



Department  
for Work &  
Pensions

# Government Response to the Consultation on Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator

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February 2019

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# Ministerial Foreword by The Rt Hon Amber Rudd MP, Secretary of State for Work and Pensions



In our 2017 manifesto, we proposed strengthening the regulatory framework and the Pensions Regulator's powers in order to better protect pension scheme members. In March 2018, we delivered on this commitment by publishing the White Paper *Protecting Defined Benefit Pension Schemes*.<sup>1</sup>

We said that, while the existing system is working well for the majority of Defined Benefit pension schemes, we could see ways in which we could improve the system further. The measures included strengthening the Pensions Regulator's powers both to enforce pensions legislation and to punish those who have acted recklessly or failed to comply with their obligations.

The consultation, *Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator*, which took place last summer, considered some of these measures in more detail, in particular those dealing with corporate transactions and the Regulator's anti-avoidance powers, and the introduction of new criminal offences and civil penalties.

This response sets out respondent's views and outlines the Government's approach to progressing and moving forward with this programme of change.

The changes will build on the robust system that is already in place to protect Defined Benefit pension schemes, and will help to ensure that the system is equipped for the challenge of a continually evolving pension's landscape. These changes will enable the Pensions Regulator to intervene where employers might evade their obligations, and help to meet their ambition to be 'clearer, quicker, and tougher'. They will also further protect individuals' pensions and ensure greater clarity for employers.

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<sup>1</sup> <https://www.gov.uk/government/publications/protecting-defined-benefit-pension-schemes>

The Government will introduce two new criminal offences to prevent and penalise mismanagement of pension schemes.

The first will target individuals who willfully or recklessly mishandle pension schemes, endangering workers' pensions, by such things as chronic mismanagement of a business; or allowing huge unsustainable deficits to build up; or taking huge investment risks; or a combination thereof. We will introduce a new custodial sentence of up to seven years' imprisonment or an unlimited fine for this offence. This brings the punishment in line with similar offences in financial services.

The second, which will attract an unlimited fine, will target individuals who fail to comply with a Contribution Notice, which is issued by The Pensions Regulator requiring a specified amount of money to be paid into the pension scheme by that individual. We will also introduce a new civil penalty of up to £1 million for this offence.

I am very grateful for the engagement of stakeholders in this consultation, which has provided Government with a solid basis on which to adapt the Defined Benefit pension system.

A handwritten signature in black ink, appearing to read 'Amber Rudd', is positioned below the text. The signature is fluid and cursive, with the first name 'Amber' written in a larger, more prominent script than the surname 'Rudd'.

RT HON AMBER RUDD MP  
SECRETARY OF STATE FOR WORK AND PENSIONS

# 1. Introduction

In March 2018, the Government published the White Paper '*Protecting Defined Benefit Pension Schemes*'.<sup>2</sup> 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 have set out a range of measures to improve member protection including:

- Delivering clearer funding standards for all Defined Benefit pension schemes and a requirement for a Chair's Statement on the scheme funding strategy, jointly with measures to help employers, trustees and the Pensions Regulator (TPR) work together to better protect members' pensions;
- Greater clarity for sponsoring employers to help them better understand how and when to notify TPR of certain business transactions and events, improving TPR's ability to ensure the needs of the pension scheme are properly considered when companies undertake corporate transactions;
- Enhanced investigatory powers for TPR to obtain the right information when they need it; and
- New powers to strengthen existing safeguards to enable TPR to punish wrongdoing when necessary.

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."

On 26 June 2018, we launched the consultation '*Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator*' (Consultation). This Consultation ran for eight weeks and closed on 21 August 2018.

Following this Consultation, this response document sets out the Government's proposals to improve TPR's powers so that they:

- Can be more proactive and get involved earlier when sponsoring employers make changes which could impact the pension scheme;
- Have the necessary powers to be able to obtain the right information about a scheme and its sponsoring employer in a timely manner;
- Are able to gain redress for pension schemes and its members when things go wrong; and
- Deter reckless behaviours.

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<sup>2</sup> <https://www.gov.uk/government/publications/protecting-defined-benefit-pension-schemes>

## **How we consulted**

The Consultation document was available on Citizen Space and an electronic version of the Consultation document was made accessible on GOV.UK.

During the Consultation period from 26 June until the 21 August, we held six consultation roundtable events involving around 70 participants; these sessions covered the following areas:

- Corporate transaction oversight and Chair's Statement;
- Sanctions and information gathering; and
- Anti-avoidance powers.

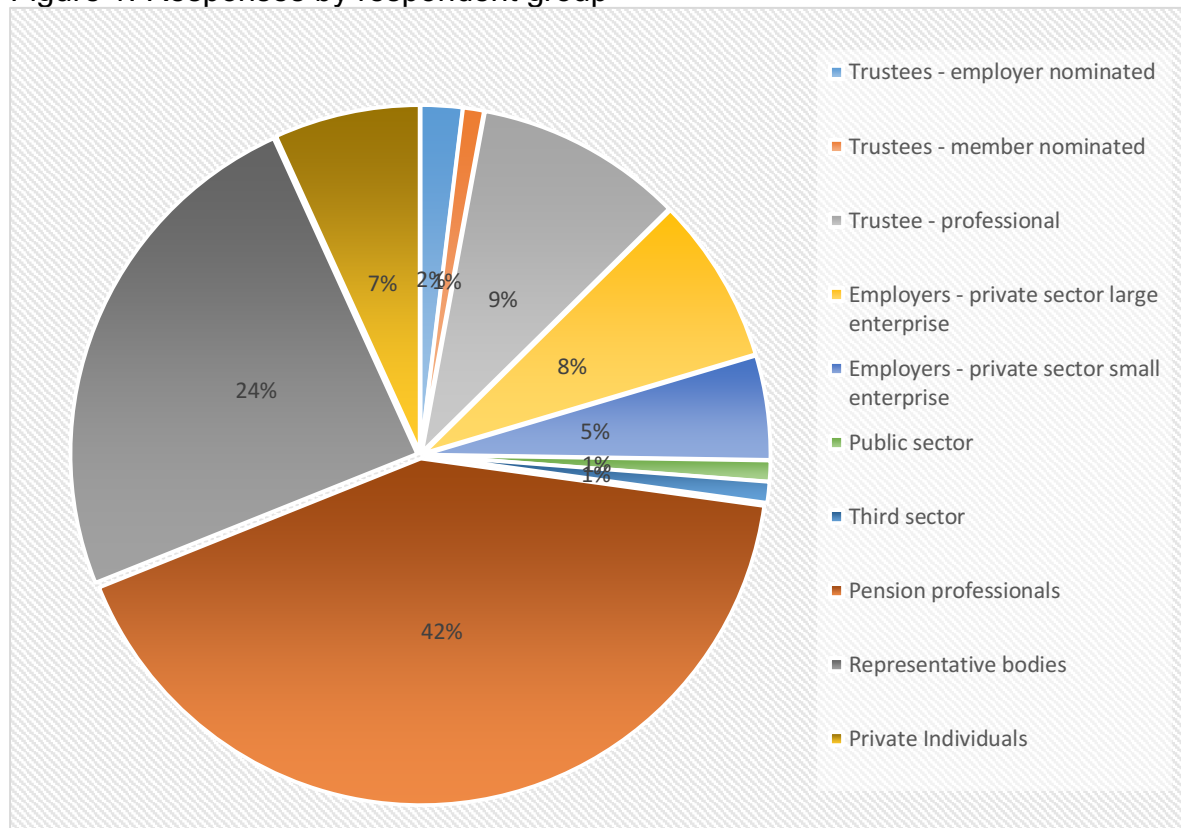
These were primarily official-led roundtables. However, ministers also attended various industry organised events and engaged with a range of stakeholders.

## **How people responded**

The Department for Work and Pensions (DWP) is grateful to all respondents for their time and has considered all of the responses collected.

In addition to the roundtable events, we received a total of 71 responses to this Consultation. The vast majority of responses were received through Citizen Space (58); the remaining responses were submitted via email. We received responses from a wide range of stakeholders; Figure 1 below breaks down the responses by respondent group.

