



Department
for Work &
Pensions

Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator

Consultation

June 2018

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Ministerial Foreword by The Rt Hon Esther McVey, Secretary of State for Work and Pensions



The Defined Benefit pension sector is an integral part of the UK pensions system, with around 10.5 million members relying on a Defined Benefit scheme for their retirement income. The Government is committed to ensuring that Defined Benefit pensions are protected and that employers are helped to meet their promises to pension scheme members.

The UK already has a robust system in place to protect Defined Benefit pensions and we expect most people will get their pension paid in full. The Pensions Regulator offers support and guidance to trustees and can take action against employers who are not delivering on their legal obligations. In the event of an employer becoming insolvent, the Pension Protection Fund provides significant support to individuals in the form of compensation for their lost pension.

However, the pensions landscape is constantly changing and recent high-profile cases have highlighted the fact that we cannot be complacent. We need to ensure that the Defined Benefit system is tough enough to deal with abuses and continues to work in the best interests of those involved – for members and pensioners, for today's workforce and for employers. Our recent White Paper set out our approach for the future of the Defined Benefit system, and supported the Pension Regulator's ambition to be clearer, quicker and tougher. For all schemes and businesses we are clarifying the rules and expectations, but otherwise not making fundamental changes to the existing system. For the vast majority of responsible employers who are already engaging effectively with their trustees, the impact of these changes and new requirements is likely to be limited. However, for the small number of employers evading their obligations, we are putting in place stronger powers so that the Pensions Regulator can intervene more effectively to protect individuals' pension rights.

This consultation is the next step in delivering this programme of change and we welcome your views.

1. Introduction

In March 2018, the government published the White Paper '*Protecting Defined Benefit Pension Schemes*'. In the White Paper, we stated that the existing system is working well for the majority of Defined Benefit pension schemes, members, trustees and sponsoring employers but that we could see ways in which we could improve the system further. We are now working to make these improvements.

These include:

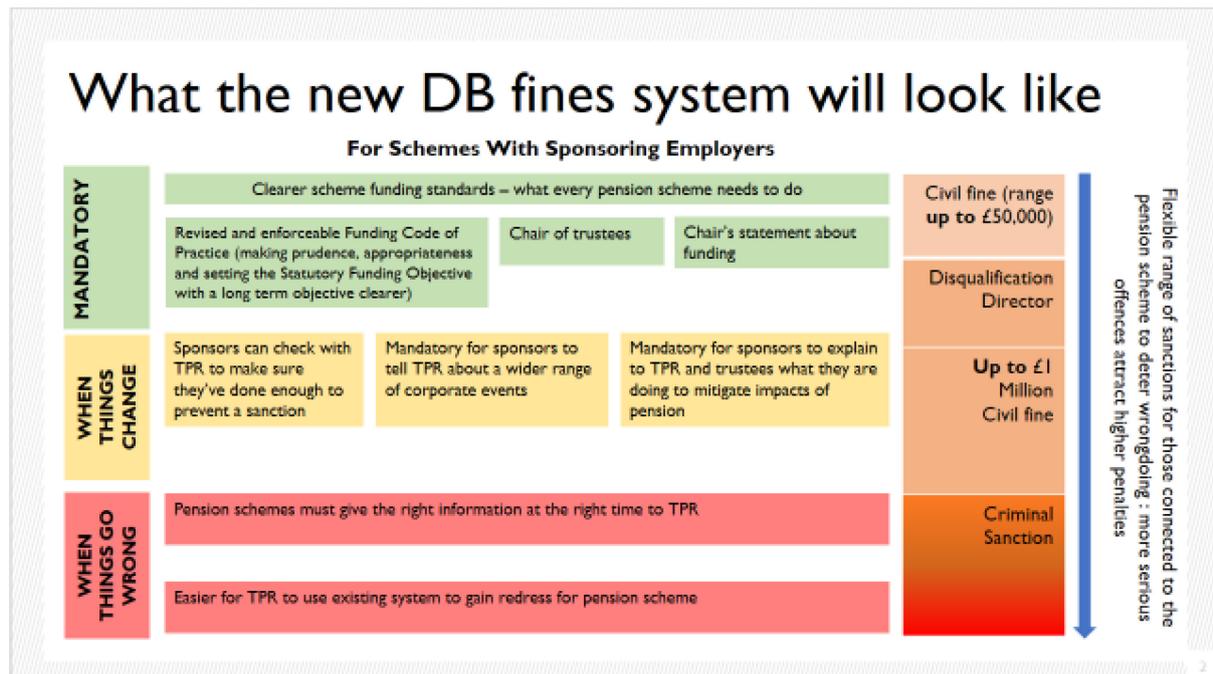
- Clearer funding standards for all pension schemes, together with measures to help employers, trustees and the Pensions Regulator work together to better secure the pension promises – these include the requirement for Defined Benefit schemes to have a Chair of Trustees and to prepare and submit a Chair's Statement;
- Greater clarity for employers to help them better understand how and when to notify the Regulator of certain business transactions and events, improving the Regulator's ability to ensure that the needs of the pension scheme are properly considered when companies undertake corporate transactions;
- Enhanced powers for the Pensions Regulator to obtain the right information when they need it;
- New powers to strengthen existing safeguards and to enable the Regulator to deter and, when necessary, punish wrongdoing; and
- New possibilities for scheme consolidation where appropriate.

