



Department
for Work &
Pensions

The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2018

Response to the consultation on draft regulations

February 2018

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Introduction

1. The consultation on the draft Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2017¹ began on 21 April and ended on 18 May 2017. The Department received 46 responses from stakeholders with an interest in defined benefit multi-employer occupational pension schemes including pension industry professionals, pension schemes, trustees, employers, pension scheme members and member representative organisations. The Department would like to thank all those who responded to the consultation. A list of respondents is at Annex A.
2. The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2018 are planned to come into effect on 6 April 2018. The Regulations are available at:- <http://www.legislation.gov.uk/>
3. The implementation stage Impact Assessment is also available at :- <http://www.legislation.gov.uk/>
4. This response is available at:
<https://www.gov.uk/government/consultations/the-draft-occupational-pension-schemes-employer-debt-amendment-regulations-2017>

A paper copy of this response to the consultation can be obtained from:

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5. This response to the consultation describes the policy underpinning the changes being made to the existing legislation. Any comments on the legislation should not be taken as an authoritative interpretation of the law. Such an interpretation can only be provided by a court.

¹<https://www.gov.uk/government/consultations/the-draft-occupational-pension-schemes-employer-debt-amendment-regulations-2017>

Chapter 1: Summary of responses to the consultation questions 1 to 5

Introduction

1.1. The consultation document sought the views of respondents on ten questions. This chapter summarises the responses to consultation questions 1 to 5 about the new deferred debt arrangement. Where respondents' comments are more relevant to a particular regulation, they are reported on in chapters 2 and 3.

1.2. For ease of reference in this and subsequent chapters, the following terms are used:

Employer Debt Regulations means The Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678)

Existing regulation AA – refers to a regulation in the Employer Debt Regulations

Draft regulation BB – refers to a draft regulation in the Regulations issued for consultation

Regulation CC – refers to a regulation contained in the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2018 which have now been made and laid.

Questions

Questions 1 – 5 the deferred debt arrangement

Question 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?

1.3. The deferred debt arrangement proposal was welcomed in principle by the majority of respondents to the consultation, who in the main were connected with non-associated multi-employer schemes such as charities and faith

groups. They felt it would provide a useful new option for employers in these schemes to manage an employer debt following an employment cessation event.

- 1.4. The arrangement was described as being a logical and sensible way forward and, of particular help to charities, as it postpones the potential requirement to pay a lump sum when ceasing to employ an active member, an event that can occur due to matters outside of the control of the employer. One charity contributing to a non-associated multi-employer scheme said that had the deferred debt arrangement been in place when they experienced a cessation event, it would have saved their trustees a good deal of unnecessary anxiety.
- 1.5. Respondents also expressed the view that the arrangement would strike a reasonable balance in providing additional flexibility for employers while continuing to ensure that scheme funding is protected and that the employers meet their obligations to the scheme.
- 1.6. Some respondents had reservations about how helpful the deferred debt arrangement would be to employers in practice because of the conditions that had to be met to enter into it and the circumstances in which it could be terminated.

Government response

- 1.7. The Government is of the view that the deferred debt arrangement will 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. This will be of particular help to smaller employers (such as charities) of non-associated multi-employer schemes in managing any employer debt incurred when they cease to employ an active member of the scheme when for example that member retires.
- 1.8. The Government has reconsidered the conditions that need to be met in order that an employer can enter into a deferred debt arrangement and the circumstances in which the arrangement may come to an end. These are explained in the responses to consultation questions 4 and 7.

Question 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?

- 1.9. Some respondents felt that the control for agreeing a deferred debt arrangement seemed to rest more with the scheme trustees. They also felt that it was important for the balance of power between employer and trustee to be equitable, and the parameters for agreeing to the deferred debt arrangement to be clear and fair.
- 1.10. However respondents acknowledged that trustee consent was necessary for an employer to enter into a deferred debt arrangement as the trustees or scheme managers have a duty to act in the best interests of all members of the pension scheme.
- 1.11. The condition that received most comment was the proposed requirement to satisfy a funding test and the responses to the appropriateness of this test can be found at paragraphs 2.10 to 2.16.

Government response

- 1.12. The Government has removed the requirement for a funding test and reconsidered the other conditions for entering a deferred debt arrangement as set out in paragraphs 2.14 to 2.16.

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

- 1.13. Some respondents expressed the view that with no active members in the scheme, employers that use a deferred debt arrangement would be likely to have less involvement and engagement with the scheme, and so schemes may need to update some of their processes to ensure a continued dialogue with employers that are using this arrangement.
- 1.14. One respondent felt it would be helpful if employers in a deferred debt arrangement had a statutory obligation to provide trustees with certain information. Employers should also be required to notify the trustees of any events that might reduce the covenant.

