

Response ID ANON-SC19-FUWD-P

Submitted to **Protecting Defined Benefit Pension Schemes - A Stronger Pensions Regulator**
Submitted on **2018-08-21 10:03:06**

About you

1 What is your name?

What is your name?:

Alan Stewart, Chair of the 100 Group Pensions Committee

2 Are you answering on behalf of:

An organisation (in an official capacity)

If you are answering on behalf of a pension scheme, an organisation or other, please state the name :

The 100 Group

3 Which of the following best describes you?

Representative body

If "Other" please specify:

4 Trustees - Which of the following best describes you?

Not Applicable

5 Employers - Which of the following best describes your organisation?

Not Applicable

6 Pension Professionals - Which option best describes your profession?

Not Applicable

If "Other" please specify :

7 Representative bodies - Who are you responding on behalf of?

Please specify :

The 100 Group

Ministerial Foreword

Introduction

Introduction - A Stronger Pensions Regulator

The Consultation Process

Corporate Transaction Oversight - Notifiable Events Framework - Introduction

Corporate Transaction Oversight - Notifiable Events Framework - Our Proposals

Corporate Transaction Oversight - Notifiable Events Framework - Our Proposals (Continuation)

Corporate Transaction Oversight - Notifiable Events Framework - Questions

8 We have set out a number of proposed changes to the existing notifiable events framework. Do these proposals strike the right balance between improved regulations on business and protecting pensions?

Please provide your comments in the box below:

Whilst we understand the rationale for adding new notifiable events to the framework, we think considerably more detail will be needed before the regime can work as intended. If the extended notifiable events framework is not to become a significant burden on employers, it is essential that definitions are clear, so that employers do not need to take expensive advice every time a corporate event occurs in order to determine whether or not it constitutes a notifiable event. The definitions must therefore be clear and enable notifiable events to be easily identifiable. Whilst ease of identification has always been a key requirement of an

effective notifiable events regime, it will become even more important if failure to comply with this regime becomes subject to large civil penalties or potentially even criminal sanctions.

For example, the proposed new notifiable event of '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' is very imprecise. It is not clear what would constitute a 'material proportion' or whether 'funding responsibility' is intended to capture only those employers which provide direct covenant support to the scheme, or would also apply to other employers within the wider corporate group who might provide indirect covenant support. Nor is it clear on what basis the liabilities should be assessed. Ideally the materiality of the sale should be weighed against the whole of the covenant support available to the pension scheme, although in practice it may be hard to come up with a definition that captures this, whilst also being straightforward to apply.

We also note that the notifiable event 'granting of security on a debt to give it priority over debt to the scheme' does not come with a 'materiality' qualification (although we are not clear whether this is intentional). Where the debt in question is small, and the granting of security is part of business-as-usual refinancing, it does not seem appropriate for this to be reported to the Pensions Regulator. Without such a materiality qualification, it is likely that some companies will have to report large numbers of notifiable events, which present no risk to the covenant support being supplied to the pension scheme. It is also unclear which employers are intended to be caught by this notifiable event: only those employers providing direct covenant support or also employers who provide indirect covenant support to a pension scheme, for example via a guarantee?

It would be helpful to have more clarity on the threshold for reporting notifiable events. The consultation paper notes that it is envisaged that only transactions exceeding a certain risk threshold should be notifiable and refers to the existing requirements that certain events are only reportable where the scheme is underfunded on a section 179 basis, but it is not clear whether it is proposed that exactly the same test should be used or whether this will apply to all of the new notifiable events. We think that all these proposed new employer-related notifiable events should be subject to a funding threshold of some kind, as any risk to the employer covenant from one of these events will be substantially less where the scheme is well-funded.

We also have significant concerns about the risks presented by the notifying of confidential market-sensitive information to the Pensions Regulator (as discussed in more detail under Q13 below).

9 Alternatively, are there any other significant business events which you think should be captured?

Please provide your comments in the box below:

We note that the consultation does not propose a notifiable event relating to dividends (although we also note that the Department for Business, Energy and Industrial Strategy is currently looking at the issue more widely as part of its work on corporate governance). We do not think that it would be appropriate to include dividend payments within the notifiable events regime. 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.

