

# Defined benefit multi-employer schemes and employer departures: guidance for trustees

# Contents

<b>Introduction</b>	<b>page 3</b>
Background	page 3
The need for updated guidance	page 3
<b>The consultation process</b>	<b>page 4</b>
<b>Main points raised in responses</b>	<b>page 5</b>
<b>The way forward</b>	<b>page 8</b>
<b>Appendix</b>	<b>page 9</b>

## Introduction

### Background

The employer debt regime for multi-employer schemes is a complex area with many factors for trustees to consider. On 1 July 2010 we began a formal consultation aimed at providing further guidance to trustees and some employers, to help them understand their responsibilities and available options, and to highlight the areas where their attention should be focussed.

The guidance relates to amendments to the employer debt regime introduced by:

- The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2008 (SI 2008/731)
- The Occupational Pension Schemes (Employer Debt Apportionment Arrangements) (Amendment) Regulations 2008 (SI 2008/1068) and
- the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 (SI 2010/725).

In April 2008, 4 mechanisms were introduced by which an employer could modify the debt that would normally arise under section 75 of the Pensions Act 1995 (section 75 debt) upon departing a multi-employer defined benefit (DB) scheme, either as a result of insolvency or other corporate activity.

On 6 April 2010, 2 further mechanisms were introduced which, rather than modifying the debt due, prevent it from arising.

Therefore, in addition to the option of paying the full section 75 debt, there are now 6 mechanisms by which an employer can depart from a multi-employer DB scheme and be discharged from their liability to that scheme. The guidance also seeks to outline the characteristics of each mechanism and the key issues that trustees should consider in relation to each.

The publication of the consultation document, which included the draft guidance, formed an integral part of the regulator's 2010 DB campaign, which concluded in July 2010. Concurrent with the start of the consultation, 2 bite-size e-learning modules – to further assist trustees of multi-employer schemes in understanding the issues that they need to consider – were published on our website.

### The need for updated guidance

In April 2008, we published guidance on multi-employer withdrawal arrangements, which gave an overview of the key messages following the changes to the employer debt regulations which came into effect at that time. As noted above, in April 2010 2 further mechanisms for departure from a multi-employer scheme were introduced.

Following the new regulations we have updated our guidance and have set out our expectations of trustees when they are faced with an employer departing their scheme. It highlights the fact that, in addition to the prescribed requirements that must be met in relation to each particular mechanism, trustees must consider their overall fiduciary duty to the scheme members when making decisions relating to the risks to which the scheme may be exposed.

The guidance is not intended to be technical guidance; we expect that trustees will normally need to seek independent professional advice where the circumstances described in this guidance apply to their scheme. The guidance outlines the mechanisms that are available as an alternative to full payment of the section 75 debt, and signposts the areas where the regulator may become involved.

The guidance on which we consulted was aimed at trustees, with indication that it may be of interest to employers. It included a section for employers to raise their awareness of the issues which trustees have to consider in this area and to highlight the regulator's expectations of them during the process.

## The consultation process

The formal consultation process commenced on 1 July 2010, following publication of our consultation document. Consultation ran for 12 weeks, closing on 23 September 2010. We received 16 responses from a cross-section of stakeholders including trustees, pensions managers, legal firms, professional and trade bodies, consultants and administrators. A full list of the respondents (excluding those who wish to remain anonymous) is attached in the Appendix.

We are extremely grateful for all the responses received, which have helped us considerably in finalising the guidance and sharing industry views.

While respondents were free to provide comments on any aspects of the draft guidance, we specifically sought comments on the following questions included in the consultation document:

### Section 1

#### What is a multi-employer defined benefit (DB) scheme?

This section aims to outline the characteristics of a multi-employer scheme and to highlight some of the complexities that go with it, particularly around establishing the legal structure of the group of employers and the circumstances under which an employer may depart from a scheme.

1. Are there any other particular characteristics or complexities that it would be appropriate to include in this section?