1.15. Another respondent was of the view that the trustee duty to regularly monitor the employers' covenant and obligations under the scheme funding regulations to assess whether to end the arrangement were too onerous on trustees and unnecessarily complex.

Government response

1.16. An employer in a deferred debt arrangement will still be an employer for scheme funding and scheme administration purpose. 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.

Question 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?

1.17. A key concern was what happens when the deferred debt arrangement comes to an end as respondents felt that it was not clear in the draft Regulations whether an employer debt triggers at this point or something else occurs and that given the very significant sums of money involved, it was critical that this is made clear.

1.18. One respondent asked what is meant by an active member and if the deferred debt arrangement would come to an end if the employer employs a defined contribution member of the scheme.

1.19. A number of respondents questioned the need for trustee consent to end the deferred debt arrangement given that an employer in a frozen scheme can trigger a debt by giving notice under existing regulation 9(4) of the Employer Debt Regulations.

- 1.20. Some respondents pointed out that a relevant event under section 75(6A) of the Pensions Act 1995 does not include an employment cessation event. Also that drafting would not work for employer debts triggered by relevant events in multi-employer schemes as these are frequently trapped by section 75(4C) of the Pensions Act 1995 which in effect makes debts triggered by a relevant event contingent upon there being a scheme failure for Pension Protection Fund (PPF) purposes.
- 1.21. They also noted a further problem namely that when an employer who employs active members undergoes a relevant event, while other employers remain solvent, an employment cessation event would be triggered when the insolvent employers make the employees redundant. This could not happen with a deferred employer as there would be no employees to make redundant.
- 1.22. Several respondents noted that the consultation listed scheme winding up as a circumstance where the deferred debt arrangement came to an end but the draft Regulations did not.
- 1.23. A number of respondents felt that the legal meaning of 'restructures' is unclear and adds uncertainty for employers and that greater clarity or guidance was needed. They also pointed out that if an employer restructures that does not necessarily weaken their covenant to the scheme.
- 1.24. A number of respondents pointed out that it is not logical for an employer debt to be triggered for an employer in a deferred debt arrangement where a scheme becomes a frozen scheme as this would not happen to other scheme employers. But they agreed that it makes sense for the deferred debt arrangement to come to an end in such circumstances.
- 1.25. Some respondents questioned the proposal to enable scheme trustees to unilaterally end a deferred debt arrangement albeit only when they are reasonably satisfied that there has been a triggering event. They pointed out that as there is no definition of 'employer covenant' in the legislation, the covenant weakening trigger would give trustees significant latitude in their decision making and leverage over employers.

Government response

1.26. New regulation 6F(6) of the Employer Debt Regulations provides that the deferred debt arrangement will continue until the first date on which one of the events listed in the table below occurs. New regulation 6F(7) sets whether or not an employment cessation event will be treated as occurring in each circumstance that the deferred debt arrangement ends and the date of it.

New Regulation	Events that will end the deferred debt arrangement	Consequence
6F(6)(a) and 6F(7)(a)	The deferred employer employs a person who is an active member of the scheme.	The deferred employer will revert to being an employer in relation to the scheme. There will be no employment cessation event so no employer debt will be triggered.
6F(6)(b) and 6F(7)(b)	The deferred employer and the trustees or scheme managers reach a mutual agreement to end the arrangement	The date of the agreement will be the date of the employment cessation event. An employer debt may be triggered if the scheme is underfunded and will be calculated by reference to this date.
6F(6)(c) and 6F(7)(b)	A relevant event occurs in relation to the deferred employer i.e. they become insolvent or are treated as being insolvent	This relevant event may trigger an employer debt if the scheme is underfunded on a section 75 basis at the time of the event and any employer debt due will be calculated by reference to this date.
6F(6)(d) and 6F(7)(b)	All employers in the scheme have undergone a relevant event or become deferred employers.	At this date an employment cessation event will be deemed to take place for the deferred employer and any employer debt due may be calculated by reference to this date.
6F(6)(e) and 6F(7)(a)	The scheme commences winding up.	The deferred debt arrangement will come to an end but there will be no employment cessation event. The calculation of the employer debt can be triggered at any time during the winding-up process under section 75(2) of the Pensions Act 1995.
6F(6)(f) and 6F(7)(c)	The deferred employer restructures unless that restructuring follows the provision for a one-to-one restructuring in 6ZB or 6ZC of the Employer Debt Regulations (See paras 1.37 to 1.40).	<p>The deferred debt arrangement will end on the date restructuring takes place (unless there is one-to-one restructuring in accordance with regulations 6ZB and 6ZC) and an employment cessation event will be deemed to have taken place. An employer debt may be triggered with reference to this date.</p> <p>In a one-to one restructuring the deferred debt arrangement will come to an end where the receiving employer is a participating employer in the scheme. There will be no employment cessation event so no employer debt will be triggered.</p> <p>Where the deferred employer restructures in a way that its obligations to the scheme are the same the deferred debt arrangement will remain in place providing the employers new structure continues to meet the conditions of the arrangement.</p>
6F(6)(g) and 6F(7)(d)	A freezing event occurs	The deferred debt arrangement will come to an end and the deferred employer will become a former employer. No employer debt will be triggered.
6F(6)(h) and 6F(7)(b)	The trustees or managers of the scheme serve notice that the deferred debt arrangement has come to end.	The date of that notice will be treated as an employment cessation event in relation to the deferred employer. An employer debt may be triggered and will be calculated by reference to this date.