The White Paper said that "There are a number of measures where, although we have agreement about what needs doing, more work is required to build consensus about the best way to deliver our aims and to design the detail of our proposals. We will be consulting further on these areas."

As a part of this process, we will be carrying out a number of consultations focussed on different areas. This is the first of these consultations, and sets out our proposals to improve the Pensions Regulator's powers so that they:

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

This is an opportunity to strengthen protection for Defined Benefit pensions and it is extremely important we get the changes right. We are therefore asking for views on our proposals before we implement them. We are keen to hear from anyone with an interest in these areas.



This is a representation of how the regulatory system will look in the future. It highlights our proposals to introduce new requirements for all trustees of Defined Benefit schemes, the limited number of new requirements which will be mandatory for all sponsoring employers of Defined Benefit schemes when things change within a company (for example when corporate transactions are being considered); and what will happen in the rare instances where trustees or employers do not comply with their obligations. The column on the right sets out the escalating sanctions regime - with stronger sanctions for the most serious wrongdoing.

A Stronger Pensions Regulator

These powers are intended to make it easier for the Regulator to intervene when employers or trustees do not comply with statutory obligations or when employers (or those associated or connected with them) are avoiding their pension liabilities. In addition, new powers will enable the Regulator to sanction individuals and companies where necessary. They therefore need to be effective as a deterrent. They also need to be workable and efficient for the Regulator to use and include appropriate protections for potential targets. The vast majority of sponsoring employers behave responsibly towards their pension scheme and are fully committed to meeting their pension promises – but where reckless or irresponsible employers (or those associated with them) do put a scheme at risk, we need to ensure that the Regulator is better equipped to step in before long-term harm is done. Trustees will also benefit by being involved more with corporate transactions.

We are asking a number of questions about the design of the following policies:

1. Improving the Regulator’s and trustees’ role in scrutinising corporate transactions.

In particular we would like views on:

- How the notifiable events framework could be made clearer and more effective; whether the right events are captured especially in more complex scenarios, ensuring that the Regulator is notified of appropriate events at the right time;
- How the new ‘declaration of intent’ should be designed and implemented so that employers engage appropriately with the trustees, and that trustees and the Regulator are provided with meaningful information without putting undue burdens on businesses; and
- How this should be enforced.

2. Improving the sanctions regime to deter wrongdoing in most cases, and punish it when necessary. In particular we would like views on:

What behaviours and actions (or inaction), and in what circumstances, should attract sanctions;

What type of sanctions are appropriate in these different scenarios (e.g. fines up to the existing maximum, fines with a new higher maximum, or criminal sanctions).

3. Improving the Regulator’s existing powers to issue Contribution Notices and Financial Support Directions.

In particular, we would like views on where we should make improvements to the Regulator’s current powers to make it more efficient to compel related companies to provide financial support to a scheme, and requires companies to compensate a scheme if they have caused loss or detriment to the scheme. We would also like views on how this should be enforced.

The Consultation Process

The consultation will run until 21 August 2018 via this website only.

This consultation is being conducted in line with the revised [Cabinet Office consultation principles](#) published in January 2016. These principles give clear guidance to government departments on conducting consultations.

Feedback on the consultation process

We value your feedback on how well we consult. If you have any comments about the consultation process (as opposed to comments about the issues which are the subject of the consultation), please email them to the DWP Consultation Coordinator.

These could include if you feel that the consultation does not adhere to the values expressed in the consultation principles or that the process could be improved.

DWP Consultation Coordinator
2nd Floor
Caxton House
Tothill Street
London
SW1H 9NA
Email: caxtonhouse.legislation@dwp.gsi.gov.uk

Further consultations

Over the coming months, the Pensions Regulator will be talking to interested stakeholders on the design of clearer funding standards, culminating in a formal consultation on a revised Defined Benefits Funding Code of Practice in 2019. The Department for Work and Pensions will also be consulting on the design of legislative framework and authorisation regime commercial consolidation of Defined Benefit pension schemes later this year.

2. Corporate transaction oversight

This section looks at the Pensions Regulator's and trustees' ability to monitor relevant corporate transactions and events, and engage with employers where appropriate to prevent possible harm to a pension scheme. It includes the notifiable events framework, declaration of intent, voluntary clearance and engagement with other regulators.

