



Department
for Work &
Pensions

The draft Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2017

Public consultation

April 2017

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Introduction

This consultation seeks views on proposed changes to employer debt legislation for employers in non-segregated defined benefit multi-employer pension schemes. It is being undertaken in response to a Call for Evidence¹ that looked at the employer debt regime for employers in non-associated defined benefit multi-employer pension schemes.

Chapter 1: Main findings of the Call for Evidence on employer debt - sets out the main findings of the Call for Evidence about section 75 employer debt in Non-Associated Multi-Employer Defined Benefit Pension Schemes.

Chapter 2: The deferred debt arrangement - explains proposals for a new arrangement that will allow employers to defer payment of a section 75 employer debt subject to certain conditions being met.

Chapter 3: Commentary on the draft Regulations - explains the policy reasons for the draft Regulations.

About this consultation

Who this consultation is aimed at

This consultation is mainly aimed at those administering and managing defined benefit multi-employer occupational pension schemes as the substantive amendments do not apply to other schemes. However, the government also welcomes comments from pension industry professionals, pension schemes, trustees, pension scheme members and member representative organisations, and any other interested parties.

Purpose of the consultation

This consultation seeks views on the draft Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2017.

Scope of consultation

This consultation applies to England, Wales and Scotland. It is anticipated that Northern Ireland will make corresponding regulations.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/410565/s75-employer-debt-call-for-evidence-march-2015.pdf

Duration of the consultation

The consultation period begins on Friday 21 April 2017 and runs until Thursday 18 May 2017.

How to respond to this consultation

Please send your consultation responses to preferably by email to:

Email: Private.pensionspublicconsultation@dwp.gsi.gov.uk

Or by post to:

Employer Debt Team
Department for Work and Pensions
First Floor
Caxton House
6-12 Tothill Street
London
SW1H 9NA

Or online at:

[Respond online](#)

Please ensure responses reach us by 18 May 2017

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

Any queries about the subject matter of this consultation should be addressed to:

Private.pensionspublicconsultation@dwp.gsi.gov.uk

Government response

We will aim to publish the government response to the consultation on the [GOV.UK](#) website. The [consultation principles](#) encourage Departments to publish a response

within 12 weeks or provide an explanation why this isn't possible. Where consultation is linked to a statutory instrument, responses should be published before or at the same time as the instrument is laid.

The report will summarise the responses.

How we consult

Consultation principles

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), including if you feel that the consultation does not adhere to the values expressed in the consultation principles or that the process could be improved, please address them to:

DWP Consultation Coordinator
2nd Floor
Caxton House
Tothill Street
London
SW1H 9NA

Email: caxtonhouse.legislation@dwp.gsi.gov.uk

Freedom of information

The information you send us may need to be passed to colleagues within the Department for Work and Pensions, published in a summary of responses received and referred to in the published consultation report.

All information contained in your response, including personal information, may be subject to publication or disclosure if requested under the Freedom of Information Act 2000. By providing personal information for the purposes of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information provided, or remove it completely. If you want the information in your response to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this.

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

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

Chapter 1: Main findings of the Call for Evidence on employer debt

Introduction

- 1.1. The Employer Debt Regulations² are intended to provide protection for members of defined benefit pension schemes where the employer ceases to participate actively in the scheme. Employer debt³ is broadly the amount the employer must pay into the scheme when it ceases to participate at a time when there is a shortfall between the scheme's assets and liabilities. The amount of the employer debt is calculated by reference to the cost of buying out members' benefits with an insurance company.
- 1.2. In response to approaches made by a number of stakeholders with concerns about how the existing employer debt legislation operates for employers in non-associated multi-employer schemes (i.e. schemes where the participating employers are from unconnected businesses or organisations), the Department undertook a Call for Evidence in March 2015.
- 1.3. The Department received 77 formal written responses to the Call for Evidence from a wide range of stakeholders who said they had experience with the employer debt requirements as they apply to non-associated multi-employer defined benefit pension schemes. The majority of respondents had experience of schemes in the charitable sector either as employers, trustees or professional advisers.
- 1.4. The Department would like to thank all those who provided evidence and set out their views about possible changes. The main findings from the Call for Evidence are set out below.

² The Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678) (as amended).

³ Employer debt also referred to as section 75 debt as the legislation on employer debt is contained in section 75 of the Pensions Act 1995.

Main findings

- 1.5. The majority of respondents to the Call for Evidence advocated some form of change to the employer debt regime to help employers in non-associated multi-employer pension schemes manage employer debts that arise following an employment-cessation event. An employment-cessation event happens when an employer in a multi-employer pension scheme ceases to have any employees who are active members of the scheme at a time when at least one other participating employer continues to have employees who are active members. It is a common way for an employer debt to be triggered in a multi-employer pension scheme.
- 1.6. Respondents were fairly evenly divided between those who felt any changes made should be limited to non-associated multi-employer pension schemes and those who felt that they should apply to both associated and non-associated multi-employer pension schemes.
- 1.7. The view was expressed that employers within associated multi-employer pension schemes are generally more likely to be able to take advantage of the various arrangements already available to manage an employer debt when they cease to employ an active member and, as such, are much less likely to be required to make payment of an employer debt in full at the point of exit. For example flexible apportionment arrangements are used by employers who are in a restructuring situation. Under this arrangement an employer's pension liabilities can be apportioned to another employer participating in the pension scheme and this avoids triggering the employer debt.
- 1.8. A number of respondents said that in contrast employers in non-associated multi-employer pension schemes were often not able to make use of existing arrangements. For example employers with a very small number of active members who were approaching retirement feared the consequence of an employer debt being triggered when their last active member retired.
- 1.9. There was anecdotal evidence that a number of employers have been driven to insolvency by employer debts and several responding employers

suggested that they could themselves be driven insolvent were they to trigger their employer debt as the result of an employment-cessation event.