Figure 1: Responses by respondent group



## Public sector equality duty

The Department's policies, guidance and procedures aim to ensure that any decisions, new policies or policy changes do not discriminate unlawfully against anyone, and that in formulating them the Department has taken due regard to its obligations under the Equality Act 2010 and the Public Sector Equality Duty.<sup>3</sup> When we bring forward legislation, a fuller analysis will include the equality impacts of any final policy proposals.

## Quality assurance

This Consultation was carried out in accordance with the [Government's Consultation Principles](#).<sup>4</sup>

<sup>3</sup> <https://www.gov.uk/government/publications/public-sector-quick-start-guide-to-the-public-sector-equality-duty>

<sup>4</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691383/Consultation\\_Principles\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles_1_.pdf)

## 2. Corporate Transaction Oversight

Chapter 2 of the Consultation looked at TPR's and pension scheme trustees' ability to monitor relevant corporate transactions and events, and engage with employers where appropriate to prevent possible harm to a Defined Benefit pension scheme. The areas where we asked for stakeholder's views included the notifiable events framework, Declaration of Intent and voluntary clearance.

### Notifiable Events Framework

The Consultation document sought views on proposals to improve the existing notifiable events framework by including a broader range of employer-related events. It also sought views on the removal of the existing notifiable event in respect of wrongful trading of the sponsoring employer, and an extension of the current 'breach of banking covenant' event.

#### **(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?**

**We received 70 responses to this question.**

Respondents' views on whether the proposed changes struck the right balance between improved regulation on business and protecting pensions varied in respect of each proposal. The proposals are set out in the table below together with a summary of the responses received.

<b>Proposal</b>	<b>Summary of consultation responses</b>
<b><i>New notifiable events</i></b>	
(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.	Broad support, but agreement that the terms "material" and "funding responsibility" in relation to a scheme's liabilities would need more precise definition.
(2) Granting of security on a debt to give it priority over debt to the scheme.	This event allows companies to raise finance to grow and sustain the business, and is an essential part of corporate activity (and not always material in the context of the pension scheme). Some concern about volume of regular additional notifications to TPR, but view is that information on this event will complement the current insolvency legislation protections which have narrow application and are time limited.



<b>Proposal</b>	<b>Summary of consultation responses</b>
(3) Significant restructuring of the employer's board of directors and certain senior management appointments.	Rationale not clear. Similar requirement relating to changes in "key employer post", removed under The Pensions Regulator (Miscellaneous Amendments) Regulations 2009, as too many routine staff changes were being notified to TPR.
(4) Sponsoring employer taking independent pre-appointment insolvency/restructuring advice (such as an independent business review).	Concern that this proposal would discourage companies from taking advice at appropriate times. Important that companies seek pre-insolvency advice at an early stage when they become financially distressed.
<b><i>Amending existing notifiable events for employers</i></b>	
(5) Removal of wrongful trading of the sponsoring employer.	Agreement that removal seems sensible as no director would admit wrongful trading; as such an admission may form the basis of a claim under the Insolvency Act 1986, with personal financial consequences.
(6) Extend breach of banking covenant to include covenant deferral, amendment or waiver.	In practice, there can be numerous amendments and waivers during the lifetime of a banking covenant, often for trivial matters, which have no bearing on the employer's financial health.

## **Government response**

Having reviewed the Consultation responses the Government proposes to take forward the introduction of the following new employer-related notifiable events:

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

The Government accepts that the definition of the terms relating to each of these new events will be crucial and, working with TPR, plans to engage with stakeholders to develop its thinking further, and will subsequently consult on draft regulations to amend the existing framework.<sup>5</sup>

The Government intends to remove the existing notifiable event of "wrongful trading of the sponsoring employer" (proposal no (5) above). Whilst the Government remains of the view that it is essential for TPR to be alerted at the earliest opportunity to instances of wrongful trading of a sponsoring employer, as some

<sup>5</sup> The Pensions Regulator (Notifiable Events) Regulations 2005, <http://www.legislation.gov.uk/uksi/2005/900>

respondents have noted, a requirement that relies on self-reporting is unlikely to be effective.

In light of the Consultation responses the Government does not intend to take forward proposals (3), (4) or (6) at this time. The Government accepts the Consultation findings that these changes would be difficult to operate in practice and may potentially stifle legitimate business activity that could be beneficial to the pension scheme.

**(1)b. Alternatively, are there any other significant business events which you think should be captured?**

**We received 23 responses to this question.**

Most respondents did not identify any other significant business events that should be captured as part of the employer-related notifiable events, noting that category A events (events that are materially detrimental to the ability of the scheme to meet its pension liabilities) which form part of the TPR voluntary clearance process are already very wide in their application and cover key business events.

A few respondents commented that the payment of large dividends may be worth considering. Whereas (in more or less equal numbers), a few others noted that responsible dividend policies play an important role in business growth and in the overall investment returns seen in the economy, and should not be viewed as detrimental to pension schemes.

**Government response**

At this stage we do not propose any additional events. We will however, keep this under review in light of the Government's proposals following the consultation on the consolidation of Defined Benefit pension schemes.<sup>6</sup>

We do not propose to extend the framework to cover the payment of dividends. However, as part of their review of the scheme's funding valuations that are submitted on a triennial basis and the wider proposals on clearer funding standards, TPR will consider whether the level of dividend payment made by the sponsoring employer or its parent company is appropriate in relation to the scheme's funding position or where a recovery plan has been agreed.

We will continue to work with the Department for Business, Energy and Industrial Strategy (BEIS) on the proposals set out in the Government's response to the consultation on Insolvency and Corporate Governance in relation to strengthening the UK's framework relating to dividend payments.<sup>7</sup>

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<sup>6</sup> <https://www.gov.uk/government/consultations/defined-benefit-pension-scheme-consolidation>

<sup>7</sup> <https://www.gov.uk/government/consultations/insolvency-and-corporate-governance>

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

**We received 37 responses to this question.**

A number of respondents pointed out that job titles are used differently across different organisations and that it may be more helpful to focus on job function rather than title. For example, whilst the role of Chief Restructuring Officer/Chief Transformation Officer was thought to be generally well understood by some, others pointed out that these roles could differ significantly from organisation to organisation.

The appointment of directors by external third parties was described as wide reaching but not necessarily indicative as an underlying issue of concern. In general, respondents were not persuaded that a change in the composition of the board of directors should be perceived negatively or suggest that the sponsoring employer is at risk. A few also questioned whether the case for re-instating this event had been made, given that it had been removed from the notifiable events framework in 2009.

**Government response**

These views have been considered and further informed the Government's decision not to take forward the proposal for a new notifiable event – significant restructuring of the employer's board of directors (see New Notifiable Event no (3) in the table above) – at this time.

**(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?**

**We received 57 responses to this question.**

Employers were cautious about bringing forward timings and raised concerns about the overlap with the existing Market Abuse Regulations.<sup>8</sup> The majority of respondents were of the opinion that the Heads of Terms (a document that sets out the agreed terms of the proposed transactions) are not sufficiently well defined, and is a term not consistently used by corporate organisations, and therefore unhelpful to be used as a trigger for notification requirements. On a practical point it was noted that, particularly in time critical transactions, it is not always clear when the Heads of Terms are in fact agreed.

Trustees, however, were supportive of earlier notification to TPR in order to increase the opportunity for their own on-going engagement with the sponsoring employer, but recognised that corporate transactions do not always have a Heads of Terms and that a more flexible criterion might be needed.

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<sup>8</sup> The Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016, <http://www.legislation.gov.uk/ukxi/2016/680/made>

Suggestions for a more appropriate time to notify TPR under the notifiable events framework included: just before completion; when a decision has definitely been taken; the date on which the board of a sponsoring employer agrees to a particular action; and the point in time at which the definitive, legally binding documentation relating to the transaction/event is signed.