Notifiable Events Framework

In the White Paper we said that:

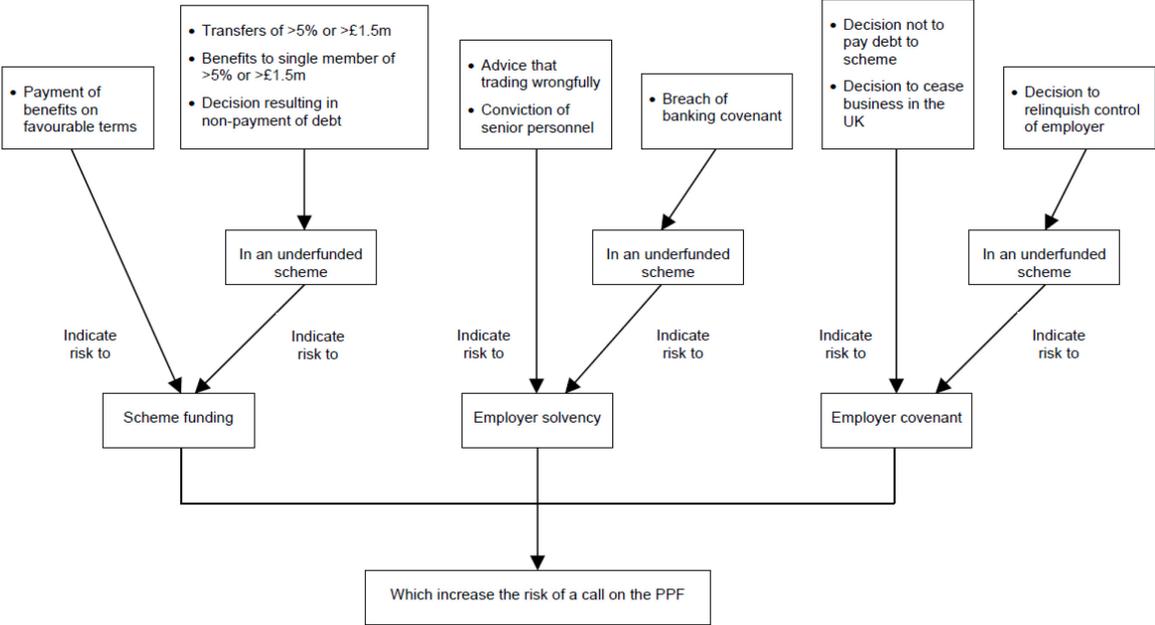
'There are a number of areas where we believe improvements could be made, in particular:

- *coverage of the notifiable events framework – we will review whether it covers all relevant transactions and widen these to include anything that is currently missing; and*
- *timing of the notifiable events framework – the framework currently requires businesses to inform the Regulator as soon as reasonably practical but without further definition. In practice, in some cases, this has meant not until (or after) the events actually occur. We think that this timing needs clarifying so that the Regulator is made aware at an earlier stage in consideration and can engage in discussions sooner.'*

'Notifiable Events' are events which have the potential to cause harm to a pension scheme – for example, by increasing the chances of the sponsoring employer becoming insolvent or by impacting on the employer covenant. The current notifiable events system includes employer-related events (notified by employers) and scheme-related events (notified by trustees) and is designed to give the Pensions Regulator early warning of a possible call on the Pensions Protection Fund. The communication of these events is between the employer, the trustee and the Regulator. The Regulator of course maintains strict confidentiality with market sensitive information.

We believe that the improvements outlined here are more proportionate and less burdensome than a mandatory clearance regime applying to all sponsoring employers. The notification of certain events and corporate transactions can be in a straightforward and unobtrusive way which should not unduly interfere with legitimate business activity.

The current Notifiable Events Framework



This diagram outlines the current Notifiable Events Framework (as prescribed in regulations and the Pensions Regulator’s directions) – setting out the current range of events that must be notified because they could cause detriment to the scheme and increase the risk of the scheme calling on the Pension Protection Fund.

Our proposals

We believe that the Notifiable Events Framework can be improved by including a broader range of employer-related events. This will ensure that the Regulator is better sighted on relevant business transactions and events which may have a detrimental impact on the pension scheme, thus giving the Regulator an earlier warning of potential problems, and should incentivise better employer behaviours by creating greater transparency around the outcomes of transactions.

The way in which we strengthen the notifiable events regime needs to be proportionate. It will need to balance improved transparency for the Regulator against the additional burden on businesses. For this reason, it is envisaged that only transactions exceeding a certain risk threshold should be notifiable - for instance, in cases where the scheme is underfunded on a pre-determined basis to be prescribed, as is current practice, by the Pensions Regulator.