- 1.10. Some employers said that they did not see the exit of the last active member from the scheme as fundamentally altering their relationship with the scheme and argued that there is a lack of parity between multi-employer schemes and frozen single employer schemes. This is because an employer sponsoring a single employer scheme can freeze the scheme at a time of their choice without triggering an employment-cessation event, and will continue making on-going contributions to the scheme as necessary in respect of the accrued liabilities.
- 1.11. Whilst respondents acknowledged the existing provisions provided protection for scheme members they felt that the current system created what was described as a perverse incentive to continue to accrue unaffordable liabilities. A number of voluntary organisations also explained how the current employer debt regime makes it difficult for them to plan for the future when running a charity.
- 1.12. Several of the larger pension schemes and a number of industry experts expressed greater caution around any changes to the employer debt regime. They cautioned that there was a potential for long-term risk to scheme stability, and argued that the current regulations work well in ensuring member protection from any attempted avoidance.
- 1.13. Respondents also provided examples of difficulties they have encountered in determining the employer debt that is due in respect of an employer that has undergone two successive employment-cessation events.

Government response

- 1.14. In the light of the responses to the Call for Evidence and following further engagement with stakeholders the Government proposes to introduce a new option for employers in multi-employer schemes to defer the requirement to pay an employer debt on ceasing to employ an active member. This deferred debt arrangement would be subject to a condition that the employer retains

all their previous responsibilities to the scheme and continues to be treated as if they were the employer in relation to that scheme. The deferred debt arrangement proposal is explained in more detail in Chapter 2.

- 1.15. The Government has looked at the practical issues raised by some schemes of how to deal with more than one employment-cessation event in respect of the same employer. The Government is proposing an amendment to clarify this as explained in the commentary on the draft Regulations in Chapter 3.
- 1.16. The Government has also reviewed the evidence received about arrangements that are currently in place to manage an employer debt that occurs when an employer ceases to have an active member in a multi-employer pension scheme. The Government is of the view that these should remain in place as they continue to provide a range of methods employers could use to provide for or cover their liabilities and reflect the diverse range of multi-employer pension scheme structures. However in response to comments received the Government is proposing a few minor amendments to these as explained in the commentary on the draft Regulations in Chapter 3.
- 1.17. More generally a limited number of technical amendments are proposed which clarify the existing Employer Debt Regulations and their application in practice but do not make substantive changes.

Chapter 2: The deferred debt arrangement

Background

- 2.1. As a result of the evidence received the Government proposes introducing a new deferred debt arrangement to the employer debt regulations. The deferred debt arrangement will enable an employer in a multi-employer pension scheme, who fulfils certain conditions to defer the requirement to pay an employer debt on ceasing to employ an active scheme member. The arrangement will require the employer to retain all their previous responsibilities to the scheme and continue to be treated as if they were the employer in relation to that scheme.
- 2.2. The deferred debt arrangement will sit alongside the existing options to manage employer debt which are available to employers in multi-employer pension schemes who cease to employ an active scheme member. This policy recognises that there needs to be a range of methods that employers can use to provide for liabilities on ceasing to employ an active member while continuing to ensure that the scheme's funding is protected.

Conditions

- 2.3. A key consideration in any arrangement to manage an employer debt is that after the time the arrangement takes effect the scheme will have sufficient and appropriate assets to cover its technical provisions and that the arrangement will not adversely affect the security of members' benefits. A funding test⁴ is already used for this purpose in some of the existing arrangements which are available to manage an employer debt.
- 2.4. As a precondition for a deferred debt arrangement it is proposed that the funding test will need to be satisfied. This will ensure that when the employer

⁴ Regulation 2(4A) to (4D) of the Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678) (as amended).

ceases to employ an active member and wishes to enter into the relationship of deferred employer, all the employers of the scheme, including the deferred employer will be reasonably likely to be able to fund the scheme going forwards.

- 2.5. The policy is that after the time that arrangement takes effect the scheme will have sufficient and appropriate assets to cover its technical provisions, taking account of any change in those provisions which will in the opinion of the trustees or managers become necessary as a result of the arrangement and that the arrangement will not adversely affect the security of members' benefits.
- 2.6. It is an additional precondition that the trustees or managers of the scheme give their consent to the deferred debt arrangement in writing based on their satisfaction that the arrangement would not be detrimental to the scheme or its members.
- 2.7. In addition the scheme must not be in a Pension Protection Fund (PPF) assessment period (this is the time the scheme is being assessed to see if the PPF can assume responsibility for it) or be likely to start such a period in the next 12 months.
- 2.8. The deferred debt arrangement will not be open to employers who are restructuring. The existing arrangements in the employer debt regulations already provide a number of options that employers can consider in these circumstances.
- 2.9. However the deferred debt arrangement will be open to employers who are already' in a period of grace arrangement.

Practical operation

- 2.10. An employer in a deferred debt arrangement will still be an employer for scheme funding purposes. Schemes carry out regular actuarial valuations to establish whether or not their funding position is on track according to the funding strategy they have adopted, and to put in place a recovery plan

where any shortfalls are identified. Employers may be required to make deficit recovery payments as part of this plan and this requirement will apply to any employer who has entered into a deferred debt arrangement.