## **Government response**

The Government recognises that this is an area in which there is more work to be done. We will work with TPR and industry to identify where earlier notification could be beneficial in relation to each of the employer-related notification events and how best to make this clear, including options to legislate or work with TPR to include this information in the supporting guidance and a revised Notifiable Events Code of Practice<sup>9</sup> published by TPR.

### **(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?**

**We received 47 responses to this question.**

Beneficial impacts identified by respondents included the board of a sponsoring employer giving earlier, fuller and more frequent consideration to the potential impact of corporate transactions on the sponsors' obligation to their Defined Benefit pension scheme.

Respondents raised concerns about confidentiality, e.g. where a sale or restructuring decision is being considered, a leak could affect share prices, or mean more people move against the business and push it into administration or liquidation. There was also concern that early involvement of TPR may result in an offer being required to be announced at a preliminary stage due to the operation of the Takeover Code.<sup>10</sup> It is likely that lenders and other creditors would insist on being notified at the same time as TPR.

There was concern about the added cost of seeking professional advice (especially for employers without access to professional advisers) and the potential delay to the business transaction this might cause.

There was also apprehension that TPR might be overwhelmed with notifications and that it would be time-consuming for sponsoring employers to deal with subsequent questions when they are at a crucial stage of negotiation.

Respondents suggested that adverse impacts on business could be mitigated by

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<sup>9</sup> <http://www.thepensionsregulator.gov.uk/codes/code-notifiable-events.aspx>

<sup>10</sup> The Takeover Code, based upon six General Principles, which are essentially statements of standards of commercial behaviour, <http://www.thetakeoverpanel.org.uk/the-code>

TPR providing reassurance that all information submitted to them would be exempt from disclosure and that notification would not result in time critical and potentially business critical transactions being delayed. Respondents also suggested making the notifiable events framework as clear as possible, and educating sponsoring employers in its application. Others suggested trustees should be subject to non-disclosure agreements to deter any unauthorised leaks of information.

## **Government response**

A number of concerns were raised about the information submitted to TPR through the notifiable events framework. TPR has a strong track record of handling information confidentially and there are existing safeguards in place under section 82 of the Pensions Act 2004 to ensure TPR does not disclose this information. Further, section 311 of the Pensions Act 2004 exempts specific information, e.g. legal advice to a client, from being shared with TPR. The Government is therefore not persuaded that this concern outweighs the benefits from early notification of events that could adversely impact the pension scheme.

The Government plans to undertake an assessment of the impact of changes to the notifiable events framework on business. This assessment will take into account the further work we plan to undertake with industry and TPR on the detail of each proposal. We will consider these views further as part of that work.

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

**We received 40 responses to this question.**

A number of respondents were of the view that the notifiable events framework would be improved through education that promoted constructive relationships between trustees of Defined Benefit pension schemes and sponsoring employers. They advocated achieving this through a comprehensive proactive communication programme to accompany any changes to legislation. It was also suggested that a review of the TPR Exchange website may be beneficial so all parties could be sure that the information they have submitted has been recorded. One respondent advocated an appeals process where trustees and sponsoring employers can raise concerns about the decisions reached, the timescales involved, the process followed and the penalties levied. Some also suggested all decisions made by TPR should be available for public scrutiny. It was also suggested that the notifiable events framework could be signposted elsewhere to raise awareness amongst sponsoring employers e.g. through the UK Corporate Governance Code<sup>11</sup> and guidance from the Financial Reporting Council.

Several respondents suggested that, in addition to changes to the notifiable events framework for employers, a review should be undertaken of scheme-related

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<sup>11</sup> <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf>

notifiable events. In particular, respondents questioned the current notifiable event that relates to transfers or benefit payments that exceed £1.5 million or 5% of the scheme's assets, suggesting that the thresholds should be reviewed. The respondents pointed out that additional reporting around transfer values is now included in the scheme return.

Some respondents suggested that an additional filter, based on the level of funding of the scheme, should be applied in the case of some new notifiable events, as the existing valuation carried out for Pension Protection Fund (PPF) levy purposes under section 179 Pensions Act 2004 may not be appropriate in some cases. One representative body suggested that to help TPR adopt a more targeted approach to the notifiable events regime, there should be different rules for schemes with large deficits as opposed to well-funded schemes.

One employer was of the view that publicly listed entities already have very considerable public reporting obligations and that an enhanced notifiable events framework should be targeted at non-listed sponsors of UK Defined Benefit pension schemes.

One respondent noted that if there is a new authorisation regime for commercial consolidators, this should be considered alongside the proposals in this Consultation.

## **Government response**

The Government recognises it is essential that sponsoring employers are clear about their responsibilities to pension schemes and the information they are required to provide to TPR. The Government will consult on the detail underpinning the notifiable events that are being taken forward, together with further consultation on any changes in relation to scheme-related notifiable events and those arising from the Consultation on the consolidation of Defined Benefit pension schemes. Further, TPR will update its guidance on the notifiable events framework and consult on a revised code of practice.

## **Declaration of Intent**

The Consultation set out the proposal for the introduction of a Declaration of Intent made by the corporate transaction planner, which will include an explanation of the transaction, confirmation that the trustee board has been consulted and how any detriment to the scheme is to be mitigated. The Declaration of Intent, addressed to the trustees and shared with TPR, would require the corporate transaction planner to make a statement in respect of the following corporate transactions:

a) Sale of controlling interest in a sponsoring employer (an existing notifiable event set out in regulation 2(2)(f) of The Pensions Regulator (Notifiable Events) Regulations 2005);

b) Sale of the business or assets of a sponsoring employer (new notifiable event (1) in the table above); and

c) Granting of security in priority to the scheme on a debt to give it priority over debt to the scheme (new notifiable event (2) in the table above).

**(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?**

**We received 66 responses to this question.**

Respondents were fairly evenly divided on the proposal for the introduction of a Declaration of Intent. Those that supported such an approach included trustees and their representatives who welcomed the concept of an early warning system that would compel employers to engage seriously with trustees on key transactions that are most likely to have a significant impact on the pension scheme.

One respondent pointed out that the trustees of underfunded schemes are taking a credit risk on the employer and have a right to be told of any proposals which might affect the security of their loan. Those with concerns, including employers, described the Declaration of Intent as a very powerful tool for trustees that could prove an obstacle to legitimate corporate transactions.

A number of respondents expressed the need for clarity regarding the business transactions and risk threshold to which the Declaration of Intent would apply. Some suggested timing of the notification was critical, but others raised concerns that the need to engage with trustees prior to a transaction could delay the transaction, potentially making it less attractive to buyers.

**(6)b. Alternatively, are there any other significant business transactions which you think should be captured?**

**We received 28 responses to this question.**

Most respondents did not identify specific business transactions that should be captured but made general comments on the approach. For example, one respondent suggested allowing the employer to assess whether there is a potential detriment to the pension scheme as a result of the proposed arrangement and only to require consultation with the trustees over the Declaration of Intent where this was the case. Another felt that the list of corporate transactions was too narrow and suggested a more general test based on principles.

Specific business transactions that respondents felt should be captured by the Declaration of Intent included:

- All employer-related events set out at paragraph 56 of TPR’s guidance on clearance:<sup>12</sup> where there is a scheme with significant funding risk (i.e. a high deficit or long recovery plan);
- Sale or change of ownership of a business held within a group where there is common ownership of the purchasing and target companies;
- Extending the proposed Declaration of Intent to guarantor companies as well as direct sponsors, even though there would be practical issues if the guarantor is based outside the UK (thus potentially putting off overseas parent companies from providing guarantees to UK schemes); and
- A material effect on covenant rather than listing specific types of transaction.

### **Government response**

The Government recognises that opinion is divided on the introduction of a Declaration of Intent, but remains of the view that a statement from the transaction’s corporate planners (including but not restricted to the sponsoring employer or parent company) will help trustees to understand the detailed nature and implications of a proposed transaction for the scheme.

The Government intends to legislate for the introduction of a Declaration of Intent by the transaction’s corporate planners that will be shared with the trustee board of the pension scheme and TPR. The Government remains of the view that transactions in respect of new and existing employer-related notifiable events as described in (a), (b) and (c) above should trigger the requirement for a Declaration of Intent.