We believe that the current framework can be improved by adding the following as notifiable events:

- (1) Sale of a material proportion of the business or assets of a scheme employer which has funding responsibility for at least 20% of the scheme's liabilities. These transactions can be significant because they frequently indicate a change in covenant support for a pension scheme, for example:
 - The sale of a material part of a sponsoring employer's business may significantly reduce the ability of the sponsoring employer to support the pension scheme (lower turnover, lower profits and lower amounts of cash generated);
 - Sales of assets / business activities within corporate groups can often be structured by way of inter-company debt which the scheme employer may not be able to realise for future funding of the scheme; and
 - Sales structured as business and asset sales can be used to transfer the profit-generating activity from one legal entity to another whilst 'leaving behind' certain liabilities, including Defined Benefit schemes (separating them from available financial support).

- (2) Granting of security on a debt to give it priority over debt to the scheme.
 - Granting a creditor priority over the scheme in the event of debt recovery would mean that the scheme stood less chance of recovering the money due to it should the employer become insolvent;
 - Granting a creditor priority over other debts can increase the availability and affordability of further lending to the sponsoring employer, and can therefore help it to grow and invest. However, granting a creditor security on a debt would disadvantage a pension scheme in the event of the sponsor becoming insolvent; and
 - The requirement to notify that a creditor had been granted security would not include the granting of security for specific chattels financing, for example hire purchase financing for company vehicles. The Regulator will set out more detail in its code of practice on notifiable events.

- (3) Significant restructuring of the employer's board of directors and certain senior management appointments.
 - The appointment (statutory or otherwise) of a chief restructuring officer, chief transformation officer and/or equivalent either to the board or to a senior management role;
 - Appointments (statutory or otherwise) made to a board or to a senior management role by external parties – for example, if a lender and/or key financial stakeholder appoints someone to a board or in to an oversight/monitoring role to protect its own interests;
 - Changes to at least two out of three of the chairman, chief executive officer (or equivalent) and chief financial officer (or equivalent) within the previous 6 months.

In the normal operation of business, the movement of senior management can be beneficial and bring new ideas to the board. However, this can also be the first stage in a series of decision that can have significant implications for the pension scheme. It is only right that the Regulator has early warning to allow it to focus on those cases that pose the most risk.

- (4) Sponsoring employer taking independent pre-appointment insolvency/restructuring advice (such as an independent business review),
- Sponsor insolvency is clearly a significant concern to a pension scheme, the Pensions Regulator and the Pension Protection Fund. Early notification of initial insolvency or restructuring advice would help to alert the Regulator to potential employer distress situations. It would also enable the Regulator to be satisfied that pension scheme interests are taken into account properly at the early stages of insolvency planning (for example in relation to pre-pack administration arrangements).

We propose removing the following existing notifiable event:

- (5) Wrongful trading of the sponsoring employer
- While it is essential to continue being alert to instances of wrongful trading and reporting cases to the Regulator, experience has shown that an employer that is trading wrongfully is extremely unlikely to make this public irrespective of any notification duty. There are other ways to gather evidence of wrongful trading that the Regulator can pursue.

We propose extending the following existing notifiable event:

- (6) The current 'breach of banking covenant' notifiable event to include covenant deferral, amendment or waiver.
- The Regulator could then receive earlier notification of a wider set of circumstances indicating that a sponsoring employer may be struggling.

Some commentators have also called for dividend payments to be considered. However, the Department for Business, Energy and Industrial Strategy (BEIS) have recently run a consultation looking at corporate governance, and are currently looking at the evidence they have received. Dividend payments are a part of this work, and will be explored by BEIS as a part of their consultation response.

The enhanced notifiable events regime will strengthen the system which gives the Regulator early warning of detriment to a Defined Benefit pension scheme. As part of this we propose bringing the timing for notification forward, by clarifying regulations and Regulator guidance on the appropriate timing of various events (see below) and extending the reporting obligation to other parties (for example to directors of a sponsor's parent company who are planning a transaction) in order to achieve earlier

notifications. Currently, events need only be notified as soon as reasonably practicable after they have occurred, but in practice the Pensions Regulator is sometimes notified after the transaction has gone through.

We believe this could be brought forward to much earlier in the planning process for the following list of transactions:

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

In our view, the Pensions Regulator should be made aware of such planned transactions no later than when negotiations have led to agreement in principle of its main terms, as this is the point at which scheme trustees should always be made aware of what is planned. For this reason, we propose that notification of these particular notifiable events should occur when a Heads of Terms agreement is first put in place (but we would expect trustees to be involved earlier in the negotiations).

(1) We have set out a number of proposed changes to the existing Notifiable Events Framework.

- a. Do these proposals strike the right balance between improved regulations on business and protecting pensions?**
- b. Alternatively, are there any other significant business events which you think should be captured?**

(2) Have we captured the right criteria for a significant change in the make-up of a board of directors?

(3) We are proposing to bring forward or specify more clearly the timing of reporting notification of certain events (as described above), for instance to the point at which Heads of Terms are agreed for some transactions. Is this appropriate or is there a better time/ event to pin the reporting notification to?

(4) What is the likely impact (either direct or indirect) on business of sponsoring employers being required to report earlier? How could the framework be modified to ensure that any adverse impact is mitigated?