- 1.27. The term "active member" in new regulation 6F(6)(a) means a person who is in pensionable service under the scheme. Active member is a term used widely throughout pensions legislation and is defined in section 124 of the Pensions Act 1995. Schemes and employers have been taking their own legal advice on this issue and, in the Government's view that would seem to be the best way forward.
- 1.28. The Government has reconsidered the need for trustee consent if the deferred employer chooses to trigger the employer debt and is of the view that the policy here should be for mutual agreement. Unlike a frozen scheme there will be other active members and so more volatility of funding and mutual consent will ensure that scheme member interests are protected.
- 1.29. New regulation 6F(6)(b) provides that the deferred employer and the trustees or scheme managers agree the date that an employment cessation event shall be treated as having occurred for the purposes of bringing the deferred debt arrangement to an end in relation to the deferred employer.
- 1.30. New regulation 6F(6)(c) will ensure that if an employer in a deferred debt arrangement suffers an insolvency event, the arrangement will come to an end. An employment cessation event will be treated as occurring to the deferred employer on the date of the insolvency event. This means that an employer debt will become payable by virtue of an employment cessation event, rather than an insolvency event, and the restriction in section 75(4C) of the Pensions Act 1995 will not apply.
- 1.31. New regulation 6F(6)(d) provides that a deferred debt arrangement will come to an end on the first date on which all the statutory employers have experienced an insolvency event or become deferred employers. An employment cessation event will be treated as having occurred to all the deferred employers on that date.
- 1.32. This will ensure that an employer debt will be triggered in respect of the deferred employers when the last of the sponsoring employers (not in a

deferred debt arrangement) experiences an insolvency event. This is intended to minimise the risk of PPF drift in what are known as 'last man standing' schemes. In a 'last man standing' scheme, the employer debt of the remaining employers will include any 'orphan liabilities' relating to the employers which have previously become insolvent. This will continue to apply when all remaining solvent employers are deferred employers. If all the deferred employers can pay any employer debt due in full no PPF assessment period will be triggered. If some or all of the deferred employers cannot pay the employer debt in full, then any deferred employers who pay the employer debt in full will cease to be statutory employers, and the remaining deferred employers will suffer insolvency events, which will trigger a PPF assessment period. This should ensure that a PPF assessment period is triggered within a short timeframe of the date on which the last employer (not in a deferred debt arrangement) experiences an insolvency event.

- 1.33. The Government agrees that the policy intention is that the deferred debt arrangement will come to an end when the winding up process starts, but the calculation of the employer debt can be triggered at any time during the winding-up process under section 75(2) of the Pensions Act 1995 and this is reflected this in new regulation 6F(4)(e).
- 1.34. The Government's view is that broadly speaking, 'restructuring' for the purpose of triggering an employer debt occurs where all the employer's corporate assets, liabilities and employees pass to another employer. The Employer Debt Regulations already provide a number of ways in which the responsibility for an employer debt can be managed in such circumstances.
- 1.35. The policy is that in a deferred debt arrangement the responsibility for pension liabilities remains with the same employer and is not passed on. Whilst the deferred debt arrangement is available to all employers who have experienced an employment cessation event to consider the policy intention is to target employers in multiple employer schemes for non-associated employers. This will redress the balance in arrangements already in place in legislation for managing an employer debt following an employer cessation event which in

the main are of more practical use to employers in associated schemes who are restructuring.