### **(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?**

**We received 41 responses to this question.**

Views on what should be included in the Declaration of Intent ranged from a concise statement limited to indicating that trustees have been consulted on the outcome, to a much broader content that covers core sections of a clearance application under the existing voluntary clearance regime. Some respondents suggested the Declaration of Intent should be flexible enough to allow for the very wide range of transactions that may occur.

### **Government response**

The Government will work with TPR to ensure that the Declaration of Intent complements the planned changes to the notifiable events framework. We also plan to consider in more detail, together with the industry, the content of the Declaration

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<sup>12</sup> <http://www.thepensionsregulator.gov.uk/guidance/guidance-clearance.aspx>



of Intent, and how best to reframe the supporting guidance in the Notifiable Events Code of Practice to ensure it explains the purpose of the Declaration of Intent clearly.

**(8) At which point in the transaction process should sponsoring employers a. engage with trustees and b. issue a Declaration of Intent to them?**

**We received 50 responses to this question.**

Whilst most respondents supported early engagement between sponsoring employers and pension scheme trustees where the transaction is material to the pension scheme, there was a range of views about the point at which this should take place.

Employers were of the view that engagement should not take place whilst the transaction is still commercially sensitive, whereas trustees wanted sufficient time to be able to negotiate any mitigation necessary. A number of respondents suggested a more flexible approach that balances the need for confidentiality with the benefits of early engagement and took into account the particular circumstances of individual transactions.

Respondents' views on when the Declaration of Intent should be issued to trustees also varied. Some felt that this should take place before or at the point Heads of Terms were agreed, whereas others suggested the document should not be finalised until just prior to, or at the point of entering into legally binding contracts.

**Government response**

The Government agrees that engagement with sponsoring employers should take place as early as possible but understands the concerns about commercial sensitivity. The Government will work with TPR to identify a flexible approach that takes into account the particular circumstances of individual transactions.

At this stage, we have no plans to legislate to specify when the sponsoring employer should share the Declaration of Intent with the pension scheme trustees and TPR. We are working with TPR to review the guidance in the Notifiable Events Code of Practice to set out more clearly our expectations on timing for both notifiable events and the Declaration of Intent.

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

**We received 47 responses to this question.**

The main direct impact identified was that transactions could become protracted through discussions with pension scheme trustees at too early a point in time, and

that the added complexity of negotiations may give rise to considerable additional costs. This could potentially result in abandonment of the transaction through frustration and could have the indirect impact of weakening the sponsoring employer's covenant to the scheme.

A number of respondents were of the view that the actual administrative cost of producing a Declaration of Intent would be marginal for sponsoring employers in the context of wider transaction costs and pointed out that consideration of any material detriment to the pension scheme should have formed an integral part of the due diligence and negotiation process for the transaction.

### **Government response**

The Government plans to undertake an assessment of the impact of introducing the requirement for a Declaration of Intent, and will consider these views further as part of that work.

### **(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?**

**We received 38 responses to this question.**

There were a number of suggestions about additional guidance that could be provided to pension scheme trustees by TPR. These included: setting out how trustees should act if they believe TPR have not been informed of relevant corporate activity; encouraging trustee engagement with negotiations through guidance in the Defined Benefit Funding Code;<sup>13</sup> and setting out case studies to help trustees understand the issues in a range of circumstances. It was also suggested that an additional module to the TPR Trustee Toolkit should focus on the new notifiable events and the Declaration of Intent.

A few respondents were of the view that the existing regulatory framework was already sufficient in this regard, pointing out that most trustees are well engaged with sponsoring employers and where the flow of information between the sponsoring employer and pension scheme trustees is already working well, this should be sufficient.

### **Government response**

The Government wants to encourage improved collaboration between pension scheme trustees and their sponsoring employers. The existing Defined Benefit Funding Code sets out the principles for collaborative working, and employers have existing statutory duties to provide information to trustees about events likely to be of material significance to the exercise of their functions. The Government is working with TPR to ensure the Notifiable Events Code of Practice, and supporting guidance,

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<sup>13</sup> Funding Defined Benefits, Code of Practice no.3,  
<http://www.thepensionsregulator.gov.uk/docs/code-03-funding-defined-benefits.pdf>

makes clear the importance of collaboration between the pension scheme trustees and the sponsoring employer to ensure the impact of a company transaction on the pension scheme is fully understood. Indeed, the aim of the Declaration of Intent is to ensure the impact can be estimated, and mitigations can be put in place with the support of TPR. In addition, the Government proposes to introduce a new civil penalty for knowingly or recklessly providing false information to trustees. Please see Chapter 3 for further detail on the civil penalty.

## **Voluntary Clearance**

The Consultation sought views on the areas that TPR should include in their review of guidance on the voluntary clearance process.

**(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?**

**We received 51 responses to this question.**

Most respondents agreed with the Consultation proposals that the following areas should be included:

- The material detriment definition and how applicants and pension scheme 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 (FSD); and
- More information about the clearance process and what applicants and pension scheme trustees can expect; to include expectations around timing of applications. Additionally, providing clarity on whether the Declaration of Intent is intended to be an alternative to the clearance process was suggested.

### **Government response**

The Government believes these are the right areas for TPR to focus on in their review of the guidance on the voluntary clearance process. There are no plans to replace clearance with the Declaration of Intent. TPR are committed to reviewing their guidance in light of the responses received and the Government's proposals.

### **Engagement with other regulators**

The Consultation referred to the work that TPR is doing to review its working protocols and information sharing with existing regulators. No questions were asked in relation to engagement with other regulators. This work is on-going.

### 3. Improved Regulator Powers

Chapter 3 of the Consultation looked at how we can best deter and punish reckless behaviours towards Defined Benefit pension schemes. The chapter examined how TPR could be enabled to act effectively when a sponsoring employer, or those associated or connected with them, tries to avoid their responsibilities to a pension scheme.

The Consultation sought views on proposals to introduce a new civil penalty of up to a maximum of £1 million for serious breaches and three new criminal offences to punish: wilful or reckless behaviour in relation to a Defined Benefit pension scheme, non-compliance with a Contribution Notice (CN) and failure to comply with the notifiable events framework.

#### **(12) What are the likely effects and impacts on business and trustees of the introduction of this proposed new system of penalties?**

**We received 60 responses to this question.**

The majority of respondents felt the new system of penalties was likely to have some impact on businesses or pension scheme trustees.

A number of respondents commented that a practical and proportionate regime could be an effective deterrent and should not impact on properly run businesses. In addition, they felt the new system of penalties would promote positive behaviours such as encouraging sponsoring employers to seriously consider their responsibilities towards their Defined Benefit pension scheme when planning corporate activities and engage appropriately with professional advisers.

Several potential impacts were identified, including possible increases in legal and compliance costs, reduced investment and delays in transactions. It was felt that these impacts might disadvantage employers with Defined Benefit pension schemes. However, a handful of respondents suggested that clear and consistent guidance on the circumstances in which the new penalties would apply would help mitigate these concerns. It was also argued that the increase in individual liability from the proposed new sanctions may make it more difficult for schemes to recruit member-nominated trustees.

#### **Government response**

The Government considers that the impact of the proposed changes would be limited for the vast majority of responsible employers. The greatest impact should be on the small number of employers evading their responsibilities as TPR will be able to hold them to account more effectively. The Government intends to move forward with the measures outlined in Table 1 at the end of this chapter, and will keep the potential impacts raised in the responses under review.

**(13) Are there other behaviours that should attract sanctions? If so, what are they?**

**We received 33 responses to this question.**

Over half of the Consultation responses submitted did not comment on this question. Of the responses received, the majority were unsupportive of other behaviours attracting sanctions. A small proportion of respondents suggested that TPR's existing powers are sufficient.

Respondents who supported widening the behaviours which attract sanctions put forward a range of additional behaviours to target, including unauthorised disclosure of commercially-sensitive information by pension scheme trustees as well as failing to notify TPR when transferring the scheme assets into a commercial consolidator.

