



DWP Consultation Coordinator
4th Floor
Caxton House
Tothill Street
London
SW1H 9NA

By email: pensions.consultations@dwp.gov.uk

27 October 2021

Dear Sir, Madam

Re: STRENGTHENING THE PENSIONS REGULATOR'S POWERS: NOTIFIABLE EVENTS (AMENDMENTS) REGULATIONS 2021

We are writing on behalf of the British Private Equity and Venture Capital Association (“BVCA”), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 750 firms, we represent the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers and investors. Between 2016 and 2020, BVCA members invested over £47bn into around 3,500 UK businesses, in sectors across the UK economy ranging from heavy infrastructure to emerging technology. Companies backed by private equity and venture capital currently employ 1.1m people in the UK and 90% of the businesses our members invest in are small and medium-sized businesses.

We write further to the consultation of the Department for Work and Pensions on “Strengthening the pensions regulator's powers: notifiable events (amendments) regulations 2021” (the “Consultation”).

We understand the policy intent of the new regulations is to enable the Pensions Regulator to be sighted and have the ability to get involved before employer make changes that could impact their ability to support any defined benefit occupational pension schemes which they sponsor. We understand the objective of the consultation is to identify any impacts or unintended consequences from the proposed regulations and note that it follows a prior consultation in 2018 to which the BVCA responded.

Our responses are therefore focussed on the practical impacts and potential unintended consequences.

Overview of BVCA recommendations

A very wide number of entities and individuals are required to make notifications or at risk of penalties if notifications are not made in accordance with these provisions under the amended provisions of the Pension Schemes Act 2021. There is a risk of multiple notifications or notifications by persons who have incomplete knowledge but who are concerned to comply given the exposure to penalties of up to £1 million.

It would be helpful, to avoid unnecessary work for all parties, if there could be provision for corporate groups associated with an employer to be able to nominate an entity (and its directors) to take

responsibility for all notifiable event reports and statements on behalf of the group so as to provide 'safe harbour' for others. The nominated party may be the employer or a controlling shareholder directly involved in negotiating the relevant sale or change of control or relevant security.

Also, it should be made clear that no person can be expected to provide information which they do not have or be responsible for notifying decisions which do not require their consent or which they were not party to.

BVCA responses to the consultation questions

Q1: Do you think that the definitions capture the policy intention? If not, please explain why?

The definition of "assets" and "sale" are clear. The concept of a "decision in principle" is less clear. It assumes that a decision is taken before negotiations begin with any other party. In practice, discussions may begin before any decision is taken and where there is no in principle decision to sell.

It would be helpful to clarify that "negotiations" for this purpose is not intended to include discussions that are merely exploratory where no decision to sell or to commence negotiations has been taken. This should ensure the policy intent of enabling the Pensions Regulator to intervene before an agreement is reached is met but without unnecessary notifications of discussions that do not in fact lead to any sale of an asset and without impeding preliminary inquiries.

Q2: Can you see any unintended consequences of these amendments?

We agree with the assessment that wrongful trading as a notifiable event serves no useful purpose and do not see any unintended consequences from removing it.

We would not expect any unintended consequences from amendment of the "relinquishing control of the employer" notifiable event to bring forward the timing of the first notification to the Pensions Regulator to a "decision in principle", provided that, as above, it is clear that the beginning of negotiations means the decision of negotiations after a decision in principle to sell or relinquish control and excludes merely exploratory discussions before a decision in principle.

New Notifiable Events

The first new notifiable event is the intended sale by the employer of a material proportion of its business or assets, in respect of which a decision in principle has been reached, including a new definition of "material proportion" (considered below).

We note that the rationale is that these transactions can be significant and may indicate a change in covenant support for a pension scheme. We also note that the original intention had been to apply this to employers responsible for 20% or more of the scheme's funding to prevent unnecessary work for employers, schemes and The Pensions Regulator but that the complexity of multi-employer schemes made determination of the share of responsibility for a scheme's funding too difficult.

Q3: Are there any unintended consequences of this approach? What is the impact on multi-employer schemes and the employers? Is there a simple way of apportioning liabilities which would work for all multi-employer schemes?

To reflect the risks to the scheme, any notifiable event based on share of liabilities to the scheme should reflect the actual obligations to the scheme. It does not seem to us sensible to have one basis for allocating liabilities for funding purposes under pensions legislation (notably the Pensions Act 1995 and Pensions Act 2004 and related regulations) and another for notifiable events. As such, unless the allocation of funding liabilities under pensions legislation can be simplified, we don't think there is a simple way of allocating liabilities for notifiable events purposes.

Requiring notification of a decision in principle to sell a "material proportion" of any employer's assets will result in the notification of assets of employers who represent less than a material proportion of the covenant and where the event is not likely to impact support for the scheme, creating unnecessary work for employers, schemes and The Pensions Regulator.

We'd suggest the policy intent would be met without unnecessary reporting of immaterial events if the employer can show that at the time it knew or had reasons to believe that it was responsible for less than 20% of the scheme's funding. This would in effect provide a dual test allowing employers either to notify automatically if the first test is met (based on the "material proportion" of its own assets) or to run a second test to avoid having to notify. The second test can be a "reasonable belief" test as the threshold is low: the sale of 25% of the assets of an employer who has reasons to believe it is responsible for less than 20% of the scheme's funding should not risk the policy intent not being met. This would reduce the impact on multi-employer schemes and employers.