(5) Are there any additional changes that could further improve the design of the framework for sponsoring employers, trustees and the Regulator?

Declaration of intent

In the White Paper we said that:

‘We will put in place a requirement for sponsoring employers or parent companies to make a statement of intent, in consultation with trustees, prior to relevant business transactions taking place that they have appropriately considered the impacts to any Defined Benefit pension scheme affected. This statement will clearly set out how a sponsoring employer proposes to mitigate any detrimental impact caused by the proposed transaction on the scheme. It will then enable trustees to better engage with the Regulator if the pension scheme is subsequently put at risk as a result of the transaction. ‘Relevant’ business transactions will only include those which pose the highest potential risk to the Defined Benefit pension scheme, such as the sale or takeover of a sponsoring employer.’

Our proposals

Declarations of Intent will work closely alongside the notifiable events framework. For some notifiable event transactions, the employer will need to issue a Declaration of Intent setting out the implications of the transaction for the scheme and how any risks will be mitigated. A Declaration of Intent will be required at a later point in a corporate transaction than a notifiable event notification, when there is greater certainty as to whether the transaction is going ahead, its nature and the implications for the scheme. This will be after parties have completed due diligence and transaction financing has been finalised but before sale and purchase contract signature – although we would expect employers’ engagement with trustees to start at the earliest opportunity.

The current Notifiable Events Framework



Introducing a Declaration of Intent will oblige corporations to think about the effect of corporate decisions on affected pension schemes in more detail and at an appropriately early point in the transaction process. Declarations of Intent will

therefore form part of an enhanced early warning system as all parties will be aware of concerns and proposed mitigations earlier than is currently the case, and will have a clear record of all agreements reached.

We propose that the following corporate transactions should trigger the need for a Declaration of Intent:

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

It is currently envisaged that the provision that a Declaration of Intent should be required according to risk-based criteria (e.g. level of funding) as prescribed by the Regulator in a way that is consistent with any criteria applied to notifiable events.

The Declaration of Intent would be addressed to trustees from the transaction's corporate planners (usually the Board of the company), shared with the Regulator, and:

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

Where the Pensions Regulator has concerns, it could take the appropriate action using its enhanced suite of powers, for example interview powers or, in some circumstances, Contribution Notices or Financial Support Directions (see below).

- (6) We have set out a number of proposed transactions which would trigger a Declaration of Intent.**
 - a. Do these proposals strike the right balance between improved regulations on business and protecting pensions?**
 - b. Alternatively, are there any other significant business transactions which you think should be captured?**
- (7) Is there any further information which could be included in a Declaration of Intent to improve understanding of the proposals to strengthen the position of the pension scheme?**
- (8) At which point in the transaction process should sponsoring employers a) engage with trustees and b) issue a Declaration of Intent to them?**

(9) What would be the impact (both direct and indirect) of our proposals on businesses, for example on transactions or administration costs of notification?

(10) What more could we do to increase trustees' involvement in negotiations to ensure there is due consideration of the potential transactional risks to pension schemes?

Voluntary Clearance

In the White Paper we said that:

'We will consider whether the whole framework can be made more effective, for example by reviewing the role of trustees and whistleblowing activity and asking the Regulator to review their clearance guidance to ensure it is clear and captures all appropriate transactions.'

Voluntary clearance can be sought by companies undertaking corporate transactions. Companies can seek confirmation from the Pensions Regulator that, in the circumstances set out in a clearance application, the Regulator does not consider it would be reasonable to use their powers to issue Financial Support Directions or Contribution Notices (see below).

Our proposals

The Pensions Regulator will be reviewing their guidance on the clearance process to clarify their expectations as to what employers and trustees should do.

Areas of the guidance that the Regulator expect to clarify and/or expand include:

- The Material Detriment definition and how applicants and trustees should approach the test;
- Revision of the definition of event types, including the circumstances in which clearance is given in relation to Financial Support Directions (given that Financial Support Directions are not an 'act' or transaction-based power; and
- More information about how the clearance process works and what applicants and trustees can expect; to include expectations around timing of application (as early as possible).

(11) Are these the right areas for the Pensions Regulator to focus on in relation to improvements to their existing guidance? Should anything else be considered?

Engagement with other regulators

The White Paper said that:

'We will consider how we can further strengthen existing processes from elsewhere in government to increase information sharing and co-operation between the Regulator and other relevant regulators, and increase the focus on the pension scheme.'

This is an ongoing process. The Regulator is currently reviewing its working protocols and information sharing with existing regulators. As part of this review, it will also ensure that any other regulator not currently captured by existing protocols is taken account of. A programme of engagement is planned over the summer.

3. Improved Regulator powers

This section looks at how we can best punish reckless behaviour towards pension schemes. We know that the vast majority of employers and directors are committed to their Defined Benefit pension schemes. However, if a small minority of employers and those associated or connected with them do try to avoid their responsibilities to a scheme, we need to ensure that the Pensions Regulator can act effectively.