**Government response**

The Government has considered the additional behaviours suggested by respondents and does not intend to introduce further criminal offences or civil penalties to target these, or to extend existing sanctions at this time.

**(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?**

**We received 46 responses to this question.**

The majority of respondents supported a new civil penalty as an effective deterrent but sought further detail on how it would be practically applied. A number of proposals were put forward on how the penalty could be made more targeted and effective, for example by increasing the maximum penalty level.

Guidance on the type of behaviour which would be caught by the new civil penalty was requested by respondents to help clarify expectations on sponsoring employers and pension scheme trustees. It was suggested that the effectiveness of this new civil penalty would be dependent on TPR deploying it regularly and taking a proportionate approach, especially with smaller employers.

A handful of respondents queried how civil penalty proceeds would be used. Whilst normal practice is for all penalty proceeds to be paid into the Consolidated Fund, respondents mooted a number of potential alternatives including paying the proceeds to the affected scheme, the PPF or TPR.

**Government response**

The Government plans to introduce a new power to enable TPR to issue civil penalties of up to a maximum of £1 million for more serious breaches. This new civil penalty will apply to a range of new and existing offences which are set out in Table 1 at the end of this chapter.

The Government agrees that the expectations on businesses needs to be clear; TPR will update their relevant policies for occupational pension schemes once the proposals come into force.

The Government is giving consideration to the treatment of civil penalty proceeds, including the interaction between TPR's powers to issue civil penalties and its anti-avoidance powers (for example, imposing a Contribution Notice on the employer or connected/associated parties).

**(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 they deter wrongdoing? If not, what would be a suitable deterrent?**

**We received 53 responses to this question.**

Respondents were divided on this issue. Many sought further detail on how criminal sanctions would be practically applied, particularly questioning how "wilful or reckless behaviour" would be defined. Where respondents did support criminal sanctions, it was felt they should only apply in the most extreme cases and so mainly function as a deterrent.

A large number of respondents were unsupportive of applying criminal sanctions for failing to comply with the notifiable events framework as it was felt to be disproportionate. A small number felt criminal sanctions were not appropriate for any of the offences proposed, arguing that the targeted behaviours were captured under existing fraud legislation.

### **Government response**

The Government plans to move forward with proposals for new criminal offences for wilful or reckless behaviour in relation to a pension scheme and for failure to comply with a CN in order to create a more comprehensive and cohesive penalty regime.

The Government has assessed the range of behaviour to be targeted under the failure to comply with the notifiable events framework offence and has determined that the most appropriate penalty would be the new civil penalty (up to a maximum of £1 million); therefore, the Government will not be taking forward this proposed criminal offence.

**(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?**

**We received 32 responses to this question.**

Over half of the Consultation responses submitted did not provide a view on the appropriate maximum penalties. Of the responses received, most respondents emphasised that custodial sentences for the proposed new offences would need to align with the existing custodial framework for fraud and insolvency offences. Respondents who supported custodial sentences agreed that these should be reserved for the most extreme cases only with some commenting that imprisonment represents a greater deterrent than a fine.

A range of custodial lengths were proposed for the wilful or reckless offence, including a maximum of 10 years' imprisonment to mirror serious fraud offences. There was a small group of respondents who supported restricting criminal sanctions to unlimited fines only.

### **Government response**

The Government agrees that any new custodial sentences must be consistent with existing penalties targeting similar behaviour. We intend to put forward a maximum penalty of up to seven years' imprisonment and/ or unlimited fines for wilful or reckless behaviour in relation to a pension scheme. The Government feels this is consistent with existing fraud and insolvency offences and will act as an efficient deterrent for the most serious cases of wrongdoing.

The Government intends for the failure to comply with a CN criminal offence to attract a maximum penalty of unlimited fines. We have determined that custody would not be a proportionate response to the behaviour targeted by this offence.

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

**We received 43 responses to this question.**

The vast majority of responses received agreed that TPR required additional resources to enable them to effectively enforce legal requirements.

It was noted that the new proposals will increase demand on TPR resources, especially due to the high burden of proof required to successfully prosecute criminal offences. A small number of respondents suggested methods to enable TPR to focus on the most appropriate cases, for example by adopting a risk-based approach.

A handful of respondents highlighted the need for TPR to be clear about the responsibilities of all parties and to communicate these to sponsoring employers and pension scheme trustees. A number of alternative methods for supporting TPR were also proposed, including facilitating better engagement with the enforcement activity of other regulators.

### **Government response**

The Government agrees that an appropriately resourced regulator is vital to ensuring timely and effective action is taken against reckless behaviour towards pension schemes. The Government will work closely with TPR to understand their resource requirements and to jointly agree a communications strategy for sponsoring employers and pension scheme trustees.

The table below summarises the new civil and criminal offences the Government intends to proceed with, including the proposed targets and penalties. These will be in addition to existing powers.

Table 1: Proposed new/ amended civil and criminal sanctions

<b>New Offence</b>	<b>New Penalty</b>	<b>Target</b>
Wilful or reckless behaviour in relation to a pension scheme	Criminal offence: up to 7 years' imprisonment and/or unlimited fines  And/or  New civil penalty: up to a maximum of £1 million	Sponsoring employers and others associated or connected
Failure to comply with a Contribution Notice	Criminal offence: unlimited fines  And/or  New civil penalty: up to a maximum of £1 million	Sponsoring employers and others associated or connected
Failure to comply with a Financial Support Direction <sup>14</sup>	New civil penalty: up to a maximum of £1 million	Sponsoring employers and others associated or connected (Not individuals with the exception of controlling shareholders who are individuals)
Failure to comply with the Notifiable Events Framework	New civil penalty: up to a maximum of £1 million	Sponsoring employers and trustees
Failure to comply with requirements for a Declaration of Intent	New civil penalty: up to a maximum of £1 million	Sponsoring employers and others associated or connected
Knowingly or recklessly providing false information to trustees	New civil penalty: up to a maximum of £1 million	Any person who is required to provide

<sup>14</sup> Please note: The Government intends to change the name of the Financial Support Direction to the Financial Support Notice (FSN) in order to reflect the changes being made to the regime. Please see the chapter on Anti-Avoidance for further information.



		information to trustees as prescribed
Non-compliance with information requests (including inspections and interviews) or delays in providing information	Fixed and escalating civil fine  The Government will develop the levels of fines as part of its secondary legislation package	Any person targeted by TPR under section 72 to 75 of the Pensions Act 2004
Knowingly or recklessly providing false information to TPR	New civil penalty: up to a maximum of £1 million	Any person who is required to provide information to TPR as prescribed
Non-compliance with clearer funding standards	Strengthened section 231 (Powers of the Regulator) scheme funding power and existing powers (such as improvement notices) of the Pensions Act 2004	Trustees and sponsoring employers
Failure to provide a Chair's Statement, failure to provide on time or providing a poor quality statement	Existing civil penalty under section 10 of the Pensions Act 1995	Trustees and sponsoring employers

## 4. Anti-Avoidance Powers

Chapter 4 of the Consultation looked at proposals to strengthen, clarify and improve TPR's anti-avoidance powers, specifically considering Contribution Notices and Financial Support Directions.

### Contribution Notices

**(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?**

**We received 52 responses to this question.**

The majority of respondents broadly supported the changes proposed, but sought clarity on the scope of the proposals. For instance, many respondents were unclear on what was intended by the phrase 'persons associated or connected with' the employer. It was felt that providing TPR with wide discretion could result in uncertainty for corporates and may inhibit legitimate corporate activity.

Respondents provided a range of views on the specific proposals. Changes to the material detriment test garnered some support with some respondents commenting that it was easier for the business community to recognise a weakening of the sponsoring employer's financial strength than a hypothetical reduction in the likelihood of benefits becoming payable at some point in the future. However, others argued that the existing test was sufficiently broad to capture this as 'impact on employer' is already taken into account. The proposal to focus on loss/risk to the pension scheme in the reasonableness test was felt to provide greater certainty for targets and pension scheme trustees, but it was argued that current factors should still be retained and emphasis should not be placed on the loss/risk to the pension scheme.