Notice and Statement

A notice and statement must be given to The Pensions Regulator in respect of three events where "the main terms have been proposed":

- a) the intended sale by the employer of a "material proportion" of its business or assets;
- b) the intended granting or extending of a relevant security by the employer over its assets which would result in the secured creditor being ranked above the scheme in the order of priority for debt recovery;
- c) where the employer is a company, the intended relinquishing of control by a controlling company of the employer company.

We note that the intention is to balance the desirability of The Pensions Regulator and the trustee having the relevant information as early in the transaction as possible with the acknowledgement that full details of the transaction and any mitigation in respect of the scheme may not be available until nearer the end of the process.

Q4: Do you agree that "when the main terms have been proposed" is an appropriate point for the notice and statement to be issued? Can you see any unintended consequences of using this definition? At what point would it be reasonable for employers to have discussions with the trustees about the intended transaction?

We think this is an appropriate point for the notice and statement to be issued to The Pensions Regulator and the trustees provided it is clear that the required content of the statement does not require or assume employers to have already had discussions with the trustees at that point, i.e. it

should be clear that they may but are not required to engage with the trustees before the main terms are proposed.

We note that before the main terms of the transaction have been proposed, the impact of the transaction on the scheme and the employer's ability to support it are unlikely to be clear.

Also, in relation to the third event, the employer is unlikely to know the impact on the scheme of a relinquishing of control by an entity that has control of it (where control is direct or indirect control of 33% of the voting power in the employer). We would suggest that an employer can only engage with the trustees in relation to a change of control in respect of matters which are within its knowledge and control, i.e. in respect of matters on which it may take decisions.

Meaning of "relevant security"

We note "relevant security" is a security granted or extended by the employer, or one or more subsidiaries of the employer, comprising more than 25% of either the employer's consolidated revenues or its gross assets and includes both a fixed charge or floating charge over assets of the employer or the wider employer group, and an all assets floating charge which gives the charge-holder the right to appoint an administrator. We note it does not include the refinancing of an existing debt, security for specific chattels, or financing for company vehicles and that The Pensions Regulator is expected to provide more information in its code of practice and accompanying guidance.

Q5: Does the definition of relevant security meet the intention that it will apply to granting of security which may affect the employer's ability to support the scheme? Are there any unintended consequences? Should other specific types of security be included or excluded? Is it appropriate to specify a 25% threshold by reference to revenues or assets as proposed?

We think the threshold is somewhat low but it has the merit of being clear. It may well have the unintended consequence of making it more difficult for employers supporting defined benefit pension schemes to raise debt finance. However, given that other provisions of the Pension Schemes Act 2021 are likely to have a similar impact, notifiable events and statements in respect of relevant security may not add materially to these concerns.

Meaning of 'material proportion'

We note that a "material proportion" of the business of the employer, for the purpose of new notifiable events, is defined as one that accounts for more than 25% of its annual revenue and a material proportion of the assets of the employer is one that accounts for more than 25% of the gross value of its assets.

We note that revenue and assets are either those recorded in the most recent annual accounts within the meaning given in section 471 of the Companies Act 2006, or where the employer is not required to file annual accounts, its accounting records.

Q6: Do you agree this is a reasonable definition of revenue and assets? If, not, how do you consider they should be defined?

Yes.

Q7: Do you consider that 25% of the revenue or assets is an appropriate level? If not, please indicate what you think is an appropriate level and why?

We think it is at the low end but it has the merit of being clear. We have suggested a dual test for multi-employer schemes (above) so that unnecessary work can be avoided for employers who are responsible only for small part of the scheme's funding.

Q8: Do you agree that disposals which have taken place or agreed within 12 months of the date of the notifiable event should be taken into account when calculating the 25% threshold? If not, please explain why.

We understand the policy intent of taking account of a series of disposals. To avoid unnecessary work and duplicate notifications in respect of the same disposals, we would suggest excluding for this purpose (1) disposals that were agreed but are not proceeding, (2) disposals that took place or were agreed and in respect of which were the subject of a notifiable event report either because they met the 25% threshold on their own or together with other transactions.

Contents of accompanying statement

We note that the statement:

- i. a description of the event, including the main terms proposed
- ii. a description of any adverse effects of the event on the eligible scheme
- iii. a description of any adverse effects of the event on the employer's ability to meet its legal obligations to support the scheme
- iv. a description of any steps taken to mitigate those adverse effects
- v. a description of any communication with the trustees or managers of the eligible scheme about the event

Q9: Does this list provide all the information which should be notified to The Pensions Regulator? If not, what else should be included?

We suggest it should be clear that no communication with the trustees prior to the main terms being proposed is required.

Meaning of material change

We note further notification to the Pensions Regulator is required for 'material change' which is defined as a change in the proposed main terms of the intended sale, the intended granting or extension of security or the relinquishing control, or a change in the steps taken to mitigate any adverse effects of the event.

Q10: Do you think that this meets the policy intention or are there any unintended consequences?

The provisions may result in unnecessary work where the transaction is not in fact material to the funding support for the scheme (either because the scheme is well-funded, has adequate alternative security or because while the thresholds tests for the events are low). This is particularly relevant given



the number of persons exposed to penalties for a failure to notify a change who may not all have full knowledge of all matters.

We would suggest that The Pensions Regulator should be given power to notify that notification of material changes will not be required by certain persons or unless the changes affect particular main terms. This would enable The Pensions Regulator to limit (but not extend) the burden of complying with the provisions.

The BVCA would of course be willing to discuss this submission with you further - please contact Ciaran Harris (charris@bvca.co.uk) at the BVCA.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Amy Mahon'.

Amy Mahon

Chair, BVCA Legal & Accounting Committee