- 1.36. The Government's has reviewed what should happen when a deferred employer restructures in the light of comments received.
- 1.37. New regulation 6F(6)(f) reflects that the deferred debt arrangement will come to an end triggering a potential employer debt liability when the deferred employer restructures unless the restructuring follows one of the existing provisions in regulations 6ZB or 6ZC of the Employer Debt Regulations that provide for one-to-one restructuring. In a one to one restructuring the obligations toward the pension scheme of one participating employer (known as the exiting employer) are taken over by another participating employer in the scheme (known as the receiving employer). No employer debt is payable as no employment cessation event occurs as a result of them. This could happen for example when one employer merges with another associated employer, or an unincorporated employer incorporates.
- 1.38. Where a deferred employer undergoes a restructuring arrangement that falls within either of the one-to-one provisions they will be treated as an exiting employer.
- 1.39. Where the deferred employer restructures so that their obligations pass to another employer in the scheme (the receiving employer) who already employs an active member of the scheme the deferred debt arrangement will come to an end but no employer debt will be payable as a consequence of the restructuring.
- 1.40. Where the deferred employer restructures in a way that its obligations to the scheme are the same the deferred debt arrangement will remain in place providing the employers new structure continues to meet the conditions of the arrangement. The receiving employer in this case will be deemed to be a deferred employer.

- 1.41. The draft Regulations have been amended to reflect that a deferred debt arrangement will terminate when a freezing event in relation to the scheme occurs, but that the employer debt will not trigger at this point. The deferred employer will become a former employer at the point of freezing in common with all employers in the frozen multi-employer scheme. Any subsequent triggering of an employer debt for an employer in the frozen scheme whether they were in a deferred debt arrangement or not prior to the freezing event will be triggered under the existing regulation 9(4) of the Employer Debt Regulations.
- 1.42. 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 and Scheme Administration Regulations. In these circumstances they can serve a notice to the deferred employer that the arrangement will come to an end.
- 1.43. Trustees also have a duty to ensure the on-going funding of a scheme and part of that includes the responsibility to assess the employer covenant. Whilst employer covenant is not defined in legislation the Regulator guidance sets² out an employer's legal obligation to support their defined benefit pension schemes now and in the future.
- 1.44. Trustees will be familiar with existing materiality requirements in paragraphs 42-53 of the Regulators Code of Practice "Reporting late payment of contributions to occupational pension schemes". The requirement to assess whether the schemes covenant is likely to weaken in any other way in the draft regulations has been replaced by a "materiality" requirement at new regulation 6F (6)(h)(ii). The Regulator will in due course update their guidance to reflect the new requirement.

Question 5 -The deferred debt arrangement is available to employers who have entered into a period of grace. Should the deferred debt arrangement be

² <http://www.thepensionsregulator.gov.uk/trustees/db-employer-covenant.aspx>

available to employers who have already used one of the other arrangements for managing their employer debt?

1.45. A number of respondents made the point that there should be no need for an employer who has already used one of the other arrangements to enter into a deferred debt arrangement. The reasoning for this was that by entering into one of the other arrangements the employer will have effectively managed the employer debt so will no longer be an employer in relation to the scheme so will not qualify for a deferred debt arrangement and even if they did would not have any need to make use of the arrangement.

1.46. Other respondents expressed the view that where the employer seeking to enter into a deferred debt arrangement was the new employer following, for example a flexible apportionment arrangement, they should be able to take advantage of a deferred debt arrangement. The deferred debt arrangement would be in respect of their liability that would include the liability transferred to them under the previous flexible apportionment arrangement.

Government response

1.47. The Government agrees that the deferred debt arrangement should be available to employers who have already participated in other arrangements for managing their employer debt in the circumstances described. This would be providing that they satisfy the conditions for the deferred debt arrangement.

1.48. The Government is of the view that the Regulations facilitate this.

Chapter 2: Summary of responses to the consultation questions 6 to 10

Introduction

2.1. This chapter summarises the responses to consultation questions 6 to 10 about specific draft regulations.

Definition of “receiving employer”

2.2. Draft regulation 3(3) amended the existing definition of “receiving employer” in regulation 2(3A) of the Employer Debt Regulations. 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).

2.3. The definition is used in the one-to-one restructuring provisions contained in regulations 6ZA and 6ZB of the Employer Debt Regulations. In one of its reports (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.

Question 6 - definition of “receiving employer”

- 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?**

2.4. Respondents who answered this question felt that the proposed substitution whilst being more prescriptive than the current definition more clearly reflected the nature of the restructuring being undertaken. The main use being identified as the situation where a charity changes its legal form to a Charitable

Incorporated Organisation where the provision would be helpful in not triggering an employer debt.