### Government response

The Government supports increasing the flexibility available to TPR in order to strengthen the CN regime and protect member benefits. The Government has reviewed and taken into account the views expressed by stakeholders in their consultation responses in relation to the proposed changes to the CN regime. The Government will be proceeding with the proposed CN measures as outlined in the Consultation. Two of these proposals are discussed in subsequent questions and the Government response is provided alongside these. The other two proposals are that:

- The Government will amend the reasonableness test as set out in section 38(7) of the Pensions Act 2004 (Reasonableness Test) to reflect that the actual or potential impact of the act, or failure to act, on the value of the scheme's assets or

liabilities, would be a relevant consideration when determining the amount to be paid under a CN; and

- The Government will add two additional limbs to the material detriment test (as set out in section 38A(4) of the Pensions Act 2004) in order to clarify the legislation. We propose that a snapshot funding approach should be used in both new limbs, and that the test would be met if either:
  - The amount the scheme would have recovered on a hypothetical insolvency of the employer is materially reduced as a result of the act; or
  - The “value” of the employer provides materially less ‘coverage’ of the scheme’s section 75 deficit following the “act”.

**(18)b. Alternatively, what else could we do to improve the way Contribution Notices work?**

**We received 18 responses to this question.**

Most respondents supported streamlining the process and shortening timescales. A number of proposals were put forward on how this could be achieved, including allowing accelerated access to the Upper Tribunal (UT) or removing the Determinations Panel (DP) stage. A small proportion of respondents suggested introducing a mechanism for adjusting contribution sums based on actuarial methods of increase.

A small number of respondents felt that no changes are required to the current system. This group argued that TPR’s existing powers are little used and therefore it is difficult to judge whether the proposals represent an improvement. Others suggested that the focus should be on ensuring that TPR is appropriately resourced.

**Government response**

The Government has considered the range of views expressed on how the CN process could be improved. The Government will proceed with the outlined improvements to the CN system, and at this time does not intend to consider any other measures to improve the CN system.

**(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?**

**We received 26 responses to this question.**

The vast majority of respondents supported an uprating mechanism. Several options were proposed by respondents, including the use of inflation indices or other suitable investment market indexes.

## **Government response**

The Government agrees that uprating is an appropriate way to protect the value of the CN, and has considered the suggested uprating mechanisms to reflect the time between the act and the determination to issue a CN. The Government will continue to consider whether a specific uprating mechanism should be set out in legislation, and will further explore the ways in which uprating the value of the CN can be reflected in the CN legislation.

### **(20) What could be the impacts of changing the date at which the cap was calculated to a date closer to the final determination?**

**We received 42 responses to this question.**

The vast majority of respondents believed that the impact of changing the date at which the cap was calculated would be positive. It was felt this represented an improved deterrent and a flexible tool for scheme recovery. Respondents commented that the amendment would discourage procrastination and would be consistent with the proposed uprating of the amount recovered under CNs.

Some respondents raised concerns that changes to the cap would create open-ended liability for CN targets, and argued that this would be contrary to the principle of fairness. In addition, a handful of respondents commented that the new system may be overly complex, leaving sponsoring employers unsure of their potential liability and exposing them to the effect of events outside of their control, such as the performance of the scheme's investments.

## **Government response**

The Government has considered the respondents' views, and is proposing to change the cap calculation date so that it is closer to the date of the final determination. The Government is currently working through the details of this change with TPR.

## **Financial Support Directions**

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

**We received 45 responses to this question.**

The majority of respondents felt that the impacts of a streamlined FSD regime would be positive. It was reasoned that a streamlined process would be clearer and more responsive, resulting in greater certainty and time savings for both the scheme and the FSD target. Respondents supported the intention to address an existing regulatory gap and felt the proposals would have a positive impact on employer behaviour, for instance by encouraging companies to focus more on the employer covenant.

It was argued by a few respondents that the proposed changes were overly prescriptive and would lead to a loss of flexibility in the regime. This group felt the changes represented a weakening of protections for companies which could be detrimental to UK businesses and investors, and may reduce the attractiveness of companies with Defined Benefit pension schemes. It was also argued by a few that restricting the forms of financial support to cash payments or statutory guarantees (whereby a guarantee is given on a joint and several basis by the targets of the FSD) would be unduly restrictive.

Respondents further questioned how a single-stage FSD process would work once a scheme has entered the PPF. The Consultation also included a proposal to enable TPR to issue an FSD after a scheme has transferred to the PPF, and for the PPF to enforce the FSD. Respondents were broadly supportive of this proposal. Respondents noted the importance of members being able to benefit from the FSD, which would mean that the scheme would need to remain in the PPF assessment period until the FSD is satisfied.

In addition to the proposal to create a single-stage FSD process, three further proposed measures were included in the Consultation document to ensure the increased effectiveness of the FSD regime. These were: (i) to make clear that the actions of a target in creating or increasing risk would be a relevant factor under the reasonableness test; (ii) to broaden the scope of FSD targets to individuals who are associated with or connected to the sponsoring employer; and (iii) to broaden the range of targets for a CN issued under section 47 Pensions Act 2004 (section 47 CN) to individuals who are associated with or connected to the sponsoring employer.

On amending the reasonableness test to include the actions of a target in creating or increasing risk as a considering factor, respondents did not support this proposal. The overarching comment was that this might blur the lines between FSDs and CNs, and would be contrary to the no-fault basis of the FSD.

On broadening the scope of FSD targets to individuals who are associated with or connected to the sponsoring employer, respondents strongly pushed back on this proposal. Respondents argued that allowing directors to be targeted under an FSD would be contrary to the no-fault basis of FSD, by potentially seeking to penalise individuals for a state of affairs over which they have very little control. Respondents believe that this might dissuade people from being directors of companies which are sponsoring employers of a Defined Benefit pension scheme (or linked to those employers). Respondents did note however that targeting an individual on the basis of being a controlling shareholder could be acceptable.

On broadening the range of targets for a section 47 CN to any person who is associated with or connected to the recipient of an FSD, respondents noted that there was not enough information in the Consultation document to comment in detail on this proposal. Respondents noted that if this power was introduced, there would need to be a very clear test, and it was also questioned whether insolvency law already covers this proposal.

## **Government response**

The Government has considered the views received on the potential impact of

streamlining FSDs and intends to proceed with the proposal. The Government will continue to work with TPR and the PPF to amend the FSD process to a single-stage process, in which the DP imposes a particular form/amount, of enforceable financial support on a target. Furthermore, to reflect the changes to the FSD regime, the Government will also change the name of the regime to Financial Support Notice (FSN).

The Government will not progress with the proposal to enable TPR to issue an FSD once a scheme has transferred to the PPF at this time. The Government will continue to develop these measures, including the FSD enforcement activity, with TPR and the PPF to ensure that there are no unintended consequences.

When considering the three proposed measures to increase the effectiveness of the FSD regime, the Government has taken into consideration stakeholder views and does not intend to pursue the amendment to the reasonableness test to make clear that the actions of a target in creating or increasing risk would be a relevant factor. The Government has also considered respondent views and does not intend to broaden the scope of FSD targets to include directors. However, the Government will extend the scope to capture controlling shareholders of the sponsoring employer (who are individuals). The Government will also pursue the proposal to broaden the targets of the FSD enforcement activity to ensure that pension obligations are met.

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

**We received 30 responses to this question.**

Respondents demonstrated support for amendments to the insufficiently resourced test (IR Test), with the majority noting that the current test is difficult to understand and to implement. Most respondents supported the creation of a guidance document to provide clarity on how the proposed IR test would work, define key terms and to enable sponsoring employers to make an adequate assessment of risk.

A large number of further suggestions for improving the test were put forward, but no clear consensus emerged across the respondents. A small group supported clarifying the rationale for the test. Currently, the IR Test is measured against a threshold of 50% of the employer’s debt as set out in section 75 of the Pensions Act 1995 (prescribed by regulation 6 of the Pensions Regulator (Financial Support Directions, etc.) Regulations 2005) and respondents felt this to be arbitrary and potentially open to abuse.