In the White Paper, we said that:

'Following a number of high-profile cases, the Government's manifesto proposed strengthening the regulatory framework and the Regulator's powers in order to protect pension scheme members. The measures included: issuing punitive fines, [...] and consideration of a new criminal offence for company directors whose actions put the pension scheme at risk.'

There is a strong argument for making these changes so that the regulatory framework is tough enough to deal with abuses and ensure that pension scheme members are protected. To achieve this, the Government will give the Regulator powers to punish those who deliberately put their pension scheme at risk by introducing punitive fines.

We will continue to work on the design of the new regime including the penalty levels, to ensure it remains proportionate and there are no unintended consequences. Although the details are still being developed, it is expected that the penalty will be linked to the contribution notice, effectively creating the possibility of a highly punitive fine being issued by the Regulator.

We will therefore legislate to bring in a criminal offence to punish wilful or grossly relevant parties and carry out a consultation [...] so that all associated impacts are considered.

To ensure members of DB schemes are protected as far as possible and to deter activity that puts the security of members' benefits at risk. We will examine the feasibility of the penalty regime applying in respect of acts or omissions prior to enactment, in particular, after the date this document is published.'

The Regulator currently has the ability under section 10 of the 1995 Pensions Act to issue a limited civil fine of up to £5,000 for individuals and £50,000 for corporate entities to penalise them for non-compliance with a wide range of duties. Under the 2008 Pensions Act, the Regulator can also impose fixed and escalating penalty notices for non-compliance of the relevant sections of the Act.

The Regulator also has the ability to commence criminal proceedings under a range of powers including obstructing investigations under section 77 of the 2004 Pensions Act, and for providing it with false or misleading information under section 80 of the

2004 Pensions Act. The maximum sentence is an unlimited fine and, in some circumstances, imprisonment for a term not exceeding two years.

However, these powers are limited in scope. We propose to introduce primary legislation to widen the circumstances in which fines and criminal proceedings can be used so that the Regulator has a comprehensive suite of powers which can be used appropriately in varying circumstances.

Our proposals

We want to complement the existing penalty regime with new penalties that can be imposed as appropriate, for both low-level compliance breaches and more serious offences (for example in the event of reckless behaviour in relation to pension scheme liabilities). This new system will give the Regulator the ability to vary the level of penalty depending on the seriousness of the breach.

We are therefore proposing a more comprehensive regime which will enable the Regulator/ Courts to consider the circumstances of the case and impose the most appropriate penalty, from a suite of options:

- Existing civil penalties for low-level non-compliance;
- A new power to issue a civil penalty of up to £1,000,000 for more serious breaches; and
- Criminal sanctions which would allow the courts to impose appropriate penalties.

Civil penalty (low-level non-compliance)

As now, the existing civil penalty (from section 10 of the 1995 Pensions Act) will play a vital role in combating non-compliance with a range of breaches as currently prescribed in legislation. This section 10 provision enables the Regulator to fine up to £5,000 for an individual and £50,000 in any other case for any act or omission which contravenes any of the pension legislation to which the section applies.

Civil penalty (for more serious offences)

We propose to introduce a new civil penalty (up to a maximum amount of £1,000,000) to provide the Pensions Regulator with the flexibility to issue different levels of fines for a range of further breaches (including non-compliance with new requirements being introduced as a part of the White Paper). In particular, the Regulator will be able to apply high-level fines to deter behaviours which are more serious in nature and have resulted in actual harm to the pension scheme or have the potential to do so if left unchallenged. We believe a £1,000,000 cap would be in line with similar breaches levied by other regulators such as the Financial Conduct Authority. The Regulator will determine the amount of the fine (within the cap) based on the seriousness of actions.

Criminal sanctions

We propose to introduce new criminal offences to punish: wilful or grossly reckless behaviour in relation to a Defined Benefit pension scheme, non-compliance with a Contribution Notice and failure to comply with the Notifiable Events framework. This will give the criminal courts the power to impose further penalties. These could include a further tier of unlimited fines and/or custodial sentences. We intend these sanctions to be used in the most serious of cases of wrongdoing, where the Regulator decides that it is appropriate to bring a prosecution.

Who will be penalised?

We believe that the range of possible targets should include all of those who have responsibility to the pension scheme. This includes directors, sponsoring employers and any associated or connected persons, and in some circumstances trustees.

The table below sets out a range of potential offences which are not sufficiently covered by the existing penalty regime, along with suggested new penalties and targets. This list is not exhaustive but provides examples of the sorts of behaviours we believe it would be appropriate to deter and, where necessary, to sanction.

These powers are primarily intended to help the Regulator ensure compliance and so we do not wish them to impose automatic sanctions where this could be counter-productive. The Regulator will therefore have discretion about how it will exercise these powers, depending on the case at hand. For example, if a Chair's Statement has not been submitted by the set deadline because a Chair is genuinely engaging with the Regulator about its content, they may choose not to impose a fine at all.