- 2.5. A further situation identified was the need to include a change of legal form to a 'Scottish Charitable Incorporated Organisation', which is a separate legal form to the 'Charitable Incorporated Organisation'. It was also suggested that the relevant statutory definitions should be included in the text of the amendment and include Scottish charities which are registered under the Charities and Trustee Investment (Scotland) Act 2005.
- 2.6. In addition one respondent reported knowledge of a scheme with a significant proportion of employers who are unincorporated individuals and may wish to incorporate without triggering an employer debt and some partnerships that may wish to become limited liability partnerships.
- 2.7. Respondents did not identify any specific changes to regulations 6ZA and 6ZB of the Employer Debt Regulations. However, several respondents questioned the need for - "an entity to which the entire undertaking of an exiting employer has been transferred"- in draft regulation 3(3) as the restructuring easements in existing regulations 6ZB(13)(a) and(b) and 6ZC(9)(a) and (b) already refer to transfer of assets and also to the exiting employer's liabilities transferring.

Government response

- 2.8. Regulation 3(3) amends the definition of "receiving employer" in existing regulation 2(3A) to provide for situations identified by the consultation where the employer is not associated with the exiting employer. Regulation 3(4) inserts new paragraph 3B to identify those situations and new paragraph 3C to provide the relevant statutory definitions.
- 2.9. The Government accepts that given the requirements of existing regulations 6ZB and 6ZC for the transfer of assets and liabilities there is no need for the additional provision for an entity to which the entire undertaking of an exiting employer has been transferred.

Funding test

2.10. The draft Regulations amended the requirements for the “funding test” in existing regulation 2(4A) of the Employer Debt Regulations currently required before a scheme or flexible apportionment arrangement to include the deferred debt arrangement.

Question 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?**

2.11. Most respondents said that the funding test was not appropriate for the deferred debt arrangement as the employer who enters into a deferred debt arrangement remains a statutory employer for the purposes both of scheme funding and employer debt. They pointed out that this is in marked contrast to existing situations, in relation to which the funding test has to be satisfied, such as a flexible apportionment arrangement, as in these the cessation employer is no longer liable for any subsequent scheme funding.

2.12. Some respondents expressed the view that the conditions for an employer wishing to enter a deferred debt arrangement should be no more onerous than for an employer in a single employer scheme that wants to close its scheme to future accrual. In this circumstance, as with the deferred debt arrangement trustee consent will be required. Respondents also said it is not clear what benefit is conferred by requiring a funding test for a deferred debt arrangement and pointed out that the test carries associated costs.

2.13. A few respondents felt the funding test was appropriate because the employer debt is being deferred to an undetermined future date and that this will give rise to practical issues for pension trustees in deciding whether or not to consent to a deferred debt arrangement. However it was noted that the provision that the pension trustees can end the deferred debt arrangement if the employer’s covenant is weakening will provide some protection to scheme members on this aspect.

Government Response

- 2.14. The Government accepts the view of the majority of respondents that the funding test is not an appropriate entry requirement for the deferred debt arrangement as the deferred employer will retain their responsibility for scheme funding.
- 2.15. The requirement for a funding test has been replaced with a further condition of entry to the deferred debt arrangement. This is that the trustees or managers of the scheme are satisfied that the deferred employer's covenant to the scheme is not likely to weaken materially within the period of 12 months beginning with the date on which the trustees or managers expect the deferred debt arrangement to take effect.
- 2.16. This condition for entry and the corresponding provision for the trustees or manager to terminate the deferred debt arrangement once it is in place where there is likely to be a material weakening of the employer covenant in the next 12 months will provide adequate member protection in place of the funding test.

Employment-cessation events

- 2.17. The draft Regulations included a new provision in regulation 6 of the Employer Debt Regulations to provide for employer debt from two consecutive employment-cessation events.

Question 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?**

- 2.18. Relatively few respondents answered the questions that related to multiple cessation events and those that did expressed a variety of opinions. Some respondents said it was not clear how the proposal would work in practice. For example whether the proposal applies only where previous employer debt had not been paid or whether it applies where they have been paid. Others pointed out that the situation described could occur in the case of more than two cessation events.
- 2.19. One respondent with practical experience of multiple cessation events said that they had occurred in the past and that any legislative change would need to be made with retrospective effect to address the situation.
- 2.20. Another respondent made the point that going forward complications of this type would be avoided if employers had the unilateral option to enter the deferred debt arrangement.

Government Response

- 2.21. The Government has considered the responses received that relate to multiple cessation events very carefully and remains of the view 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.
- 2.22. The Government is of the view that the situation described where the same employer has experienced more than one employment cessation event has occurred in very limited instances in the past and can be managed under the flexibility in current legislation so that the same liability does not have to be met more than once.
- 2.23. The Government has therefore decided not to amend the legislation relating to the calculation of an employer debt arising as a result of an employment cessation event at this time.

