of amendments to regulations has altered significantly. In the first place the Government's approach is to control and to reduce the burden of regulation. A strong case has to be made for any new regulations, based on their costs and benefits. The new "One-in, One-out" approach is intended to ensure that new regulatory burdens on business are only brought in when reductions can be made to existing regulation.
3. A number of the technical amendments to the regulations would involve changes to the policy. As such, costs would arise. It is not clear that any savings that would arise from these adjustments to policy would outweigh the costs.
4. However, a limited number of technical amendments are proposed in these regulations which clarify the regulations and their application in practice but do not make substantive changes to requirements.

Outstanding issues

5. The approach the Government is taking means that certain amendments on which there have been earlier discussions with the pensions industry will not be made. They are discussed in the following paragraphs.
6. **"Active member"** Representations have been made that the definition of "active member" should be amended to make clear whether or not it encompasses "life assurance members" or members of closed schemes who are no longer accruing benefits but who are still employed and whose benefits are linked to future salary increases.

[11] http://www.dwp.gov.uk/docs/consultation-employer-debt-draft-regs.pdf

[12] The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 (SI 2010/725).

[13] http://www.dwp.gov.uk/docs/employer-debt-draft-regs-response.pdf

7. If “life assurance members” etc. could be counted as active members of the scheme that could defer the triggering of an employer debt. This would have a number of consequences. It would in effect create a new category of exemption from employer debt; it would mean that the definition of “occupational pension scheme” in section 1 of the Pension Schemes Act 1993 would need to be revisited to see whether changes to it are needed; and it would not be appropriate to amend the definition of “active member” only in relation to employer debt requirements - that would raise questions on the interpretation of the term elsewhere.

8. The other side of the issue is whether the definition of “active member” should be amended so that it expressly does not include “life assurance members” etc. The term “active member” is defined in section 124 of the Pensions Act 1995 as a person in pensionable service under the scheme. Each scheme will have its own longstanding rules about what this means for the scheme. Amending the legislation to provide that “active member” does not include particular categories of persons e.g. “life assurance members” could cause uncertainty for pension schemes. Primary legislation would probably be needed. An amendment would cause uncertainty (and extra costs in adviser fees etc) for the great majority of schemes but the numbers of schemes benefiting from any amendment would be small. Whilst it is understandable that some schemes and advisers would like new legislation to clarify this issue, it is not clear that the majority of schemes would be best served by such changes.

9. Schemes will have their own rules about what constitutes pensionable service and hence who is an active member. If any scheme is uncertain as to whether a person is an active member of their scheme, the Government’s view is that the best way forward would be for the scheme to take legal advice.

10. **“Underpin schemes”** Another issue that has been raised is how an employer debt should be calculated in an underpin scheme. The definition of “money purchase benefits” is the focus of the *Bridge* case[14] and the Government’s view is that it would be better to await the outcome of that case before considering any further legislation on this point.

11. **“Floating” basis of calculation** The Employer Debt Regulations make specific provision for the calculation of the employer debt on a “floating” basis in withdrawal arrangements (paragraph 5(2) of Schedule 1A). Some commentators interpret the existing Regulations as allowing the floating method of calculation to be used in the calculation of scheme apportionment arrangements. Under a floating scheme apportionment arrangement, the liability proportion of the departing employer (for example 1/10th of the liabilities) would be apportioned to another employer in the scheme. At some future date, when a new employer debt event arises, that proportion would be applied to the deficit that existed at that future time to calculate the amount due. The calculation is described as “floating”

[14] Bridge Trustees Ltd vs Houldsworth and another [2010] EWCA Civ 179.

because at that future time, the debt so calculated may be smaller or larger than the debt due at the original date the departing employer left the scheme.

12. The draft regulations issued for consultation in 2009 included a revised regulation on scheme apportionment arrangements. The draft regulation included an explicit provision on the floating method of calculation. Respondents to the consultation raised a number of complex technical issues about this provision. To address all of the issues raised, complicated amendments would need to be made to the regulations, but these would seem to be out of all proportion to the number of occasions on which such calculations would need to be made. The Government is therefore making no material amendment to the requirements on scheme apportionment arrangements. However, this will be mitigated by the introduction of the Flexible Apportionment Arrangement, which will provide the extra flexibility that many advisers and schemes want.

13. **"Former employer"** Regulation 9 of the Employer Debt Regulations makes provision about former employers. A "former employer" is defined in regulation 9(2)(a) as "any person who employed persons in the description of employment to which the scheme relates but at the relevant time has ceased to do so". A former employer may still be liable for an employer debt unless one of the Conditions in regulation 9 is met.

14. In the 2009 consultation on draft regulations, respondents commented that it could take several months between the date the debt triggered and the date the debt was paid or apportioned etc. If during this period a further debt event occurred, the former employer would still be counted as a participating employer in the new debt calculation. Respondents considered this would have the effect of altering the amount of the new debt that would otherwise be produced.

