LexisNexis®

DWP consultation on improving the notifiable events regime—increasing the powers of TPR through regulations

Pensions analysis: The Department for Work and Pensions (DWP) has launched a consultation on strengthening the powers of The Pension Regulator (TPR) in relation to defined benefit pension schemes by improving the scope of the notifiable events regime, introducing draft regulations, and proposing new notices and accompanying statements. The draft regulations set out extended circumstances in which the notifiable events arise, from when information must be provided and how much information is required. The proposed regulations are expected to be finalised alongside an increase in the fines for failing to comply once the consultation closes on 27 October 2021. Written by Stephen Richards, partner at Stephenson Harwood LLP.

This analysis was first published on Lexis®PSL on 15 September 2021 and can be found here (subscription required).

What is the background to the consultation?

Since April 2005, there has been an obligation on employers and trustees of certain defined benefit (DB) pension schemes to notify The Pensions Regulator (TPR) of specified events. These events cover both scheme related events as well as employer related events, such as a decision to sell an employer sponsoring a DB pension scheme. The intention behind this 'notifiable events regime' is to ensure that TPR is alerted in good time to events which could have the potential to cause harm to a DB pension scheme.

In 2018 the government published a consultation discussing proposals to strengthen the powers of TPR. One of the areas it considered could be improved was increasing the scope of the notifiable events regime. The 2019 response proposed:

- to introduce two new notifiable events
- to remove the wrongful trading notifiable event, and
- to introduce a requirement for changes to notifiable events to be further notified, and an accompanying statement to be sent to TPR in respect of certain notifiable events. This was legislated for in the Pension Schemes Act 2021 which inserted a new section 69A into the Pensions Act 2004

The current consultation sets out the proposed amendments to the notifiable events regime as well as how and when the new notices and accompanying statement requirements will apply.

What does the consultation propose?

Change to notifiable events

The consultation includes proposed draft regulations (The Pensions Regulator (Notifiable Events) (Amendment) Regulations 2021) which would amend the notifiable events regime as follows:

- remove the need for an employer to notify TPR if it receives advice that it is wrongfully trading. It has been acknowledged that this is an ineffective notifiable event trigger and that no notification has ever been made under this provision. The reason for this is that an admission of wrongful trading could form the basis of a claim against a director under the Insolvency Act 1986
- the introduction of two new notifiable events:
    - a decision in principle by an employer to sell a material proportion of its business or assets. A material proportion of the business or assets is defined as one that accounts for more than 25% of the employer's annual revenue or gross value of its assets (as appropriate) either on its own or taken together with any other sales decided upon within the previous 12 months, and
    - a decision in principle by an employer to grant or extend certain security over its assets which will be ranked above the pension scheme on an insolvency

Additional notification and accompanying statements for certain notifiable events

The consultation also sets out which notifiable events the new notices and accompanying statements would apply to. These must be given in respect of the two new notifiable events listed above, as well as the current notifiable event where a parent company decides to relinquish control of the sponsor of a DB pension scheme.

The consultation proposes the requirements for the contents of the accompanying statement to be:

- the event and where relevant, the main terms proposed
- the adverse effects on the pension scheme
- the adverse effects of the event on the employer's ability to meet its legal obligations to support the scheme
- steps taken to mitigate the adverse effects, and
- any communication with the trustees of the eligible scheme about the event

What are the implications for pension schemes?

The changes set out in the draft regulations extend the circumstances in which the notifiable events framework comes into play, from when information must be provided, and how much information must be provided.

These changes will have greater impact on sponsors of pension schemes rather than pension schemes, but are likely to lead to trustees (as well as TPR) getting more information and more advanced notice of potentially detrimental corporate activity than currently.

The new notifiable events are intended to cover typical scenarios that can have an adverse impact on the covenant supporting a pension scheme (material business and asset sales and security) and give TPR advanced notice of corporate activity in which it may wish to take a closer interest. In particular, by focusing on events where there could be a covenant impact, the two new notifiable events will give TPR advanced notice of circumstances in which it could potentially use its new covenant impact-related contribution notice powers, ie when the new 'employer resources test' or new 'insolvency test' are met.

The new notifiable events also bring forward the time from when certain notification obligations apply. The new events (and the existing corporate sale event as amended by the draft regulations) are triggered once a 'decision in principle' is reached. This is defined as the stage before any negotiations have even been entered into and provides TPR with an earlier warning compared to current notifiable events, where the requirement to notify only kicks in where there is a firm 'decision' made (usually after the negotiations). Corporates will therefore need to consider the impact of any proposed corporate activity on their DB schemes well in advance and keep this in mind throughout the process.

An awareness of previous transactions will also be needed as the new notifiable event of the sale of a material proportion of the business requires sponsors to take into account corporate activity in the previous 12 months and not just the immediate transaction.

What are the next steps?

The consultation closes on 27 October 2021 after which time we can expect to see the regulations finalised. While it is unlikely that any major changes will be made to the key proposals, it will be interesting to see how the industry responds to the new concepts of notifications being required where there is a sale of a 'material proportion' of a sponsor's business or assets, and notifications being required before any 'decision in principle' is made.

As part of the wider process of strengthening the powers of TPR, fines for failing to comply with the notifiable events regime are being increased to up to £1m. This will also be the penalty for a failure to comply with the notice and statement obligations. With the potential for such large penalties, this is an area that trustees and particularly sponsors should watch closely.

Interviewed by Banita Kalia

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

Stephen Richards is a partner at Stephenson Harwood LLP. Stephen is a big scheme specialist, and expert on pensions in the banking sector, large pension schemes, The Pensions Regulator issues and master trusts. Stephen has experience on major strategic projects including advising on the acquisition of a major master trust provider and the largest company contribution made to a pension scheme to date. Stephen has also been awarded for his work in non contentious pensions in the Chambers and Partners UK Awards 2021, and is listed as a leading individual by the Legal 500 UK 2021 legal directory.