It would be particularly difficult in practice to come up with a workable definition of a 'notifiable dividend payment' which would work across the wide range of company structures. For example, many 100 Group companies operate on a global basis. As a result, their dividend policies will be linked to global performance and profitability, and it would be both difficult in practice and unfair in principle for companies to have to think about the size of a global dividend payment solely in the context of UK pension contributions or deficits.

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

Please provide your comments in the box below:

In some companies, turnover of directors will essentially reflect changes in the roles of senior leaders, and not indicate any change in relation to sponsor covenant. It appears that all such changes would need to be notified irrespective of the reason for the changes in appointments, and this could lead to a large number of notifications. (It may be worth noting that a previous notifiable event in relation to the changes in the holders of key employer posts was found not to be useful and removed.)

11 We are proposing to bring forward or specify more clearly the timing of reporting notification of certain events, 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?

Please provide your comments in the box below:

We agree with the rationale that, if reporting is to lead to effective regulatory action, earlier notification will be required. However, we would note that earlier notification will be meaningless if the Pensions Regulator does not act on notifiable event reports in a timely manner. In addition, earlier notification increases the risks of confidential information leaking into the public domain and therefore appropriate protections must be put in place by the Pensions Regulator to prevent this. Please further our comments under Q13.

We would also note that commercial transactions can often take place very swiftly, and therefore early notification may not mean that the Pensions Regulator receives information much sooner than under the existing regime. This highlights the importance of the Pensions Regulator needing to have the appropriate processes and resources to deal with notifiable events as soon as they are reported.

Whilst the Heads of Terms stage may often be an appropriate point for the transaction to be notified, the negotiation process is often more fluid than the consultation document appears to appreciate. Heads of Terms are not always agreed on up front, so it may be difficult to identify the precise point at which an event is notifiable. Careful consideration will therefore need to be given to alternative times at the earliest of which notification should be made.

12 What is the likely impact (either direct or indirect) on business of sponsoring employers being required to report earlier?

Please provide your comments in the box below:

Provided that it is clear what the event is that needs to be reported and when it needs to be reported and that appropriate safeguards are put in place to protect

confidential information, we do not think that having to report certain events in advance will have significant impacts on business.

13 How could the framework be modified to ensure that any adverse impact is mitigated?

Please provide your comments in the box below:

The proposed changes as set out are rather one-sided in that they impose potentially significant new reporting requirements on employers, whilst not making clear what will be required from the Pensions Regulator. We think that much greater clarity as to how the Pensions Regulator will respond to notifiable event reports would be desirable: the Pensions Regulator must provide a meaningful response to notifications within a short timescale. If delay to a transaction occurs because of the Pensions Regulator, businesses may fail, crystallising a weak covenant, which the proposals are trying to prevent.

Given the proposed early notification of some of these events, it is also important that the Pensions Regulator has appropriate measures in place to ensure that it can keep market-sensitive information confidential. Events may well be notified to the Pensions Regulator in advance of a stock exchange announcement. Whilst there are already legislative provisions in the Pensions Act 2004 to prevent the Pensions Regulator disclosing restricted information, businesses will need reassurance that the Pensions Regulator has the necessary structures in place to comply with these requirements. One approach might be to have a specific unit within the Pensions Regulator to deal with notifiable and other corporate events. Any information received, including notifiable events reports, could then be confined within that unit, except to the extent that other parts of the Pensions Regulator have to be informed in order to carry out their functions. Insider lists would also need to be maintained; and both sponsors and the Pensions Regulator would need to take account of the Market Abuse Regulations when notifiable events are reported.

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

Please provide your comments in the box below:

We do not have any comment on this question.

Corporate Transaction Oversight - Declaration Of Intent - Our Proposals

Corporate Transaction Oversight - Declaration Of Intent - Questions

15 We have set out a number of proposed transactions which would trigger a Declaration of Intent. Do these proposals strike the right balance between improved regulations on business and protecting pensions?

Please provide your comments in the box below:

Please see our comments under Q8 above about the need to define these transactions appropriately and to understand the risk thresholds that would apply. We believe that any requirement to provide a Declaration of Intent should be subject to a funding threshold.

We appreciate that the aim of these proposals is to put an onus on the company to give consideration to the pension scheme in corporate transactions, and we agree that it is right that companies should do so. Whilst our experience is that this generally happens already where practical, at least for larger companies, we recognise that not all employers may give sufficient consideration to the pension schemes in corporate transactions. Therefore we accept the rationale for action.