Other proposals ranged from taking a more holistic approach to the value of the sponsoring employer to replacing the IR Test completely with something more scheme-focussed. At the roundtables, TPR proposed a potential move to a test centred on funding of the scheme. This was supported by roundtable attendees.

Consultation respondents also raised concerns around the current service company (SC) test, and the need to amend the current definition of a SC.

## **Government response**

The Government has considered respondents' views and intends to progress with replacing the IR Test with a new test which will be scheme-focussed. The Government will continue to work with TPR on the details of this test, which will be set out in secondary legislation. Additionally, the Government agrees with respondents' views that the current definition of a SC needs to be amended, and intends to progress this proposal.

**(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?**

**We received 34 responses to this question.**

There was a fairly even split between responses which argued that there would be no impact or only positive impacts on business, and those who felt impacts would be negative.

Respondents who supported the changes strongly felt that they provided clarity on FSDs and would help to streamline the process. It was argued that cash payments and statutory guarantees were the two most likely forms of financial support that might be provided by a target and therefore the proposals codified existing practices. Some respondents commented that the focus on cash and statutory guarantees would be helpful to pension scheme trustees as they felt cash into the pension scheme or an enforceable guarantee would always be the trustee's preferred option.

Respondents who did not support the changes felt it was unnecessary and that the requirement to provide cash may make it more difficult for companies to comply with FSDs. Respondents argued that it would be preferable for TPR to retain the flexibility to determine the most appropriate form of financial support in each individual case.

Additionally, the majority of respondents questioned the practical implementation of this proposal. Most questioned what would be considered as a form of statutory guarantee, and commented that there should still be the opportunity for the target to propose their own form of financial support both before and after the DP and UT, which TPR could then accept if they determine it to be satisfactory.

## **Government response**

The Government has considered the range of responses received on tightening up the forms of financial support the target of the FSD is required to provide to the scheme, and will proceed to tighten the forms of financial support to cash and/or joint and several liability- by which we mean where the targets are jointly and severally liable for the sponsoring employer's liabilities in relation to their pension scheme.

**(23)b. Are there other forms of support we should take into consideration?**

**We received 34 responses to this question.**

The vast majority of respondents felt further forms of support should be taken into consideration. It was argued that TPR should retain the flexibility to agree the form of support required based on the circumstances of the case. In addition the no-fault nature of FSDs meant respondents saw it as equitable to allow sponsoring employers flexibility on how they comply.

Several alternative forms of financial support were suggested including charges on assets, letters of credit and escrow trust arrangements. A small group of respondents proposed restricting initial FSDs to cash or a statutory guarantee with a fall-back position of alternative support being allowed if trustees and TPR agree. A handful of respondents felt that, as a minimum, assets which the PPF recognise for levy-reduction purposes should also be acceptable for FSDs.

**Government response**

The Government has noted respondents' views around forms of support that should be considered under an FSD, and intends to restrict the forms of financial support that may be imposed under a FSD to cash and/or joint and several liability- by which we mean where the targets are jointly and severally liable for the sponsoring employer's liabilities in relation to their pension scheme.

It is the Government's view that as part of the FSD process, there should still be scope for the target to agree an alternative form of financial support with TPR prior to determination through settlement outside the formal FSD process. The Government will work on the details of the proposals with TPR and will assess potential flexibilities as part of this process.

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

**We received 39 responses to this question.**

The majority of respondents did not support an extended lookback period. It was argued that a longer lookback period would increase uncertainty for businesses and would be contrary to the principle of fairness as it could result in liability being imposed in relation to acts that at the time could not have attracted liability.

A large proportion of respondents felt that the proposals could have a negative effect on legitimate corporate activity relating to sponsoring employers which would not be in the best interests of the economy as a whole. It was reasoned that the current length of the lookback period was appropriate as it strikes the right balance between allowing time for regulatory action to be taken and giving businesses certainty on their exposure to a FSD.

A small number of respondents argued that extending the lookback period would have a positive impact as it could encourage positive behaviours such as ensuring



pension schemes are given due consideration during any corporate transactions. A handful of respondents supported a six-year lookback period to bring FSDs in line with the lookback period for CNs.

### **Government response**

The Government agrees that the time period for regulatory action must be appropriate to ensure that there is sufficient time for TPR to take action where it is needed, but also agrees that it must be timely to ensure business certainty, and that a longer six-year lookback period would increase uncertainty for businesses.

The Government will therefore not increase the lookback period at this time but will need to consider further whether it is appropriate in light of other changes – such as moving to a single-stage process for FSDs. However, the detail of any change to the lookback period will be in secondary legislation and so Government will continue to work with TPR on any potential changes here.

## 5. Information Gathering Powers

In the White Paper “*Protecting Defined Benefit Pension Schemes*”, the Government confirmed that it would harmonise and broaden some of TPR’s information gathering powers to enable investigations to be carried out in a more efficient way.

These included the introduction of a stand-alone interview power which was not dependent on a notice previously having been issued under section 72 of the Pensions Act 2004 (section 72 Notice), the harmonisation of inspection powers to close potential gaps in applications and the power for TPR to impose fixed and escalating civil penalties as an alternative to criminal prosecution for non-compliance with section 72 Notices, or in relation to requirements to attend an interview or to submit to an inspection.

These areas were not included in the Consultation since their introduction had already been confirmed. However, the roundtable events held over August and September 2018 gave the Department the opportunity to discuss the tenor of the proposals, including the impact on business, with a range of stakeholders as further details had been developed since the publication of the White Paper.

### Interview Power

**Question: Can you see any issues in granting the Regulator a stand-alone interview power, which is not dependent on prior issue of a section 72 Notice, to require any ‘relevant person’, who can reasonably assist TPR in discharging any of its functions to attend an interview?**

It is proposed that TPR would be required to issue a notice – similar to that of the section 72 Notice – giving a date, time and explaining broadly what the scope of the interview would be about.

### Responses:

There was general support in principle if an interview means it is easier for people to comply with section 72 Notices, or could result in fewer section 72 Notices being issued. However, respondents requested more detail as to how the power would be used in practice and whether TPR would conduct more investigations.

Several comments queried how much advance notice would be given to the recipient of the interview notice and what would be covered during the interview. Concern was flagged that people would require reasonable time to prepare and to obtain any necessary documents as otherwise the interview could potentially be unproductive. How the information obtained might be used was questioned, particularly as to whether it could be used as evidence against the person who provided it. Similar points were expressed as to whether the interview power would override an adviser’s duty of confidentiality to clients and documents which are legally privileged.

## **Government response**

The Government will proceed with this change. It has noted the comments raised and it is the intention that prior written notice, along the lines of the notice currently issued to obtain information under section 72 of the Pensions Act 2004, will be issued by TPR. The written notice would explain broadly the purpose of the interview and set out the recipient's legal rights and responsibilities.

TPR intends to update and revise its existing 'compliance and enforcement policies' to include a statement on the legal context of when this interview power would be used (in a similar manner to what is already included in respect of issuing Section 72 Notices and conducting inspections under sections 73 and 74 of the Pensions Act 2004).

The Pensions Act 2004 already contains protection against self-incrimination and this would apply to the proposed new stand-alone interview power. Section 310 of the Pensions Act 2004 provides that, subject to a prescribed list of exceptions, any information generated by the person in response to a range of information requests made by TPR under compulsion may not be relied upon by TPR as evidence in criminal proceedings or for the purpose of issuing civil penalties. In these circumstances, TPR must rely on other sources of evidence.

The Government intends that the interview power would override an adviser's duty of confidentiality to their client, as with other compulsory information gathering powers exercised by TPR and other regulators. As explained in the White Paper, this is to enable TPR to handle situations where an adviser would be willing to provide information and cooperate during an investigation but felt unable to do so due to their duty of confidentiality to their client. Section 311 of the Pensions Act 2004 already deals with legally privileged information and documents and this would continue to apply.