Potential new offence	Suggested penalty	Proposed targets
Wilful or reckless behaviour in relation to the pension scheme	New Criminal Offence or New Civil Fine	Sponsoring employers and others associated or connected
Failure to comply with a Contribution Notice	New Criminal Offence or New Civil Fine	Sponsoring employers and others associated or connected
Failure to comply with the notifiable events framework	New Criminal Offence or New Civil Fine	Sponsoring employers and Trustees
Non-compliance with information requests (including inspections and interviews) and or delays in providing information	Fixed and escalating Civil Fine - already used for other functions.	Any person targeted by TPR under section 72 to 75 of the Pensions Act 2004

Potential new offence	Suggested penalty	Proposed targets
Deliberately providing false information to the Pensions Regulator	New Civil Fine	Any person who is required to provide information to the Regulator
Deliberately providing false information or failing to provide required information to Trustees	New Civil Fine	Any person who is required to provide required information to trustees as prescribed
Non-compliance with elements of the DB funding code	New Civil Fine	Sponsoring employer and others associated and connected as well as trustees
Failure to provide a Chair's Statement, failure to provide on time or providing a poor quality or misleading statement	Existing Civil Fine (low-level penalty)	Trustees
Non-compliance with providing a declaration of intent.	New Civil Fine	Sponsoring employer and others associated and connected

- (12) What are the likely effects and impacts on business and trustees of the introduction of this proposed new system of penalties?**
- (13) Are there other behaviours that should attract sanctions? If so, what are they?**
- (14) We have proposed a new civil penalty (up to a maximum £1m) for example to take action for non-compliance with providing a declaration of intent. Will this deter wrongdoing? If not, what would be a suitable deterrent?**
- (15) We have proposed a new criminal offence for wilful or reckless behaviour in relation to a pension scheme, and for failures to comply with Contribution Notices and the Notifiable Events Framework. Do you agree with these proposals? Will this deter wrongdoing? If not, what would be a suitable deterrent?**

(16) If yes, should the maximum penalty for these offences be:

- a. Unlimited fines?**
- b. Custodial sentence and/or fine for the worst offenders – do you have views on the appropriate maximum term?**

(17) What more can we do to support the Pensions Regulator in enforcing legal requirements in an effective and proportionate way?

4. Anti-Avoidance Powers

This section looks at the ways in which the Pensions Regulator can require third parties to pay into to a scheme where their actions have caused loss or detriment to the scheme, or help support a scheme where this is reasonable.

In the White Paper we said that:

'[The Pensions Regulator] has identified other ways in which its current anti-avoidance powers could be enhanced. We will take this opportunity to review these powers more generally and, if needed, legislate to improve the Regulator's contribution notice and financial support directions powers, further strengthening the regime.'

Key features of the existing regime

Contribution Notices

Contribution Notices can be imposed against employers or connected parties if they behave in such a way as to avoid section 75 employer debt obligations, or where the act they have carried out has “*detrimentally affected in a material way the likelihood of accrued scheme benefits being received*”.

Contribution Notices require payment of a cash sum to the scheme. The Regulator must show that the amount sought is “reasonable” when assessed by all relevant factors, which may include the relationship between the target and the employer. However, a recent legal case suggested that Contribution Notices may be limited to the loss caused by the ‘act’, regardless of whether other circumstances might be thought to make a higher amount reasonable.

Contribution Notices are currently capped at the scheme’s section 75 deficit at the time of the ‘act’. As there can be many years between an ‘act’ and recovery under a Contribution Notice, a scheme’s deficit could have increased substantially before payment. In addition, the Contribution Notice power does not currently provide any specific mechanism to reflect the range of consequences that arise from a delay in the eventual payment in the amount asked for.

Financial Support Directions

Financial Support Directions require third parties to assume some financial responsibility for a scheme. However, under the current regime, a Financial Support Direction does not impose a specific enforceable obligation on a target – instead, it is up to the recipient of the Financial Support Direction to propose a form of financial support for consideration by the Regulator. Separate enforcement action must be pursued if satisfactory proposals are not made.

This structure allows for flexibility in the form of financial support which is potentially acceptable; however the multi-stage approach means that it might be a very long time before support is actually obtained for a scheme.

There are various tests which the Regulator must satisfy in order to be able to issue a Financial Support Direction – including that the sponsoring employer is either a service company or is “insufficiently resourced”. This latter test involves comparing the estimated value of the employer’s resources to the buy-out deficit in the scheme. The Regulator must also show that imposition of a Financial Support Direction is reasonable.

A Financial Support Direction can generally only be issued to a corporate entity, not an individual (in contrast to a Contribution Notice), and the Regulator must commence its case within a two year ‘lookback period’.

