PENSIONS AND LIFETIME SAVINGS ASSOCIATION

DEPARTMENT FOR WORK AND PENSIONS: STRENGTHENING THE PENSIONS REGULATOR'S POWERS: NOTIFIABLE EVENTS (AMENDMENTS) REGULATIONS 2021

OCTOBER 2021

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EXECUTIVE SUMMARY

- The PLSA recognises this important step in the Department for Work and Pensions (DWP) efforts to continue to strengthen The Pensions Regulator's (TPR's) powers, by requiring companies to ensure the interests of pension schemes and savers are considered during corporate activity.

- The PLSA recommends TPR provides more guidance to aid both employers and trustees in understanding when the new notification requirements are triggered. The current regulations suggest judgement will need to be made by trustees to determine at what stage things should be declared, which could lead to inconsistencies as different employers could interpret these events differently.

- The PLSA calls on the DWP and TPR to clarify what is defined as a "decision in principle" to avoid any confusion, and also recommend that they consider using different terminology, such as "statement of intent." We believe that in its current form, the term of "decision in principle" is too vague and could therefore create confusion for firms at a very early stage of looking into disposing of business assets but are yet to reach any such "decisions in principle." This in turn could lead to an unintended breach of the regulations as they are currently proposed. The PLSA recommends further clarification on "when the main terms are proposed" – both in its definition and at what point will the main terms of a transaction be deemed to be "proposed." There may be an unintended consequence that in its current form, the phrase may create a culture of fear and may lead to unintentional breaches from both trustees and employers.

- Additionally, the draft regulations do not include any detail of materiality. Rather, it considers *any* change to the proposed main terms, or the steps taken to mitigate the effects of an event to be a *"material change"*. In order to avoid irrelevant or unnecessary notifications having to be made, which would also help to ease administrative burden for the Regulator, the PLSA recommends revisions to draft Regulation 2(7) to provide clarity on the term materiality.

- The PLSA welcomes the recognition of the challenges for multi-employer schemes but encourages clarity on whether late notification will be treated in the same way as no notification. We also recommend that guidance is provided to illustrate the type of fines which could be imposed for a minor or technical breach.

- The PLSA acknowledges the TPR cannot use its new powers for decisions which were made – or are in the process of concluding – before 1 October 2021. However, PLSA recommends TPR's guidance encourages employers to retain relevant information highlighting the rationale for substantial activity pre-October 2021, where the later stages of activity may result in risks that emerges after 1 October 2021.

ABOUT THE PLSA

We are the Pensions and Lifetime Savings Association; we bring together the pensions industry and other parties to raise standards, share best practice, and support our members. We represent over 1,300 pension schemes with 20 million members and £1 trillion in assets, across master trusts and defined benefit, defined contribution, and local government schemes. Our members also include some 400 businesses which provide essential services and advice to UK pensions providers. Our mission is to help everyone to achieve a better income in retirement. We work to get more people and money into retirement savings, to get more value out of those savings, and to build the confidence and understanding of savers.

CONSULTATION QUESTIONS

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

The PLSA believes that most of the definitions capture the policy intention and is a clear step towards protecting DB pension schemes. We support the need for companies to consider the interests of pension scheme members in any material corporate activity.

We are, however, concerned over the use of the term "decision in principle;" we believe the definition meaning in its current form is confusing as it is defined as "decision prior to any negotiations or agreements being entered into with another party." Generally, a "decision in principle" is seen as an indication that two parties are willing to enter into an agreement or contract subject to certain conditions being met. The definition provided creates confusion and could lead to trustees and employers falling short of the regulations.

We believe the vagueness of the definitions may mean both the employer and trustees may be reluctant or fail to notify TPR for fear both may be considered a concluded agreement. There are also some practical instances in which the current definition could potentially see trustees and employers fall short; for instance, an informal conversation or a telephone call could be categorised as a "decision in principle" under the current wording. The PLSA would recommend that the DWP amend the term used and use language such as "statement of intent" which would better fit the definition described in the consultation.

Whilst TPR cannot use its new powers for decisions which were made – or are in the process of concluding – before 1 October 2021, the PLSA recommends TPR's guidance encourages employers to retain information highlighting the rationale for substantial activity pre-October 2021, if this information is available. We believe this information may be of relevance to trustees to consider risks that appear after 1 October 2021 to DB schemes.

The PLSA believes there should be clarity on whether late notification will be treated in the same way as no notification. We recommend that guidance is provided to illustrate the type of fines which could be imposed for a minor or technical breach.

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

The PLSA believes there may be some unintended consequences due to the vague and unclear definition of "main term" and the actions tied to it. We would recommend guidance is provided to prevent schemes from potential breach of the regulations. As highlighted in our response to question one, there may be a reluctance to notify TPR, creating a culture of fear of carrying out normal corporate business.

