

PROTECTING DB PENSION SCHEMES – TABLE OF PROPOSALS

Proposal	Comment	Process
Corporate transactions		
Changes to notifiable events ("NE")		
1. Sale of a material proportion of the business or assets of an employer which has funding responsibility for at least 20% of the scheme's liabilities (new NE).	The definition of terms will be crucial.	DWP working with TPR and plans to engage stakeholders before consulting on draft regulations.
2. Granting of security on a debt to give it priority over debt to the scheme (new NE).	As above.	As above.
3. Removal of wrongful trading NE.		
4. Notification of dividend payments NE.	No new legislation proposed.	As part of new clearer funding standards, TPR to consider whether level of dividend is appropriate. DWP to work with BEIS in relation to dividend payments as part of the consultation on Insolvency and Corporate Governance.
5. Strengthening of banking covenant breach NE.	Not proceeding.	
6. Significant restructuring of board NE.	Not proceeding.	
7. Employer taking pre-insolvency advice NE.	Not proceeding.	
8. Earlier notification of NEs.	Proposal to link NE reporting to adoption of Heads of Terms has been dropped.	DWP to work with TPR to identify where earlier notification could be beneficial and whether this requires legislation or inclusion in revised NE Code.
9. NE regime generally.		DWP to consult on changes to NE regime (outlined above), with further consultation in relation to any scheme-related NE changes arising from the DB Consolidation consultation. TPR to update NE guidance and consult on revised Code.

Proposal	Comment	Process
Declaration of intent		
10. Declaration of Intent (DoI) to be made to TPR and the trustees by the “planner” of a corporate transaction explaining the transaction, confirming the trustee has been consulted and detailing any mitigation.	The requirement for a DoI will be triggered by the sale of a controlling interest in an employer (current NE), sale of business or assets of an employer and granting of security in priority to a scheme debt (new NEs). The response suggests that the trigger will be included in legislation with the remaining detail in TPR guidance and the revised NE Code. Backed up by new civil penalty on providing false information (see below).	DWP to legislate on the triggers for a DoI. DWP to work with TPR to ensure DoI and the new NE regime complement each other. DWP to consider the content of the DoI with “the industry”. DWP to work with TPR to identify a “flexible approach” on when a DoI must be provided. No current plans to legislate on timing.
Voluntary clearance		
11. TPR to review clearance guidance.	TPR’s review should include further guidance on the material detriment definition, revision of the types of events and more information on the process and timings.	TPR to revise clearance guidance.
Improved Regulator powers		
Penalties		
12. New civil penalty of up to £1m for various failures.	The £1m civil penalty will be available for: <ul style="list-style-type: none"> • Wilful or reckless behaviour • Failure to comply with a CN or FSD • Failure to comply with the NE regime • Failure to comply with DoI requirements • Knowingly or recklessly providing false information to trustees or TPR 	Will require primary legislation.
13. New criminal offence for willful or reckless behaviour in relation to a pension scheme.	Up to 7 years’ imprisonment and/or unlimited fine. Against employers or those associated or connected with an employer.	Will require primary legislation.
14. New criminal offence of failure to comply with a CN.	Unlimited fine. Against employers or those associated or connected with an employer.	Will require primary legislation.
Information gathering		
15. New TPR interview power.	The response states that this new power will override an adviser’s duty of confidentiality to their client, but subject to s311 on legally privileged information.	Will require legislation (primary?) TPR to revise compliance and enforcement policy.
16. TPR inspection power.	Expansion of current s73 and s74 powers to cover all TPR statutory functions.	Will require legislation (primary?)

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17. Fixed and escalating penalties for failure to comply with information powers.		Will require primary legislation – with detail of level of fine in secondary legislation. DWP to engage with stakeholders on the appropriate level.
Anti-avoidance powers		
Contribution notices		
18. Amendment to the reasonableness test for CNs to reflect the impact of the act or failure to act on the value of scheme assets.		Will require primary legislation.
19. Amendment to the material detriment test to include a hypothetical insolvency recovery test and the employer’s “coverage” of the deficit.		Will require primary legislation.
20. Introduce an uprating mechanism to protect the value of a CN.		DWP to consider whether a specific uprating mechanism should be set out in legislation.
21. Change the date on which the “cap” on a CN is calculated.	Currently the level of a CN is capped in relation to the s75 debt as at the date of the act or failure to act (section 39(2)). The proposal is to bring it closer to the value of the debt as at the determination of the CN.	DWP currently working through the details with TPR.
Financial Support Directions		
22. Creating a single stage FSD with a specific and enforceable obligation on the target.		DWP will continue to work on this with TPR and the PPF.
23. FSD will either require cash or a particular form of guarantee.	The response is quiet on any particular form of guarantee – but joint and several liability of targets for the employer’s liabilities to the scheme will be required. An alternative form of support could be agreed with TPR outside the formal FSD process.	DWP to proceed on the basis that either cash or “joint and several liability” is required. DWP to work with TPR on potential flexibilities in the process.
24. Allowing an FSD to be issued to individual controlling shareholders.	This rows back from the original proposal to broaden it to anyone associated or connected.	Will require legislation (primary?).
25. Replacement of the “insufficiently resourced” test with a new scheme-focused test and a new “service company” definition.		Will require secondary legislation. DWP to continue to work with TPR on the details.
26. FSD to be renamed Financial Support Notice		
27. Longer look-back period	Not proceeding at the moment; the two year period will remain.	To be kept under consideration.

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28. Allowing an FSD to be issued after a scheme transfers to the PPF.	Not proceeding.	
29. Amend the reasonableness test to include the actions of a target in creating or increasing risk.	Not proceeding (contrary to the “no fault” basis of an FSD).	

CMS

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***Note:** The information in this document is for general purposes and discussion only and does not purport to constitute legal or professional advice. It is not an exhaustive review of recent developments or relevant law and must not be relied upon as giving definitive advice. It is intended to simplify and summarise the issues which it covers.*