Our proposals

Contribution Notices

We propose to strengthen the Contribution Notice regime by:

- Amending the “reasonableness” test so that there is a stronger focus on the loss or risk caused to a scheme by the ‘act’ when assessing the amount to be demanded under a contribution notice, as opposed to consideration of issues such as the relationship between the target and the sponsor, or benefit received by the target from the sponsor. Scope would also be given for the employer’s justification for the ‘act’ as a determining factor.
- Providing a specific mechanism by which impacts of the delay in payment will be reflected in the Contribution Notice sum, rather than allowing for differing approaches under the reasonableness test. For example, if an act had caused quantifiable harm to a scheme on a particular date (which is earlier than the date of issue of the Contribution Notice), this amount could be adjusted by the increase (if any) in the value of a prescribed notional asset allocation, by reference to publically available inflation indices.
- Changing the date on which the cap on the level of a Contribution Notice is calculated. Rather than calculating the cap at the date of the ‘act’, the cap will be calculated at a date closer to the final determination (e.g. by the Regulator’s Determinations panel, the Upper Tribunal or a higher court).
- Creating an additional limb to the ‘material detriment’ test, assessed by reference to the weakening of the employer rather than the prospect of scheme benefits being paid many years into the future. This would provide clarity to the regulated market about the circumstances in which a Contribution Notice might be issued.

(18) We have set out a number of proposed changes to the way Contribution Notices function.

- a. **Do these proposals strike the right balance between improved regulations on business and protecting pensions?**
 - b. **Alternatively, what else could we do to improve the way Contribution Notices work?**
- (19) What would be the most appropriate way of protecting the value of the Contribution Notice through uprating? What are the likely impacts of this?**
- (20) What could be the impacts of changing the date at which the cap was calculated to a date closer to the final determination?**

Financial Support Directions

We propose to strengthen and improve the way Financial Support Directions work by:

- Creating a single-stage process, under which the Financial Support Direction would create a specific and enforceable obligation on the target (rather than this occurring at some later stage as in the current regime). This would make the process simpler and quicker, and would provide greater clarity for everyone involved.
- Tightening up the forms of financial support the target is required to make to the scheme, so that Financial Support Directions will either require a cash payment or impose a form of statutory guarantee in relation to some or all of the sponsoring employer's liabilities to the scheme. This will fit better with the change to a single stage process. Obligations under the statutory guarantee will be enforceable by scheme trustees without the need for further action by the Pensions Regulator.
- Reviewing whether the "insufficiently resourced" requirements should be amended or replaced in order to make the criteria for imposing a Financial Support Direction clearer and more certain for all parties.
- Allowing Financial Support Directions to be issued to a broader range of individuals, where they are associated with or connected to the sponsoring employer (provided the other tests are met). This would mirror the scope of Contribution Notices.
- Amending the reasonableness test to make clear that the actions of a target in creating or increasing risk are a relevant (but not necessary) factor. This would mirror the scope of Contribution Notices.
- Providing the Regulator with a power to impose a Contribution Notice on any person associated or connected with the recipient of the Financial Support Direction

- Exploring how and whether the ‘lookback’ period could be increased beyond two years, and what appropriate protections would need to be put into place for businesses brought within scope by a longer ‘lookback’ period.
- Providing the Regulator with a power to issue a Financial Support Directive after a scheme has entered the PPF and enable the PPF to enforce the Financial Support Directive in the form of a cash payment.

(21) What would be the likely impacts on business of a more streamlined Financial Support Direction regime?

(22) How could we best amend the ‘insufficiently resourced’ test to make it simpler and clearer?

(23) We propose to tighten up the forms of financial support the target is required to make to the scheme to include cash payments or statutory guarantees.

- a. What would the impact of this approach be on business?**
- b. Are there other forms of support we should take into consideration?**

(24) What would be the impact on business of a longer ‘lookback’ period?

5. Conclusion

We believe that the approach set out in this consultation will support the Pensions Regulator in their ambitions to be a clearer, quicker and tougher regulator. The measures set out are intended to provide improved protection to defined benefit pension scheme members whilst balancing the interests of sponsoring employers.

We believe that these proposals will strengthen the power the Pensions Regulator has to deal with the tiny minority who may engage in reckless behaviour. They will give the Regulator increased ability to monitor corporate activity in order to protect pension scheme members' interests, and set out a robust framework for punitive measures to deter and ultimately punish wrong-doing. This is a strong package of measures that will make a real difference to people's security in retirement.

- (25) The proposals in this consultation are suggested as ways in which the Pension Regulator's powers could be increased or improved in order to clamp down on corporate wrongdoing and ensure improved compliance with all legal responsibilities by sponsoring employers.**
- a. Do these proposals strike the right balance between improved regulations on business and protecting pensions?**
 - b. Alternatively, do you think there are other areas where the Pensions Regulator's powers could be increased or improved to achieve our intended outcomes?**