We believe it is not clear what is an “offer” and would recommend that the regulations are clear that an informal offer/discussion will not trigger a notification requirement. Additionally, a notification obligation should not arise if a company has rejected or intend to reject the offer.

3: 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?

The PLSA agrees that the removal of the strict 20 per cent threshold is helpful for many multi-employer schemes, as it can be difficult to assess this for “last man standing” type arrangements with no sectionalisation.

We do not however believe there is any simple or accurate way of apportioning liabilities which will work for all multi-employer schemes. This is in part because not all employers are equal within multi-employer schemes. The largest employers (those with the largest liabilities) may not also be the ones that have the largest corporate assets; the loss of one of these sponsors could be significant.

As highlighted in our response to question two, the PLSA recommends that the regulations are revisited to ensure an informal offer/discussion will not trigger a notification of requirement, as we believe this could prove challenging for multi-employer schemes.

We welcome the recognition of the challenges for multi-employer schemes but encourages clarity on whether late notification will be treated in the same way as no notification. As highlighted in our response to question one, we recommend that guidance is provided to illustrate the type of fines which could be imposed for a minor or technical breach.

4: 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?

The PLSA asks for clarity on what “main terms” means, as set out in the draft regulations, and at what point will the main terms of a transaction be deemed to be “proposed.” The scope of intent is vague and could also create confusion on what is expected of both trustees and employers. As highlighted in questions one and two, the confusion in definitions of what is a “decision in principle” will make it difficult for employers to have those conversations with trustees about an intended transaction. The PLSA would recommend this process is revisited to ensure that both employers and trustees are left in no doubt on how transactions and corporate deals are legitimised.

The PLSA notes the regulations highlight that notice must be made to TPR if there is a *“material change in, or in the expected effects of, a notifiable event.”* However, draft regulations do not include any detail of materiality. Rather, it considers *any* change to the proposed main terms, or the steps taken to mitigate the effects of an event to be a *"material change"*.

In order to avoid irrelevant or unnecessary notifications having to be made, which would also help to ease administrative burden for the Regulator, the PLSA recommends the following: that the draft Regulation 2(7) should be revised so that Regulation 2(7)(a) and (b) only apply to changes to the proposed main terms which would materially modify the assessment of the level to which the event will have a material adverse effect on the scheme, compared with that described in the most recent accompanying statement, and/or to material changes in the steps taken to mitigate any (material) adverse effect.

5: 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 per cent threshold by reference to revenues or assets as proposed?

We believe the 25 per cent threshold would seem reasonable as it would capture any significant changes to security granted by an employer without setting the bar too low, thus creating unnecessary additional work. However, assets would – overall – be a better metric to use than revenue, as this relates to granting security, which is generally done over an asset rather than a revenue stream.

However, the PLSA recommends that the revenue test should apply to subsidiaries who do grant security. If one or more material subsidiaries grant security and it/they contribute 25 per cent or more to group revenue, the enforcement of security over the assets would lead to the loss of that revenue stream, thus undermining the employer's ability to meet the scheme liabilities. There could be a situation where although the assets test was not breached, the charge might result in a breach of the revenue test for a smaller subsidiary with funding obligations, which could therefore impact on scheme funding.

The PLSA recommends the 25 per cent threshold includes all types of assets (tangible and intangible, depending on the type of business).

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

The PLSA believes the DWP need to further clarify what is defined as revenue. We would also ask that there is clarification on what is defined as "all assets" - whether this includes assets held overseas or just within the United Kingdom.

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

The PLSA believes 25 per cent of assets would seem to be an appropriate level. As with question 5, it would capture any significant changes in security granted without being set at a level so low that it would create a notifiable event for frequent, business-as-usual activities for certain firms who

rely on secured borrowing. A lower level could potentially capture too many transactions and generate an administrative burden on firms, whilst any higher and it may capture too few events.

We also believe that measuring this against assets as opposed to revenue overall would be a more appropriate metric; if you are granting security against an asset rather than revenue, then measuring that security in terms of assets would make more sense than revenue.

However, there are instances in which revenue is the more appropriate metric (please see question 5).

The PLSA recommends that a sale should only count towards the 25 per cent threshold where the transaction has completed or where the relevant party has entered a contract to complete the transaction within the past 12 months to avoid uncertainty.

Alternatively, an asset or business sale could count where it has completed or where an obligation to notify the Regulator under section 69 or 69A has arisen in respect of it within the past 12 months.

8: 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 per cent threshold? If not, please explain why.

The PLSA believes recent disposals should be taken into account, as it is a possibility that an unscrupulous employer could otherwise parcel up transactions into smaller pieces to attempt to come in below the threshold.

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

The PLSA believes that this list provides all the information which should be notified to TPR.

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

The PLSA believes this meets the policy intention.

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