Ending the arrangement

- 2.11. The aim of the deferred debt arrangement is to enable employers in a multi-employer pension scheme whose only change in circumstance is that they are ceasing to employ an active member to retain an on-going commitment to the scheme and their employees who are members it.
- 2.12. There are a number of circumstances in which the deferred debt arrangement may come to an end and an employer debt could become due:
- the deferred employer in a deferred debt arrangement employs an active member of the scheme;
 - the employer chooses to trigger the section 75 employer debt subject to the consent of the trustees;
 - an insolvency event occurs in relation to the deferred employer;
 - the deferred employer commences winding-up;
 - the scheme winds up triggering a section 75 employer debt;
 - the deferred employer restructures;
 - a freezing event in relation to the scheme;
- 2.13. In addition trustees as part of their regular monitoring of the scheme funding may determine that the deferred employer has failed to comply with their obligations under the scheme funding regulations. In these circumstances they can serve a notice to the deferred employer that the arrangement will come to an end.
- 2.14. Trustees also have a duty to ensure the ongoing funding of a scheme and part of that includes the responsibility to assess the employer covenant. As part of that duty the trustees may determine that it is no longer in the interests of the scheme for the deferred employer to continue in the deferred

debt arrangement and can serve notice to the employer that the arrangement is to be terminated.

- 2.15. We anticipate that that the circumstances in which the trustees will need to terminate a deferred debt arrangement will be rare, but that this provision will deter employers from using the deferred debt arrangement to avoid their responsibility and provide adequate safeguards for all scheme members.

Other considerations

- 2.16. The deferred employer will remain responsible for their share of what are generally known as ‘orphan liabilities’. They are liabilities remaining in the scheme that were accrued by members who were the employees of employers that have since left the scheme and which are not attributable to a participating employer.
- 2.17. Some respondents to the Call for Evidence raised the issue of orphan liabilities prior to the introduction of the full buyout requirement in 2005. We are exploring this issue in the context of the Green Paper Security and Sustainability in Defined Benefit Pension Schemes⁵. This consultation runs for 12 weeks and closes at 11:45 pm on Sunday 14 May 2017. We welcome views on these issues.

Consultation questions

- 1. We would welcome your views on the deferred debt arrangement proposal. In particular, will it be helpful to employers of non-associated multi-employer schemes in managing an employer debt when they cease to employ an active member?**
- 2. Will the proposed conditions to enter into a deferred debt arrangement work in practice for the employer and the trustees and managers of the scheme?**

⁵ <https://www.gov.uk/government/consultations/defined-benefit-pension-schemes-security-and-sustainability>

- 3. Do you envisage any difficulties in the practical operation of the deferred debt arrangement?**

- 4. Do you agree with the list of circumstances in which the deferred debt arrangement would end, and can you identify any other circumstances in which it will end?**

- 5. The deferred debt arrangement is available to employers who have entered into a period of grace. Should the deferred debt arrangement be available to employers who have already used one of the other arrangements for managing their employer debt?**

Chapter 3: Commentary on the draft Regulations

Statement of policy

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

Commentary

- 3.2. Draft regulation 1 cites the title of the Regulations and the coming into force date of 1 October 2017 (a common commencement date).
- 3.3. Draft regulation 2 prefaces that the following draft regulations make changes to the Employer Debt Regulations.
- 3.4. Draft regulation 3 amends the interpretation of the Employer Debt Regulations to include new terms and some amendments to existing terms.
- 3.5. Draft regulation 3(2) defines the terms “deferred debt arrangement” and “deferred employer” used in new regulation 6F of the Employer Debt Regulations explained below. A deferred employer is an employer in relation to a multi-employer scheme who as a result of ceasing to employ an active member of that scheme has entered into a deferred debt arrangement.
- 3.6. Draft regulation 3(3) amends the existing definition of “receiving employer” in regulation 2(3A) of the Employer Debt Regulations. Sub-paragraph (b) (ii) provides for situations where the receiving employer can be the new legal status of the exiting employer. The existing definition of “receiving employer” was inserted into the Employer Debt Regulations in April 2010 by the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 (S.I. 2010/725). The definition is used in the

restructuring provisions contained in regulations 6ZA and 6ZB of the Employer Debt Regulations. In one of its reports⁶ (the second report 2010-11 session at paragraph 6) the Joint Committee on Statutory Instruments commented on the way sub-paragraph (b) (ii) of the definition is drafted.

- 3.7. The policy intention has not changed and is to provide that where an organisation's restructuring, is limited to changing its status, but all other things are remaining the same, the receiving employer could be the new legal status of the exiting employer. The intention of the amendment is to capture situations where this happens in practice, for example, where an organisation changes status from an unincorporated charity to an incorporated company, or from an unincorporated business to a limited company so that in those situations no employer debt will be triggered provided the other criteria in for the restructuring arrangements in regulations 6ZA or 6ZB of the Employer Debt Regulations are met. We know from responses to the Call for Evidence and wider stakeholder engagement that the personal liability attributed to unincorporated status poses a significant concern for some employers, particularly small employers where a potential employer debt can be a significant sum of money.

Consultation questions 6

- i. Will this amendment work in practice where an organisation's restructuring, is limited to changing its status and are there any further situations it should cover?**
- ii. Are any changes needed to regulations 6ZA and 6ZB of the Employer Debt Regulations to provide for a restructuring where the receiving employer is the new legal status of the exiting employer?**

Funding test

- 3.8. Draft regulation 3(4) amends the requirements for the "funding test" in regulation 2(4A) of the Employer Debt Regulations. The funding test is currently required before a scheme or flexible apportionment arrangement can be entered into. This draft regulation extends its application to the new

⁶ <http://www.publications.parliament.uk/pa/jt201011/jtselect/jtstatin/23/2303.htm>

deferred debt arrangement so that in order to enter a deferred debt arrangement the funding test will need to be satisfied.