## **Inspection Power**

Currently, section 73 of the Pensions Act 2004 gives an inspector appointed by TPR the power to enter certain premises for the purpose of investigating whether specified statutory provisions under the Pensions Act 2004, Welfare Reform and Pensions Act 1999, Pensions Act 1995 and Pension Schemes Act 1993 relating to occupational pension schemes are being complied with. The premises are those where members of the scheme are employed, documents relevant to the administration of the scheme are kept, or work relating to the administration of the scheme is being carried out there.

Additionally, section 74 of the Pensions Act 2004 permits the inspection of premises in respect of an employer's obligations and permits TPR to enter an employer's premises where the administration of the business or pension scheme take place, where documents relating to the administration of the business are held, or where employees are employed.

However, TPR has indicated that, despite these provisions appearing comprehensive, they may not cover all of their statutory functions and so the inspection power may not be used when their investigations do not fall neatly within scope of any of the above categories, or where the target trustee/company/scheme has sought to argue that the issues under investigation do not fall within scope of one of the listed legislative provisions. The White Paper confirmed that the Government intended to extend this inspection power to remove any such potential gaps.

**Question: Can you see any issues in granting TPR a power to enable inspectors to enter any premises where documents or records (including documents in electronic format) are kept which are relevant to the exercise of any of TPR's functions, thus removing any potential gap between the current inspection powers under section 73 and section 74 of the Pensions Act 2004 and the Regulator's other functions.**

TPR would issue advance notice of any planned inspection apart from situations where there is a reasonable belief that relevant documents might be at risk and it is necessary to carry out an unannounced inspection to preserve or prevent interference with any documents or records.

#### **Responses:**

There was general support with more detail requested as to how the power would be used in practice.

Several comments raised the issue that a too broad a power would allow TPR excessive flexibility and that targeted inspections would be preferred with a list to be included in primary legislation setting out the circumstances when TPR can use their inspection powers (as per the current provisions in section 73 of the Pensions Act 2004). Others asked whether the notice of inspection would give information on what TPR was looking to find during the inspection. Comments were also made about specific protection for the employer regarding data and devices used for the running of the business, pointing out that if TPR removes these devices, the business may not be able to function. Some other comments were raised about the possible negative impact on Defined Benefit pension schemes, suggesting that such a broad power, in conjunction with other White Paper proposals, would deter employers and trustees from continuing to operate the scheme.

#### **Government response**

The Government will proceed with proposals to expand the power to inspect premises. It has noted the comments raised and believes the existing protections should address these concerns.

TPR already has wide powers to inspect premises and has shown it is aware of the need to balance the relevant legal interests and obligations. Inspections are a significant use of its resources and schemes and their sponsoring employers can be

reassured that the powers are, and will be, only used where necessary and in a proportionate way. TPR is aware that many devices, such as computers, may be important in the running of the business and, where possible, would seek to obtain a copy of the data rather than removing the actual device.

TPR takes account of the Home Office Code of Practice on Powers of Entry<sup>15</sup> and already sets out the legal context on how it uses its current inspection powers in its Compliance and Enforcement Policies for Automatic Enrolment (AE)<sup>16</sup> and for public service pension schemes. It will review other related compliance and enforcement policies in the light of legislative changes and make any necessary amendments. The Government intends therefore, to go ahead with the proposals as announced in the White Paper.

## **Fixed and Escalating Civil Penalties**

The Government also confirmed in the White Paper that it would introduce fixed and escalating civil penalties as an alternative sanction for non-compliance with a Section 72 Notice, while retaining the option of initiating a criminal prosecution for the most serious breaches. These fixed and escalating penalties would be similar to those currently provided under section 40 and section 41 of the Pensions Act 2008 for breaches of Section 72 Notices issued in relation to the AE regime and to those provided under section 17 and 18 of the Pensions Schemes Act 2017 for breaches of Section 72 Notices issued in relation to the Master Trust (MT) regime.

The current statutory maximum fixed penalty is £50,000 and the statutory maximum daily rate of the escalating penalty is £10,000, in both the AE and MT context, with the details set out in the Employers' Duties (Registration and Compliance) Regulations 2010.

The current fixed penalty for non-compliance with a Section 72 Notice issued in relation to the AE regime is £400. The on-going daily rate for an escalating penalty for non-employers is £200. The daily rate figure for employers varies, depending on the number of employees and ranges from £50 up to the maximum daily rate of £10,000, until compliance is achieved.

The existing fixed penalty for non-compliance with a Section 72 Notice issued in relation to the MT regime is £500. The on-going daily rate for an escalating penalty starts at £1,000 and increases daily by £1,000 up to the maximum daily rate of £10,000, until compliance is achieved.

The intention is that similar civil sanctions of fixed and escalating penalties will also be available for non-compliance with the broader interview and inspection powers.

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<sup>15</sup> <https://www.gov.uk/government/publications/powers-of-entry-code-of-practice>

<sup>16</sup> <http://www.thepensionsregulator.gov.uk/docs/pensions-reform-compliance-and-enforcement-policy.pdf>

**Question: Do you think a fixed penalty of £400 (in line with AE penalties) is an appropriate level? Should higher levels of escalating penalties apply to (a) large employers/companies, and if so, how should 'large' be defined; and (b) professional trustees, since they are often held to a higher standard by TPR. If so, what level should these escalating penalties be?**

**Additionally, should similar civil penalties be available for TPR for non-compliance with the new interview and enhanced inspection powers (the existing option of criminal sanctions would continue to be available for more serious cases)?**

## **Responses**

There was little opposition to the new fixed penalty and the daily escalation rates for individuals being similar amounts to those for AE, or for the penalties to apply to the interview and inspection powers. However, there was no consensus around a higher daily penalty rate for certain categories, such as large companies or professional trustees.

Several comments were made about the level of penalty for an individual being unlikely to have a deterrent effect on wealthy individuals. Many believed that the threat of criminal sanctions would have a higher impact rather than a fine as reputation is considered more important. Respondents agreed that penalties should be discretionary, not automatic, as there might be good reasons for non-compliance. They also called for specific guidance regarding situations when civil penalties would arise and what behaviours would be covered.

There was no support for the suggestion that professional trustees should receive higher penalties. The main argument against was that a failure to comply with information gathering provisions would not be affected by the fact a trustee is remunerated, or has been appointed for their skills as a trustee. Concern was expressed that this might have an impact on whether trustee boards would be deterred from employing a professional trustee. There was greater support for larger companies being subject to higher escalating rates but no consensus as to how to define 'larger', as many felt the method used under the AE regime of categorising by number of employees was not appropriate.

## **Government response**

The Government will proceed with this change and has noted the comments raised. It intends that the power for TPR to apply fixed and escalating penalties up to a statutory maximum would be in primary legislation, consistent with those already in existence in relation to the AE and MT regimes, but that the levels of the fixed and escalating penalties would be detailed in secondary legislation, in the same way as the levels of fixed and escalating penalties under the AE and MT regimes.

We will continue to engage with stakeholders regarding the appropriate level of the fixed and escalating penalties and intend to consult on the regulations in due course.

## 6. Conclusion

We received comprehensive and thorough responses to this Consultation with contributions from a range of stakeholders which have informed our thinking. We will continue to work closely with TPR to deliver the measures proposed in this document, and work with stakeholders on the detail to deliver practical changes that will support TPR to become a stronger and more efficient Regulator.

Our proposals will:

- Improve TPR's ability to monitor relevant corporate events or transactions and take action as necessary;
- Strengthen TPR's powers to deter and punish wilful or reckless behaviours that might have negative impacts on pension schemes;
- Update TPR's information gathering powers, so that their investigations can be more efficient and effective; and
- Simplify and improve TPR's anti-avoidance powers so that the industry has more clarity on what is required of them and so TPR can take quicker action.

We will bring forward legislation as soon as Parliamentary time allows, and will continue to engage with stakeholders on the detail, for example on key definitions in relation to the notifiable events or the appropriate level of the fixed and escalating penalties.