Period of grace notification period

2.24. The draft Regulations increased the notification period that employers have to write to trustees to seek permission to use the period of grace from two to three months.

Question 9

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

2.25. Most respondents considered three months a reasonable period for the processing of a period of grace application. However a few respondents argued for an extension of three month to six months. They said that there may be unforeseen circumstances where a small employer was unable to make the notification on time. One respondent felt that there should be some trustee discretion where an employer failed to give notice within the required period and had a legitimate reason for doing so.

Government Response

2.26. The proposal to extend to three months arose because respondents to the Call for Evidence who have used this arrangement reported that the period of two months did not allow sufficient time for employers to take the required action.

2.27. An extension to three months was considered appropriate to deal with these issues. Extending it to make further accommodations for other circumstances would increase the risk of employers and trustees losing sight of the debt event. The Government has therefore decided to continue with the proposal of a notification period of three months.

Period of grace followed by a deferred debt arrangement

2.28. The draft Regulations made provision 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.

Question 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?**

2.29. Respondents who answered this question said they were not aware of any reason why a deferred debt arrangement could not follow on from a period of grace and were generally supportive of this approach. There were a number of comments that the draft being consulted on did not have sufficient clarity to enable the follow on to work in practice.

2.30. One respondent with considerable experience of period of grace arrangements noted that because a period of grace can be cancelled by the employer at any time it provides flexibility for the employer. Employers who currently enter a period of grace will continue to do so, on the basis that they intend to recruit another active scheme member and do not wish to trigger their employer debt. However should the employer decide not to do so the deferred debt arrangement would provide another option for them to consider.

Government Response

2.31. The Government has reviewed the draft regulations so that the provision for a deferred debt arrangement to follow on from a period of grace will work in practice provided the conditions for the deferred debt arrangement are met. The changes are set out in the following paragraphs.

2.32. Regulation 5(2)(b) amends sub-paragraph (a) of existing regulation 6A(1) to extend the existing provision. 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.

2.33. Regulation 5(2)(c) substitutes sub-paragraph (b) of existing regulation 6A(1) 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.

Chapter 3: Commentary on the Regulations

- 3.1. This chapter provides a general commentary on the Regulations. Changes made to the draft regulations that have not been explained in the previous chapters are considered in this chapter. Also other relevant issues raised in the consultation are also discussed.
- 3.2. **Regulation 1** cites the title of the Regulations and the coming into force date of 6 April 2018 (a common commencement date).
- 3.3. **Regulation 2** prefaces that regulations 3 to 11 make changes to the Employer Debt Regulations.
- REGULATION 3 [Amendment of existing regulation 2 of the Employer Debt Regulations – “Interpretation”]**
- 3.4. **Regulation 3** amends the interpretation of the Employer Debt Regulations to include new terms and some amendments to existing terms.
- 3.5. **Regulation 3(2)(a)** defines the term “deferred debt arrangement” used in new regulation 6F of the Employer Debt Regulations.
- 3.6. **Regulation 3(2)(b)** references the period of grace and deferred debt arrangement in the existing definition of employer.
- 3.7. **Regulation 3(2)(c)** insert a reference to the Pensions Regulator (Financial Support Directions etc.) Regulations.
- 3.8. **Regulation 3(3) and (4)** amends the existing definition of “receiving employer” in regulation 2(3A), this is explained in paragraph 2.8.

- 3.9. **Regulation 3(5)** defines the term “deferred employer” used in new regulation 6F of the Employer Debt Regulations. 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.

REGULATION 4 [Amendment of existing regulation 6ZA of the Employer Debt Regulations – “Employment-cessation events: general”]

- 3.10. **Regulation 4** amends existing regulation 6ZA(1)(c) to reflect that the date an employment cessation occurs will also be subject to the provisions for the deferred debt arrangement in new regulation 6F.

REGULATION 5 [Amendment of existing regulation 6A of the Employer Debt Regulations – “periods of grace”]

- 3.11. **Regulation 5(2)(a)** extends the period for employers to provide a period of grace notice to the trustees or managers of the scheme from within 2 months of the employment cessation event to within 3 months of the employment cessation event as explained above in paragraph 2.31.
- 3.12. **Regulation 5(2)(b) and(c)** makes amendments to existing regulation 6A consequential to the relationship between the period of grace and the deferred debt arrangement as explained above in paragraphs 2.31 to 2.32.
- 3.13. **Regulation 5(3)** amends existing regulation 6A(1) so that an employer in a period of grace arrangement is treated for the purposes of regulation 16 of the FSD 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 statutory employer.