- 3.9. The policy rationale for the funding test is to ensure that when the employer ceases to employ an active member and wishes to enter into the relationship of deferred employer the employers of the scheme, including the deferred employer will be reasonably likely to be able to fund the scheme going forwards. So that after the time that arrangement takes effect the scheme will have sufficient and appropriate assets to cover its technical provisions, taking account of any change in those provisions which will in the opinion of the trustees or managers is necessary as a result of the arrangement. The test is also designed to check that the effect of the arrangement will not be to adversely affect the security of members' benefits.

Consultation questions 7

- i. Is the funding test appropriate for the deferred debt arrangement?**
- ii. Are any further changes needed to the test to ensure it works in practice?**
- iii. Are there any circumstances in which it would be unnecessary?**

3.10. Draft regulation 3(5) extends existing provision for situations where a funding test is carried out before the first actuarial valuation of the scheme to include the deferred debt arrangement.

3.11. Draft regulation 3(6) extends the meaning of remaining employers to include all deferred debt employers currently in deferred debt arrangements in relation to the scheme.

Employment-cessation events

3.12. Draft regulation 4 inserts a new provision in regulation 6 of the Employer Debt Regulations to provide for employer debt from two consecutive employment-cessation events.

3.13. Several respondents to the Call for Evidence raised the issue of what they describe as historic employer debts and questioned whether under the employer debt regulations an employer debt for each cessation event must

be calculated and paid in full. They pointed out that this created the potential for multiple payments in respect of the same pension liabilities and that this seems unfair to employers as there appears to be no provision within the Employer Debt Regulations for any offset in the calculations, despite the potential for multiple payments in respect of the same pension liabilities.

- 3.14. The policy intention is that if an employer debt is due in relation to an employment-cessation event it should be either settled in full or provided for in the future by means of one of the prescribed arrangements. An employer debt is not required to be met more than once in respect of the same liabilities in these circumstances.
- 3.15. Draft regulation 4 addresses the situation where an employer has undergone two sequential employment cessation events so that it is the debt from most recent employment-cessation event that has to be either settled in full or managed via a prescribed arrangement. This provision is limited to situations where both the first employment-cessation event and subsequent employment of an active member take place on or before 31 March 2017 and the second employment-cessation event occurs on or after the Regulations came into force.

Consultation questions 8

- i. Does this provision adequately address the problems schemes have faced in calculating an employer debt in relation to more than one employment-cessation event?**
- ii. Is this provision a fair way to attribute liabilities to an employer who has undergone two sequential employment-cessation events?**
- iii. Does there need to be any related assessment of the schemes funding position in relation to it?**
- iv. Does this provision pose any risk to the funding of pension schemes and members pensions?**

Period of grace arrangement

- 3.16. Draft regulation 5 amends the period of grace arrangement. The period of grace is a provision whereby an employer who temporarily ceases to employ

an active member of the pension scheme does not trigger an employer debt if he informs the trustees he intends to employ an active member within 12 months or a maximum of 36 months with the trustees' discretion, and in fact does so. The requirements are contained in regulation 6A of the Employer Debt Regulations.

- 3.17. Draft regulation 5(2)(a) increases the notification period that employers have to write to trustees (to seek permission to use the period of grace) from two to three months. Respondents who have used this arrangement reported that the period of two months did not allow sufficient time for employers to take the required action.

Consultation question

9. Will a three month period allow sufficient time for both employers and trustees to process a period of grace application?

- 3.18. Draft regulation 5(2)(b) extends the existing provision so that an employer who does not employ an active scheme member or enter into a deferred debt arrangement by the last day of a period of grace will be treated as if the period of grace has not applied. This could result in an employer debt being due from the employer calculated at the time he ceased to employ an active member of the scheme.
- 3.19. Draft regulation 5(2)(c) extends the existing provision so that an employer in a period of grace arrangement must notify the trustees or managers of the scheme if he does not intend to employ an active member or enter into a deferred debt arrangement. In either of these circumstances the employer will be treated as if the period of grace has not applied.
- 3.20. Draft regulation 5(2)(d) inserts a new provision so that an employer who enters into a deferred debt arrangement during a period of grace arrangement will be treated as if the period of grace had not applied.
- 3.21. The policy intention here is to permit an employer who has entered into a period of grace arrangement either for a 12 month period or by agreement

with trustees up to a 36 month period to follow this with a deferred debt arrangement, that can be entered into during the period of grace, subject to meeting the conditions for that arrangement.

- 3.22. Draft regulation 5(3) amends the period of grace provision so that an employer in a period of grace arrangement is treated for the purposes of regulation 16 of the Financial Support Directions Regulations as if he is an employer in relation to the scheme. Financial Support Directions enable the Pensions Regulator to direct that arrangements are put in place by the employer or a connected or associated person to ensure that financial support is put in place for the pension liabilities of the sponsoring employer.

Consultation questions 10

- i. Will the arrangements enabling a deferred debt arrangement to follow on from a period of grace arrangement work in practice?**
- ii. Are any further changes needed to facilitate this?**

- 3.23. Draft regulation 6 makes a technical amendment to regulation 6E(1) of the Employer Debt Regulations to clarify that a flexible apportionment arrangement will take effect immediately upon the conditions in regulation 6E(2) being satisfied where the scheme is frozen.

Deferred debt arrangement

- 3.24. Draft regulation 7 inserts new regulation 6F into the Employer Debt Regulations to set out the conditions that must be met for a deferred debt arrangement to be entered into and the circumstances under which that arrangement will come to an end.
- 3.25. New regulation 6F(1) outlines the circumstances in which a deferred debt arrangement is available to an employer.
- 3.26. New regulation 6F(1)(a) specifies that the conditions in regulation 6F(2) need to be met.