### Section 2

#### Considerations for employers

This section is intended to raise employers' awareness of the trustees' duty to carefully consider any proposals put by the employer and why they need to ensure that support for the scheme will remain robust. We have also included periods of grace under this section, as the employer is solely responsible for this process, with no action required from the trustees.

2. Are there any other specific considerations for employers that we should include here?

### Section 3

#### What do we expect of trustees?

This section sets out the areas that we expect trustees to understand and to consider closely. This section in particular highlights the importance of protecting the employer covenant.

3. Does this section clearly explain the regulator's expectations of trustees and are these expectations reasonable?

### Section 4

#### Important aspects of each mechanism

This section aims to outline the mechanisms that are available either to modify a section 75 debt or to prevent it from arising. As well as describing the requirements for each mechanism, it also highlights particular issues for trustees to consider. This section is not intended to be a complete technical guide to each mechanism, as this is an area where we would expect trustees to obtain professional advice.

4. Does this section give an adequate overview of each mechanism for employer departure?

## Main points raised in responses

The responses raised a number of interesting stakeholder view points covering a range of matters addressed in the guidance. Generally comments were positive and many respondents supported our initiative to provide updated guidance in this area and felt that the draft guidance was useful and informative.

A number of responses did, however, note that the guidance should perhaps be aimed at employers as well as trustees, given that employers normally initiate proposals concerning section 75 debts. Whilst we noted that some employers may be interested, on reflection we agree that the guidance would be useful for employers and that we should increase the flagging to employers. It could help employers to understand the complexities of the employer debt regime, and what is expected of trustees, and it highlights ways in which they can helpfully engage to ease the process.

A smaller number of responses suggested that the guidance should also be aimed at advisers to trustees, on the basis that trustees are likely to engage with advisers on these issues. We agree that trustees are likely to, and in most cases should, speak to their advisers on issues concerning employer departures, but we reject the point that trustees never have sufficient understanding or that they should not try to improve their understanding. There are specific requirements of trustees in relation to knowledge and understanding, and we believe that trustees of a multi-employer scheme should, in many cases, have a level of understanding greater than that of a more straightforward scheme. The bite-size learning modules that we produced alongside the consultation can assist in this regard, as can the Trustee toolkit<sup>1</sup>.

A small minority of responses commented that the structure of the guidance was not straightforward. We have made some changes to try to address this, for example, including information about former employers earlier in the guidance and, therefore, putting it more in context. We have also moved the 'understand the scheme's liabilities and who is responsible for them' section before 'understand your employer covenant', in response to the comment that 'unless one knows what an employer's liabilities toward the scheme are, one cannot know how extensively to research covenant'.

Several responses suggested that the guidance should cover employer departures effective prior to 6 April 2010, and in particular the effects of recent judgments in respect of the Pilots' National Pension Fund<sup>2</sup> (PNPF) and Cemex<sup>3</sup>. This was considered shortly before the guidance was consulted on, and we stand by our original decision for the guidance to be forward looking. However, we recognise that the effects of these judgments could impact on current assessments of who the employers to a scheme are and we have acknowledged this in the final guidance.

Some respondents commented that there is some overlap with the guidance on 'monitoring employer support', on which we have also recently consulted. We recognise that this is the case, and in this guidance we have aimed to highlight the issues which are most likely to arise for multi-employer schemes. However, it is not intended for the two pieces of guidance to be mutually exclusive; the guidance on monitoring employer support is equally relevant for trustees of multi-employer schemes.

Various comments were made regarding the possible ambiguity of some of the particular wording used in the guidance, and others asked that the language in respect of the prescribed mechanisms more closely mirror that of the regulations. We have taken these comments into account and made amendments where appropriate.

continued over...

<sup>1</sup> [www.thepensionsregulator.gov.uk/trustees.aspx](http://www.thepensionsregulator.gov.uk/trustees.aspx)

<sup>2</sup> PNPF Trust Co Ltd v Taylor and Ors, June 2010

<sup>3</sup> Cemex UK Marine Limited v MNOPF Trustees Limited, December 2009

Main points raised in responses continued...