15. The definition of "employer" is one of the issues being considered in the *Pilots* case[15]. The outcome of the case may have implications for the definition of "former employer". As such, the Government considers that it would be inappropriate to legislate before the outcome of the case is known. But as mentioned above, for many schemes and advisers, it is expected that the introduction of the Flexible Apportionment Arrangement will be a useful option for dealing with debt events.

Technical amendments

16. Some technical amendments are being made by these regulations to the Employer Debt Regulations. They are considered in the following paragraphs.

    - **Draft regulation 4(2)(b) and (c)** makes some minor clarificatory amendments to the definitions of "liability proportion" and "liability share" in regulation 2(1).

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

- **Draft regulation 4(3)** amends the definition of “receiving employer” in regulation 2(3A). The amendment clarifies the definition where it applies to an exiting employer who has changed its legal status.
- **Draft regulation 5** amends regulation 5 of the Regulations. Paragraph (3) of regulation 5 is substituted to make clear that the calculation of the assets and liabilities of the scheme must be made by reference to the position on the same date. Draft regulation 5(3) amends a cross reference. Draft regulation 5(4) substitutes a revised paragraph (15) of regulation 5. The substituted paragraph clarifies the circumstances in which the amount payable under a withdrawal arrangement (amount B) is to be treated as an asset under regulation 5(4).
- **Draft regulation 6** amends regulation 6(4) of the Regulations. Draft regulation 6(a) amends regulation 6(4)(a) and provides that, from the date the amending regulations come into effect, regulation 6(4)(a) ceases to have effect for any further reattributions. The policy is that henceforward, the reattribution of liabilities from one employer to another should take place under the auspices of a Flexible Apportionment Arrangement – please see draft regulation 6(b) which inserts new sub paragraph (ab) into regulation 6(4).

  Draft regulation 6(c) substitutes a new regulation 6(4)(b). The substituted regulation applies where the liabilities to or in respect of the member arose as a result of pensionable service with one employer or more than one employer. The regulation provides that the liabilities to or in respect of the member which arose as a result of pensionable service with Employer A are to be attributable to Employer A. Liabilities includes any liabilities transferred in during service with Employer A.
- **Draft regulation 12** amends Schedule 1 to the Regulations. The amendments reflect the changes being made by draft regulation 4(2)(b) and (c) to the definitions of “liability proportion” and “liability share” in regulation 2(1).

Chapter 5 – Impact Assessment

Introduction

1. Estimates setting out the Government's current understanding of the costs and benefits of the policy options under consideration form an integral part of this consultation exercise.
2. A "consultation-stage Impact Assessment" is contained in the Annex. It sets out the evidence that is currently available to Government. However the Government is keen to elicit further evidence from consultees on the potential costs and benefits of policy options.

Overview of options considered

3. Four options have been considered - **1**. Group Guarantees – no employer debt would be payable if a group of companies entered into guarantee arrangements for the payment of the debt. **2**. Apportionment Arrangements - more flexible arrangements which allow one employer to take over responsibility for the pensions liabilities of another. **3**. Extended Period of Grace – the existing period would be extended so no employer debt would be payable for up to 36 months (instead of the current 12 months) where the employer intended to re-employ an active member of the scheme within that period. **4**. No Change – which does not meet pensions industry concerns.
4. Options **1** and **2** are alternative options for dealing with cases where the employer ceases **permanently** to employ an active member of the scheme. For example this may occur where two companies are merged into one. Of these two, the preferred option (as provided for in the draft regulations) is option **2**, because it is a simplification of existing procedures which are already familiar to employers and pension scheme trustees. Option **3** (also provided for in the draft regulations) is the preferred option where an employer ceases **temporarily** to employ an active member of the scheme. The preferred options will increase flexibility for employers without materially increasing the risk to members' benefits.

Proportion of employers taking up the new easements

5. The Government wants to test its estimation regarding the proportions of "new cases", that is, employers who would use Options **1** and **2**, instead of paying

an employer debt to the pension scheme. In the Impact Assessment, the estimated proportion for option **1** is 1% of employers and for option **2** it is 2%.

6. Some basic data about employers participating in pension schemes is available from the Pensions Regulator. Working up this data produces a figure of 10,862.5 employers participating in multi-employer pension schemes (see paragraph 27 of the Impact Assessment).
7. Beyond this, however, there is very little information. In particular there is no information on the number of employer debt events that occur each year or on the number of employers involved.
8. In the absence of any firm data, the Government sought the views of contacts in the pensions industry. Responses suggested that most employers will endeavour to use the existing easements to avoid paying, or to defer paying, the employer debt. The proportion of employers who pay the employer debt – but would have used the proposed new easements instead if these were available – is therefore expected to be very small. Anecdotally the Government was told that this figure might amount to just a few employers per year.
9. The Government considers that its estimated proportions broadly reflect what is actually happening. However the Government also believes that more reliable information would be beneficial.

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

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

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?