- 3.27. New regulation 6F(1)(b)(i) and (ii) provides that the arrangement is available to employers who have either experienced an employment cessation event before entering into the arrangement or who would have experienced an employment cessation event if they had not entered into a period of grace.
- 3.28. New regulation 6F(1)(c) requires the trustees or managers of the scheme to give their consent to the deferred debt arrangement in writing before it can take effect.
- 3.29. New regulation 6F(2) sets out the conditions that must be met before the deferred debt arrangement can take effect. These are:
- a) that the funding test described above is met; and
 - b) the scheme is not in a PPF assessment period or being wound up when the deferred debt arrangement takes effect.
 - c) the trustees or managers of the scheme are satisfied that the scheme is unlikely to enter a PPF assessment period in the 12 months beginning with the date the deferred debt arrangement takes effect.
- 3.30. New regulation 6F(3)(a) requires the deferred employer is treated during the period that the deferred debt arrangement is in place as if they are an employer of an active scheme member. This is in keeping with the status of an employer during a period of grace arrangement, and reflects the policy that the employer will continue to have the same responsibility to the scheme as if they were still employing an active member.
- 3.31. New regulation 6F(3)(b) requires that an employer in a deferred debt arrangement is treated for the purposes of regulation 16 of the Pension Regulator (Financial Support Directions etc.) Regulations 2005 (SI 2005/2188) as if they are an employer in relation to the scheme. This reflects the policy that the employer will have the same responsibility to the scheme as if they were still employing an active member.
- 3.32. New regulation 6F(4) provides where an employer meets the conditions for the deferred debt arrangement the employment-cessation event that

preceded that arrangement will be treated as if it has not occurred. This means that no employer debt will be triggered as a consequence of it.

- 3.33. New regulation 6F(4) lists the circumstance in which the deferred debt arrangement will come to an end. These are the earliest date one of the following occurs:
- a) the deferred employer in a deferred debt arrangement employs an active member of the scheme; or
 - b) the deferred employer chooses to trigger the debt under section 75 of the Pensions Act 1995 subject to the trustees or managers agreement and the debt due from the employer at that time is paid in full; or
 - c) the date on which an employer debt could be triggered by a relevant event such as insolvency of the employer occurs, as described in section 75(6A) of the Pensions Act 1995 occurs: or
 - d) the date on which the deferred employer restructures. This reflects the policy intention that a deferred debt arrangement is to enable employers in a multi-employer scheme (whose only change in circumstance is that they are ceasing to employ an active member) to retain an on-going commitment to the scheme and their employees who are members of it. However if an employer in these circumstances restructures this is likely to weaken the covenant to the scheme and therefore in these circumstances the arrangement will come to an end; or
 - e) a freezing event in relation to the scheme occurs; or
 - f)(aa) the trustees or managers of the scheme as part of their regular monitoring of the scheme funding determine that the deferred employer has failed to comply with their obligations under the scheme funding regulations; or
 - (bb) the trustees or managers of the scheme determine that the deferred employer's covenant to the scheme is likely to weaken in any other way in the next 12 months. In these circumstances they can serve notice to the deferred employer that the arrangement will come to an end and that an employer debt determined at the date will fall due from the employer.
- 3.34. We anticipate that that the circumstances in which the trustees will need to terminate a deferred debt arrangement under new regulation 6F(5)(f)(will be

rare, but that this provision will deter employers from using the deferred debt arrangement to avoid their responsibility and provide adequate safeguards for all scheme members.

- 3.35. New regulation 6F(6)(a) provides for the deferred employer to be treated as if the employment cessation event had not occurred in circumstances where they employ an active member under new regulation 6F(5)(a). This means that they will not incur an employer debt in relation to that employment cessation event while the deferred debt arrangement is in place.
- 3.36. New regulation 6F(6)(b) provides that where a relevant event (as defined in the Pensions Act 1995 section 75) occurs to a deferred employer under new regulation 6F(5)(c) the deferred employer will be treated as if the employment cessation event had not occurred. This means that they will not incur an employer debt in relation to that employment cessation because the relevant event itself will trigger that debt.
- 3.37. New regulation 6F(6)(c) provides that the date the deferred debt arrangement comes to an end in all other circumstances to be the date of an employment-cessation event for the deferred employer.
- 3.38. Draft regulation 8 makes a technical amendment to regulation 8(2)(a)(i) of the Employer Debt Regulations to clarify the definition of a segregated scheme.
- 3.39. Draft regulation 9 is a technical amendment to regulation 9(2)(a) of the Employer Debt Regulations to clarify that former employers includes those who ceased to employ actives as a result of the “freezing event”.
- 3.40. Draft regulation 10 inserts a new provision after paragraph 3 of Schedule 1B Notifiable Events in the Employer Debt Regulations in respect of the deferred debt arrangement. Any transaction whereby the trustees or managers agree a debt to the pension scheme need not be paid in full is normally a “notifiable event”, that is a matter to be notified to the Pensions Regulator. Failure to notify the Pensions Regulator could result in a civil penalty.

- 3.41. Draft regulation 10 requires the trustees or managers of a pension scheme to notify the Pensions Regulator when they to enter a deferred debt arrangement and of any decision to bring the deferred debt arrangement to an end. These notices to the Pensions Regulator are made in writing as soon as is reasonably practical after making the decision.
- 3.42. Draft regulation 11 makes an amendment to the Occupational Pension Schemes (Scheme Funding) Regulations 2005 (S.I. 2005/3377) in relation to the deferred debt arrangement. Paragraph 3A in Schedule 2 is amended to make clear that an employer in a deferred debt arrangement is still an employer for scheme funding purposes.