REGULATION 6 [Amendment of existing regulation 6E of the Employer Debt Regulations – “flexible apportionment arrangements”]

- 3.14. Draft regulation 6 proposed a technical amendment to existing 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 a frozen scheme.
- 3.15. A number of respondents commented that the purpose of the amendment was unclear as it seemed to assume that an employer cessation event occurs when the scheme is subject to a freezing event. This could not happen as by definition an employment cessation event only occurs where at least one employer who is not a defined contribution employer continues to employ an active member after the cessation employer has ceased to do so.
- 3.16. The issue consulted on related to the language used in relation to existing regulation 6E(1)(b)(iii) relating to the time when a flexible apportionment arrangement takes effect and whether a separate event is necessary after a scheme becomes frozen. Regulation 6 gives effect to the policy that only the conditions in existing regulation 6E(2) need to be met in the case of a frozen scheme.

REGULATION 7 [Insertion of new regulation 6F into the Employer Debt Regulations – “Deferred debt arrangement”]

- 3.17. New regulation 6F(1) specifies that deferred debt arrangement will take effect when the trustees or scheme managers being satisfied that the conditions in regulations 6F(2) and 6F(3) are met and consent in writing.
- 3.18. New regulation 6F(2)(a) and (b) 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.
- 3.19. New regulation 6F(3) sets out the conditions that must be met before the deferred debt arrangement can take effect. These are:
- (a) the scheme is not in a PPF assessment period or being wound up when the deferred debt arrangement takes effect; and
 - (b) the trustees or managers of the scheme are satisfied:

(i) 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; and

(ii) that the deferred employer's covenant to the scheme is not likely to weaken materially within the period of 12 months beginning with the date on which the deferred debt arrangement would be due to take effect.

- 3.20. New regulation 6F(4)(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 responsibilities to the scheme as if they were still employing an active member.
- 3.21. New regulation 6F(4)(b) requires that an employer in a deferred debt arrangement is treated for the purposes of the Employer Debt Regulations and 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 responsibilities to the scheme as if they were still employing an active member.
- 3.22. New regulation 6F(5) provides where an employer meets the conditions for the deferred debt arrangement the employment-cessation event that preceded that arrangement, or would have preceded it the employer had not entered into a period of grace, will be treated as if it has not occurred. This means that no employer debt will be triggered as a consequence of it at that time.
- 3.23. New regulation 6F(6) lists the circumstance in which the deferred debt arrangement will come to an end, and new regulation 6F(7) sets out the consequence for each circumstance as explained in the table at paragraph 1.26.

REGULATION 8 [Amendment of existing regulation 8 of the Employer Debt Regulations – “Single employer sections, multi-employer sections, etc”]

3.24. Draft regulation 8 proposed a technical amendment to existing regulation 8(2)(a)(i) of the Employer Debt Regulations to clarify the definition of a segregated scheme. One respondent suggested a further amendment to include contributions by “a member in employment under that employer,” for consistency with regulation 18(2) of the Payments to Employer Regulations (SI 802 2005). Regulation 8 now includes this provision.

REGULATION 9 [Amendment of existing regulation 9 of the Employer Debt Regulations – “frozen schemes and former employers”]

3.25. Draft regulation 9 proposed a technical amendment to existing regulation 9(2)(a) of the Employer Debt Regulations to clarify that former employers includes those who ceased to employ active members of the scheme as a result of the “freezing event”. A freezing event occurs when a scheme ceases to have active members and becomes what is known as a frozen scheme.

3.26. One respondent was of the view that one reading of the proposed amendment might remove such employers from the scope of the definition of former employers which are currently caught under the legislation. The policy intention is that former employer includes those who ceased to employ actives as a result of the freezing event and regulation 9(2) reframes this technical amendment to clarify this.

3.27. Regulation 9(3) inserts a corresponding amendment in relation to deferred employers. Where a scheme has one or more deferred employers at the time of the freezing event the deferred employer will be treated as if they ceased to employ active members of the scheme immediately before the freezing event. The policy intention is that former employer includes employers who ceased to be deferred employers as a result of the freezing event.

REGULATION 10 [Amendment of Schedule 1B of the Employer Debt Regulations – “Notifiable Events”]

- 3.28. Draft regulation 10 proposed a new provision after paragraph 3 of Schedule 1B Notifiable Events in the Employer Debt Regulations in respect of the deferred debt arrangement. This required the trustees or managers of a pension scheme to notify the Pensions Regulator of any decision to enter or terminate a deferred debt arrangement.
- 3.29. One respondent pointed out that not all circumstances that cause the deferred debt arrangement to come to an end will require a decision of the trustees.
- 3.30. Regulation 10 now reflects the requirement for the trustees or managers of a pension scheme to notify the Pensions Regulator of any decision by them or of any event to enter or terminate a deferred debt arrangement. This notice must be given in writing as soon as reasonably practicable after the trustees or managers of a scheme either make the decision or become aware of the event.