However, we think that the Declaration of Intent is a complex and impractical means of achieving this end. We are concerned in particular that this could in some cases lead to deals not completing, where pension scheme trustees who do not have sufficient expertise to understand the transaction may create obstructions in an often fast-moving transaction negotiation. It is unlikely to be in the interests of the pension scheme for commercial deals to be frustrated.

We also think that it would be particularly difficult to operate a Declaration of Intent regime for multi-national companies. Foreign parents may well be very reluctant to share confidential advance information about their commercial activities with the trustees of the pension scheme. In addition, international companies might reasonably question why they should provide privileged information to the trustees of the UK pension scheme, whilst not providing it to the other non-UK pension schemes that they sponsor.

If the Government wishes to legislate, we would prefer there to be a requirement for employers to consider the pension scheme in the course of a transaction rather than for there to be a requirement to consult the trustees in all cases. This could be in the form of an agreed board paper that is prepared as part of the transaction process, but which is not required to be shared with the trustees in all cases. Where there is time to do so, the scheme is underfunded and the transaction will have a material effect on the pension scheme, then we would expect that employers would engage with the trustees; but we do not think that there should be a requirement to do so in all cases. Trustees should generally be involved in decisions which will have a material impact on the pension scheme, but that does not mean that they should have a direct role in the transaction process.

From the perspective of the trustees, a blanket requirement for a Declaration of Intent will also lead to unnecessary burdens. Where the employer regularly carries on transaction activity, trustees may find themselves consulted frequently and in time-pressured situations, even where these transactions do not have a material impact on the pension scheme. This will involve time and advice costs that the trustees might better spend on other scheme matters. Trustees may also find themselves put into a difficult position where they have access to market-sensitive information in advance of a stock exchange announcement, and will be exposed to potential liability in the event that that information is leaked or the transaction is frustrated.

Whilst confidentiality agreements between trustees and employers can be put in place, there have been cases where trustees have not adhered to them. Early engagement with trustees may therefore increase the risk of market-sensitive information being leaked, with potentially serious consequences for the company in question (as well as for the party responsible for the leak), especially where the company in question is subject to the listing rules. It would be helpful to have clear guidance from the Pensions Regulator of appropriate processes for the trustees to follow when handling commercially sensitive information, for example establishing a small permanent and expert sub-committee of the trustee board to receive and consider such information.

The White Paper indicates that the aim of the Declaration of Intent is to 'enable trustees to better engage with the Regulator'. However, provided that an effective

notifiable events framework (supported by an appropriate sanctions regime for non-compliance) is in place, the Pensions Regulator should already be aware of corporate transactions that are likely to have an impact on the pension scheme, and therefore should be able to act on behalf of the scheme in the event that a transaction gives grounds for concern. To have the Declaration of Intent in addition seems unnecessary as a means of involving the Pensions Regulator. The onus should be on the Pensions Regulator to use the information it has to intervene where appropriate.

16 Alternatively, are there any other significant business transactions which you think should be captured?

Please provide your comments in the box below:

We do not think that any other business transactions should be included.

17 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?

Please provide your comments in the box below:

As noted above, we think that the aims underlying the Declaration of Intent could be achieved more effectively by other means. We therefore do not have any comments on the contents of the Declaration of Intent.

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

Please provide your comments in the box below:

As noted above, we think this will vary from case to case, depending on the speed, nature and confidentiality of the transaction and the materiality to the pension scheme. In some cases, we would expect trustees to be involved from a very early stage; in others, it may not be practical for trustees to be informed until just before the transaction completes.

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

Please provide your comments in the box below:

We do not think the requirement to provide a document setting out the implications of the transaction for the pension scheme would be particularly onerous in the overall context of the costs of a transaction.

However, if the Declaration of Intent were to lead to protracted negotiations with trustees, this could potentially give rise to considerable additional costs, even more so if the transaction has to be abandoned as a result. These costs could also have an impact on the pension scheme, if it leads to a weakening of the sponsor covenant.

20 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?

Please provide your comments in the box below:

Please see our comments under Q15.

Corporate Transaction Oversight - Voluntary Clearance - Our Proposals

Corporate Transaction Oversight - Voluntary Clearance - Questions

21 Are these the right areas for the Pensions Regulator to focus on in relation to improvements to their existing guidance?

Please provide your comments in the box below:

We do not have sufficient experience of the clearance regime to comment on this question.