Annex A: List of consultation questions

Chapter 2: The deferred debt arrangement

1. We would welcome your views on the deferred debt arrangement proposal. In particular, will it be helpful to employers of non-associated multi-employer schemes in managing an employer debt when they cease to employ an active member?
2. Will the proposed conditions to enter into a deferred debt arrangement work in practice for the employer and the trustees and managers of the scheme?
3. Do you envisage any difficulties in the practical operation of the deferred debt arrangement?
4. Do you agree with the list of circumstances in which the deferred debt arrangement would end, and can you identify any other circumstances in which it will end?
5. The deferred debt arrangement is available to employers who have entered into a period of grace. Should the deferred debt arrangement be available to employers who have already used one of the other arrangements for managing their employer debt?

Chapter 3: Commentary on the draft Regulations

6.
 - i. Will this amendment work in practice where an organisation's restructuring, is limited to changing its status and are there any further situations it should cover?
 - ii. Are any changes needed to regulations 6ZA and 6ZB of the Employer Debt Regulations to provide for a restructuring where the receiving employer is the new legal status of the exiting employer?

7.
 - i. Is the funding test appropriate for the deferred debt arrangement?
 - ii. Are any further changes needed to the test to ensure it works in practice?
 - iii. Are there any circumstances in which it would be unnecessary?

8.
 - i. Does this adequately address the problems schemes have faced in calculating an employer debt in relation to more than one employment-cessation event?
 - ii. Is this provision a fair way to attribute liabilities to an employer who has undergone two sequential employment-cessation events?
 - iii. Does there need to be any related assessment of the schemes funding position in relation to it?
 - iv. Does this provision pose any risk to the funding of pension schemes and members pensions?

9. Will a three month period allow sufficient time for both employers and trustees to process a period of grace application?

10.
 - i. Will the arrangements enabling a deferred debt arrangement to follow on from a period of grace arrangement work in practice?
 - ii. Are any further changes needed to facilitate this?

Annex B: The draft Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2017

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PENSIONS

**The Occupational Pension Schemes (Employer Debt)
(Amendment) Regulations 2017**

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State for Work and Pensions in exercise of the powers conferred by sections 75(5) and (10), 75A (1) to (4) and (5)(a), 124(1), 125(3) and 174(1) to (3) of the Pensions Act 1995(a) and sections 69(2), 126(5), 232, 307(1)(b) and (2)(ba), 315(2) and (5) and 318(1) of the Pensions Act 2004(b) makes the following Regulations.

In accordance with section 120(1) of the Pensions Act 1995 and section 317(1) of the Pensions Act 2004, the Secretary of State has consulted such persons as he considers appropriate before making these Regulations.

Citation and Commencement

1.—(1) These Regulations may be cited as the Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2017.

(2) These Regulations come into force on 1st October 2017.

Amendment of the Occupational Pension Schemes (Employer Debt) Regulations 2005

2. The Occupational Pension Schemes (Employer Debt) Regulations 2005(c) are amended as follows.

3. —(1) Regulation 2(d) (interpretation) is amended as follows.

(2) In paragraph (1)—

(a) after the definition of “the corresponding assets”, insert—

““deferred debt arrangement” means an arrangement that takes effect in accordance with regulation 6F;

“deferred employer” means an employer—

(a) in relation to a multi-employer scheme,

(a) 1995 c.26. Section 75 was amended by section 271 of the Pensions Act 2004 (c.53) and section 75A was inserted by section 272 of that Act. Section 124(1) is cited for the meaning it gives to “prescribed” and “regulations”.

(b) 2004 c.35. Section 318(1) is cited for the meaning it gives to “prescribed” and “regulations”.

(c) S.I. 2005/678. Amending instruments are S.I. 2005/993, 2224, 3377 and 3378, 2006/467 and 558, 2007/60, 2008/731 and 1068, 2009/1906 and 2010/725.

(d) Regulation 2 was amended by S.I. 2005/2224, 2007/60, 2008/731 and 1068, 2010/725, 2011/2973 and 2012/1817.

- (b) in respect of whom a relevant event, other than an employment-cessation event, has not occurred,
 - (c) who used to employ at least one active member of the scheme in respect of which defined benefits were accruing, and
 - (d) who is currently participating in a deferred debt arrangement;”;
- (b) in the definition of “employer”, after “6,” insert “6F,”.
- (3) In paragraph (3A)(b)(ii), for “the new legal status of the exiting employer” substitute—
 “an entity to which the entire undertaking of the exiting employer has been transferred, and which is—
- (aa) a limited company(a), or
 - (bb) a partnership(b), a limited partnership(c) or a limited liability partnership(d), or
 - (cc) where the exiting employer is a charity(e), either a charitable incorporated organisation(f) or a charitable company(g);”.
- (4) In paragraph (4A)(h)—
- (a) in the first line, after “6E” insert “, 6F”;
 - (b) in sub-paragraph (a), after “flexible apportionment arrangement” insert “or a deferred debt arrangement,”;
 - (c) in sub-paragraph (b)—
 - (i) in the first line, for “or a” substitute “, a”;
 - (ii) for “under regulation 6E” substitute “or a deferred debt arrangement”.
- (5) In paragraph (4B) —
- (a) after “flexible apportionment arrangement” insert “or a deferred debt arrangement”;
 - (b) in substituted paragraph (4A), after “6E” insert “, 6F”.
- (6) After paragraph (4D) insert—
- “(4E) In paragraphs (4A) and (4C), references to “remaining employers” where one or more deferred debt arrangements are in place include all deferred employers.
- (4F) .In substituted paragraph (4A) , references to “remaining employers” where one or more deferred debt arrangements are in place include all deferred employers.””
4. In regulation 6(i) (multi-employer schemes: general), after paragraph (8) insert—
- “(9) Paragraph (10) applies where the events in sub-paragraphs (a), (b) and (c) have occurred in the following order—
- (a) (i) an employment-cessation event (“Event 1”) has occurred in relation to an employer (“Employer B”), and
 - (ii) as a consequence of Event 1, a debt has arisen under section 75(2) and (4) of the 1995 Act;
 - (b) after Event 1, but not later than 31st March 2017, Employer B has employed an active scheme member (“Event 2”);

(a) “Limited company” is defined in section 3(1) of the Companies Act 2006 (c.46) and includes companies limited by shares or by guarantee.