REGULATION 11 [Insertion of new regulation 19 into the Employer Debt Regulations]

- 3.31. Regulation 11 inserts a new regulation 19 into the Employer Debt Regulations. This gives the Secretary of State for Work and Pensions a duty to review the provisions in new regulation 6F and publish a report setting out the conclusions of the review, in accordance with sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015(c.26). This has to be done, no later than five years after these Regulations come into force, and subsequently at intervals of not more than five years.

REGULATION 12 [Amendment of to the Occupational Pension Schemes (Scheme Funding) Regulations 2005]

- 3.32. Regulation 12 makes amendments to Schedule 2 of the Occupational Pension Schemes (Scheme Funding) Regulations 2005 (S.I. 2005/3377)³ in relation to the deferred debt arrangement.

³ <http://www.legislation.gov.uk/ukxi/2005/3377/contents/made>

3.33. Regulation 12(2) inserts new paragraphs 3B, 3C and 3D after paragraph 3A of Schedule 2 to make it clear that where an employer participates in a deferred debt arrangement or in a period of grace arrangement followed by a deferred debt arrangement the employer remains an employer for scheme funding purpose throughout that time,

Chapter 4: Other issues

Introduction

- 4.1. In the consultation, respondents took the opportunity to raise other concerns with Government about the employer debt requirements. These issues are considered in this section.

Payment plans

- 4.2. One respondent said it is not currently clear whether trustees have discretion under the current employer debt legislation to allow employers to pay off their employer debt over a period of time. They noted while this point was included in the 2015 Call for Evidence that clarity is absent from the current consultation. The respondent was of the view that the availability of payment plans would offer a pragmatic solution for those employers who would be forced into insolvency were they required to pay the full debt upfront and asked for confirmation on whether this option is available to trustees.
- 4.3. The Employer Debt Regulations do not prescribe when or how the trustees or scheme managers pursue or enforce payment of an employer debt. Respondents to the Call for Evidence on Section 75 Employer Debt in Non-Associated Multi-Employer Defined Benefit Pension Schemes were of varying opinion as to whether any statutory change in this regard would be beneficial.
- 4.4. Whilst some supported a change others were concerned that giving employers a statutory right to pay the debt over a set period would increase the risk of the full amount not being paid and could increase the financial burden on other employers in the scheme.
- 4.5. Having reviewed all the evidence submitted the Government is of the view that the existing provisions enable trustees and managers to take a pragmatic approach in the collection of employer debt and that to introduce additional legislation would limit this flexibility.

Technical Amendments

- 4.6. A few comments were made by respondents about technical aspects of the Employer Debt Regulations. These included some suggestion for technical amendments to provisions relating to the scheme apportionment arrangement and the withdrawal arrangements.

- 4.7. These arrangements did not form part of the consultation and any amendments to them would need to be the subject to a further consultation in order to consider all views on how they work.

Annex A: List of respondents to the consultation

Aon Hewitt
Association of British Ports
Association of Consulting Actuaries
Association of Pension Lawyers
Baptist Pensions Employers Group
Baptist Pension Trust Limited
Barnett Waddingham LLP
BP Treasury – Pension Investments
Brendan Mulkern
Burgess Salmon LLP
Cancer Research UK
Carole Sheldon
Charity Finance Group
DLA Piper UK LLP
Eversheds Sutherland (International) LLP
Gowling WLG
Herbert Smith Freehills
Hymans Robertson LLP
ICAS
Institute and Faculty of Actuaries
JLT Benefit Solutions Limited (Actuary)
Mercer Limited
NAMES Group
National Housing Federation
Pensions Advisory Service
Pilots National Pension Scheme
Pinsent Masons
PNPF Trust Company Limited
Reed Smith
Sackers
SAUL Trustee Company
Squire

Scottish and Northern Ireland Plumbing Employers' Federation
Scottish Charity Regulator
Spence & Partners Limited
Sports Chaplaincy UK
The Law Society of Scotland
The Society of Pensions Professionals
Travers Smith LLP
Trustee of the Plumbing & Mechanical Services (UK) Industry Pension Scheme
West Kingsdown Baptist Church
Willis Towers Watson
W H Dorward Ltd
UK Power Networks
Universities & Colleges Employers Association
Universities Superannuation Scheme Limited

ISBN: 978-1-78659-021-3