22 Should anything else be considered?

Please provide your comments in the box below:

We do not have sufficient experience of the clearance regime to comment on this question.

Corporate Transaction Oversight - Engagement With Other Regulators

Improved Regulator Powers - Introduction

Improved Regulator Powers - Our Proposals

Improved Regulator Powers - Who Will Be Penalised?

Improved Regulator Powers - Questions

23 What are the likely effects and impacts on business and trustees of the introduction of this proposed new system of penalties?

Please provide your comments in the box below:

We support the introduction of a stronger sanctions regime. However, it is important that this regime can be properly implemented. For example, if serious sanctions are to apply to non-compliance with the notifiable events regime, it is essential that the notifiable events are clearly defined and communicated to employers so that they know exactly what to report and when.

If the regime is practical and proportionate, then there should be no impact on responsible businesses and trustees. If, however, the triggers for possible penalties are unclear, or the sanctions are applied disproportionately, then the impacts on business could be substantial as companies would be likely to take frequent advice on how to interpret the triggers or on how to appeal against inappropriate penalties. We therefore welcome the fact that none of the penalties being proposed will be mandatory.

24 Are there other behaviours that should attract sanctions? If so, what are they?

Please provide your comments in the box below:

We do not have any comment on this question.

25 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?

Please provide your comments in the box below:

We do not have any comment on this question.

26 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?

Please provide your comments in the box below:

We do not have any comment on this question.

27 If yes, should the maximum penalty for these offences be: Unlimited fines? Custodial sentence and/or fine for the worst offenders – do you have views on the appropriate maximum term?

Please provide your comments in the box below:

We do not have any comment on this question.

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

Please provide your comments in the box below:

We do not have any comment on this question.

Anti-avoidance - Introduction

Anti-avoidance - Our Proposals

Anti-avoidance - Questions

29 We have set out a number of proposed changes to the way Contribution Notices function. Do these proposals strike the right balance between improved regulations on business and protecting pensions?

Please provide your comments in the box below:

We do not have sufficient experience of the anti-avoidance powers to comment on this question.

30 Alternatively, what else could we do to improve the way Contribution Notices work?

Please provide your comments in the box below:

We do not have sufficient experience of the anti-avoidance powers to comment on this question.

31 What would be the most appropriate way of protecting the value of the Contribution Notice through uprating? What are the likely impacts of this?

Please provide your comments in the box below:

We do not have sufficient experience of the anti-avoidance powers to comment on this question.

32 What could be the impacts of changing the date at which the cap was calculated to a date closer to the final determination?

Please provide your comments in the box below:

We do not have sufficient experience of the anti-avoidance powers to comment on this question.

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

Please provide your comments in the box below:

We do not have sufficient experience of the anti-avoidance powers to comment on this question.

34 How could we best amend the 'insufficiently resourced' test to make it simpler and clearer?

Please provide your comments in the box below:

We do not have sufficient experience of the anti-avoidance powers to comment on this question.

35 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. What would the impact of this approach be on business?

Please provide your comments in the box below:

We do not have sufficient experience of the anti-avoidance powers to comment on this question.

36 Are there other forms of support we should take into consideration?

Please provide your comments in the box below:

We do not have sufficient experience of the anti-avoidance powers to comment on this question.

37 What would be the impact on business of a longer lookback period?

Please provide your comments in the box below:

We do not have sufficient experience of the anti-avoidance powers to comment on this question.

Conclusion

Conclusion - Questions

38 The proposals in this consultation are suggested as ways in which the Pensions Regulator's powers could be increased or improved in order to clamp down on corporate wrongdoing and ensure improved compliance with all legal responsibilities by sponsoring employers. Do these proposals strike the right balance between improved regulations on business and protecting pensions?

Please provide your comments in the box below:

We agree with the aims of this consultation paper and support the principle of responsible engagement by sponsors with trustees. However, we have some concerns about how practical these proposals are, in particular in the context of the Declaration of Intent, and about the lack of clarity in the definition of the proposed additional notifiable events. We also think that any requirements on companies to share confidential market-sensitive information with the trustees or the Pensions Regulator will carry significant risks, especially for listed companies, and will require careful consideration of the Market Abuse Regulations and the need for insider lists.

39 Alternatively, do you think there are other areas where the Pensions Regulator's powers could be increased or improved to achieve our intended outcomes?

Please provide your comments in the box below:

We do not have any comment on this question.