(b) “Partnership” is defined in section 1 of the Partnership Act 1890 (c.9).

(c) “Limited partnership” is defined in section 4 of the Limited Partnerships Act 1907 (c.24).

(d) “Limited liability partnership” is defined in section 18 of the Limited Liability Partnerships Act 2000 (c.12).

(e) “Charity” is defined in section 1 of the Charities Act 2011 (c.25).

(f) “Charitable incorporated organisation” is defined in Part 11 of the Charities Act 2011.

(g) “Charitable company” is defined in section 193 of the Charities Act 2011.

(h) Paragraphs (4A) to (4D) of regulation 2 were inserted by S.I. 2008/731 and amended by S.I. 2011/2973.

(i) Regulation 6 was amended by S.I. 2010/725, 2010/2973 and 2012/1817.

- (c) (i) after Event 2, a second employment-cessation event has occurred in relation to Employer B (“Event 3”), and
- (ii) as a consequence of Event 3 a further debt has arisen under section 75(2) and (4) of the 1995 Act.

(10) Where this paragraph applies and where Event 3 has occurred after the date that these regulations come into force, Employer B’s total liability to the trustees in respect of any outstanding debts incurred as a consequence of Events 1, 2 and 3 is limited to Employer B’s liability in respect of Event 3.”

5.—(1) Regulation 6A(a) (employment-cessation events: periods of grace) is amended as follows.

(2) In paragraph (1)—

- (a) for “2 months” substitute “3 months”;
- (b) in sub-paragraph (a), after “of the scheme” insert “or enter into a deferred debt arrangement”;
- (c) in sub-paragraph (b) before “employ any person” insert “(i)”, and after “member of the scheme” insert “, or (ii) enter into a deferred debt arrangement,”;
- (d) after sub-paragraph (d) insert—

“(e) if during the period of grace A enters into a deferred debt arrangement, A will be treated as if the period of grace had not applied.”.

(3) In paragraph (2), after “these Regulations” insert “and regulation 16 of the Pensions Regulator (Financial Support Directions etc) Regulations 2005(b)”.

6. In regulation 6E(c) (flexible apportionment arrangements), for paragraph (1)(b)(iii) substitute “has occurred to the leaving employer as part of a freezing event as defined in regulation 9(2)(b).”.

7. After regulation 6E, insert—

“6F Deferred Debt Arrangement

(1) A deferred debt arrangement takes effect on the date on which all the following conditions are satisfied—

- (a) the conditions in paragraph (2) are met;
- (b) an employment-cessation event—
 - (i) has occurred in relation to the deferred employer before the date the conditions in paragraph (2) are met; or
 - (ii) would have occurred if the deferred employer had not entered into and remained in a period of grace until immediately before entering into the deferred debt arrangement; and
- (c) the trustees or managers of the scheme have consented in writing to the deferred debt arrangement.

(2) The conditions are that—

- (a) the funding test is met,
- (b) the scheme is not in an assessment period or being wound up, and
- (c) the trustees or managers of the scheme are satisfied that an assessment period in relation to the scheme is unlikely to begin within the period of 12 months beginning with the date on which a deferred debt agreement takes effect.

(a) Regulation 6A was inserted by S.I. 2008/731 and amended by S.I. 2011/2973.
 (b) S.I. 2005/2188. Amending instruments are S.I. 2005/2224, 2008/731, 2009/617, 2010/725 and 2011/2973.
 (c) Regulation 6E was inserted by S.I. 2011/2973.

(3) A deferred employer will be treated during the period that the deferred debt arrangement is in place—

- (a) as if they were an employer of an active scheme member, and
- (b) for the purposes of these Regulations and regulation 16 of the Pensions Regulator (Financial Support Directions etc) Regulations 2005, as if they were an employer in relation to the scheme.

(4) Where a deferred debt arrangement is in place following the operation of regulations (1)(b) and (2) the deferred employer will be treated as if the employment cessation event had not occurred.

(5) The deferred debt arrangement will continue until the earliest of the following dates—

- (a) the date on which the deferred employer employs an active member of the scheme;
- (b) the date on which the deferred employer obtains the agreement of the trustees or scheme managers that the debt under section 75(2) or (4) of the Pensions Act 1995 can be calculated as falling due on that date;
- (c) the date on which a relevant event, other than an employment-cessation event, occurs in relation to the deferred employer;
- (d) the date on which the deferred employer restructures;
- (e) the date on which a freezing event as defined in regulation 9(2)(b) occurs in relation to the scheme;
- (f) the date on which the trustees or scheme managers, being reasonably satisfied—
 - (i) that the deferred employer has failed to comply with its obligations under the Scheme Funding Regulations, or
 - (ii) that the deferred employer's covenant to the scheme is likely to weaken in any other way in the next 12 months,

serve a notice on the deferred employer stating that the deferred debt arrangement has come to an end.

(6) For the purpose of this regulation—

- (a) where the deferred employer employs an active scheme member, the deferred employer will be treated as if an employment-cessation event had not occurred to them;
- (b) where an event referred to in paragraph (5)(c) occurs, the deferred employer will be treated as if an employment-cessation event had not occurred to them;
- (c) the dates referred to in paragraphs (5)(d) to (5)(f) will be treated as the date of an employment-cessation event in relation to the deferred employer.”.

8. In regulation 8(a), in paragraph (2)(a)(i)—

- (a) after “employer’s section,” insert “or”;
- (b) for the words from “to the section” to the end of paragraph (i), substitute “, to the section which is appropriate in respect of the employment in question; and”. [DN power section 75A of the 1995 Act]

9. In regulation 9(b), in paragraph (2)(a), for the words from “who employed persons” to the end of the sub-paragraph substitute “who was the employer immediately before the time when the scheme ceased to have any active members”.

10. In Schedule 1B,(c) in paragraph 2(1)—

(a) Regulation 8 was inserted by S.I. 2008/731 and amended by S.I. 2010/725.
(b) Regulation 9 was substituted by S.I. 2008/731 and amended by S.I. 2010/725 and 2011/2973.
(c) Schedule 1B was inserted by S.I.2005/2224 and substituted by S.I.2008/731. It was amended by S.I.2010/725 and S.I.2011/2973.

- (a) at the end of paragraph (a), omit “or”;
- (b) after paragraph (b), insert—
 - “(c) a deferred debt arrangement taking effect; or
 - (d) a deferred debt arrangement coming to an end.”.

Amendment of the Occupational Pension Schemes (Scheme Funding) Regulations 2005

11. In paragraph 3A of Schedule 2 to the Occupational Pension Schemes (Scheme Funding) Regulations 2005(a) (frozen or paid-up schemes—

- (a) in sub-paragraph (1), after “periods of grace)” insert “or regulation 6F(1) of those Regulations (deferred debt arrangements)”, and
- (b) in sub-paragraph (3)—
 - (i) after “Regulations 2005” insert “or the deferred debt arrangement referred to in regulation 6F(1) of those Regulations”, and
 - (ii) for “that regulation” substitute “those regulations”.

Signed by authority of the Secretary of State for Work and Pensions.

Richard Harrington
Parliamentary Under-Secretary of State,
Department for Work and Pensions

Date

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations contain provisions about debts arising for an employer under section 75 of the Pensions Act 1995 in respect of occupational pension schemes and also contain consequential amendments.

These Regulations amend the Occupational Pension Schemes (Employer Debt) Regulations 2005 (“the Employer Debt Regulations”), the Pensions Regulator (Financial Support Directions etc.) Regulations 2005 (“the Financial Support Regulations”) and the Occupational Pension Schemes (Scheme Funding) Regulations 2005 (“the Scheme Funding Regulations”).

Regulation 4 amends the Employer Debt Regulations to assist employers in multi-employer schemes who are dealing with consecutive employment-cessation events. The amendments operate to limit employers’ liability in this situation to liability for the debt incurred in respect of the second employment-cessation event, provided that both the first employment-cessation event and the employment of the active scheme member happened before 31st March 2017.

Regulation 5 amends the Employer Debt Regulations consequential to the relationship between the period of grace and the deferred debt arrangement.

Regulation 6 makes a clarifying amendment to the Employer Debt Regulations in relation to flexible apportionment arrangements.

(a) S.I. 2005/3377. Paragraph 3A of Schedule 2 was inserted by S.I. 2011/2973.

Regulation 7 amends the Employer Debt Regulations to allow an employer in a multi-employer occupational pension scheme who experiences an employment-cessation event (a “deferred employer”) to defer payment of the section 75 debt and to continue as an employer in relation to the scheme while certain conditions are in place. The deferred employer will remain responsible for the debt and following certain events will be obliged to pay it. The arrangement is called a “deferred debt arrangement”.

New regulation 6F(1) sets out the pre-conditions for a deferred debt arrangement to take place. The arrangement can be entered into by an employer who has experienced an employment-cessation event, including a situation where the employer has entered into a period of grace, where the conditions set out in regulation 6F(2) are in place and the trustees or scheme managers consent in writing.

New regulation 6F(2) states the conditions that must be met for the arrangement to take place, namely that the funding test is met, the scheme is not in an assessment period or being wound up, and the trustees or scheme managers are satisfied that an assessment period in relation to the scheme is unlikely to begin within 12 months of the date that the arrangement takes place.

New regulation 6F(3) confirms that a deferred employer is treated, for the period that the deferred debt arrangement is in place, as if it were an employer of an active scheme member, and for the purpose of the Employer Debt Relations and the Financial Support Regulations as if it were an employer in relation to the scheme.

New regulation 6F(5) deals with how a deferred debt arrangement comes to an end. The arrangement will end on the date when the employer employs an active scheme member; the date on which the deferred employer and the trustees or scheme managers agree that the debt can be paid in full when calculated as of that date; the date of a relevant event other than an employment-cessation event; and in other specified circumstances when the employer’s relationship to the scheme is weakened.

Regulation 8 makes clarifying amendments to regulation 8 of the Employer Debt Regulations.

Regulation 9 makes clarifying amendments to regulation 9 of the Employer Debt Regulations.

Regulation 10 amends Schedule 1B to the Employer Debt Regulations to make the commencement and conclusion of a deferred debt arrangement a notifiable event and to impose notification duties on the trustees or scheme managers.

Regulation 11 makes amendments to the Scheme Funding Regulations consequential to the deferred debt arrangement.

These Regulations reduce costs on the private and civil society organisations. An Impact Assessment has been prepared and copies are available from the libraries of both Houses of Parliament; www.legislation.gov.uk, where it is annexed to the Explanatory Memorandum which is available alongside these Regulations; and the Better Regulation Unit.