The main comments raised specifically in relation to questions asked in the consultation document are detailed below.

### Section 1

#### Are there any other particular characteristics or complexities that it would be appropriate to include in this section?

Some responses suggested that the guidance could include reference to hybrid schemes, particularly in light of court cases such as *Bridge*<sup>4</sup>, which can mean that identifying what benefits are, in fact, DB is difficult. We have considered this and have included such a reference in the final guidance, pointing out that this is an area where trustees may need to seek advice.

Respondents also asked that the information regarding former employers and frozen schemes be brought closer to the beginning of the section. We accept this and have sought to bring this material more into context by integrating the considerations for former employers and frozen schemes into the main body of this section.

A number of respondents requested that reference be made to schemes which may have rules for partial wind-up and the practical implications of this, as well as for segregated schemes. We have sought to accommodate this request and have included reference to these circumstances in the final guidance.

As mentioned above, several responses suggested that the guidance should include more on the potential complexities raised in the recent cases concerning the Pilots' National Pension Fund. We have included reference to this case in this section of the final guidance and acknowledged that, although the guidance does not cover pre 6 April 2010 employer departures, the case may affect the task of identifying the employers to the scheme.

### Section 2

#### Are there any other specific considerations for employers that we should include here?

Several respondents commented that the record keeping requirements should be a consideration for employers, given that trustees often rely on the employer to provide them with information, for example, employment records. We have taken this on board and included appropriate text in section 2.

Some respondents commented that some of the paragraphs relating to material detriment considerations would be better placed in the section for employers. We agree with this point and have incorporated paragraphs 86 to 88 of the draft guidance into section 2 of the final guidance.

A number of respondents noted that the guidance did not make any reference to relevant transfer deductions, and that it ought to do so. We have taken this on board and included a brief paragraph on these, in particular the applicable timescales.

A small number of respondents suggested that we should point out that there may be tax implications where one employer agrees to meet the debt of another. There are many areas where tax implications may need to be a consideration in the context of employer debt. Given that it is not possible to flag them all, nor is it the focus of this guidance, we have not flagged this particular consideration.

<sup>4</sup> *Houldsworth v Bridge Trustees (Imperial Home Decor Pension Scheme)*, March 2010

### Section 3

**Does this section clearly explain the regulator's expectations of trustees and are these expectations reasonable?**

The majority of respondents agreed that the regulator's expectations set out in this section were both clearly explained and reasonable.

However, several respondents noted that it may not be realistic to expect that trustees can easily negotiate for more than the departing employer's liability share to be paid, as is indicated might be appropriate in some circumstances. Similarly, it may not be realistic to expect trustees to go further than the employer debt regulations require, in respect of the tests for the various mechanisms.

For example, suggesting trustees should negotiate additional mitigation where an employer departs using the de minimis mechanism. We accept that some of the mechanisms in the employer debt regulations do not include a requirement for trustees to seek additional mitigation. However, trustees must also consider their wider fiduciary duties to the beneficiaries of the scheme under trust law and it is in this context that we expect trustees to consider whether use of a mechanism is appropriate in the circumstances; this will not necessarily be the case just because it is possible.

Several respondents noted that it is unrealistic to expect trustees to ensure that employer records are kept up-to-date. We have therefore included this expectation in the section for employers, and clarified that the trustees should adhere to the standards set out in our guidance on record keeping.

Many respondents suggested that the language regarding the trustees' role in relation to the use of the various mechanisms be revised. Many readers interpreted the implication to be that trustees instigate discussions regarding the possible use of one or more of the mechanisms described. We have revised the language as appropriate, in order to clarify that trustees will usually have to decide whether or not they should agree to the use of a mechanism, and we believe the revisions remove any ambiguity.

### Section 4

**Does this section give an adequate overview of each mechanism for employer departure?**

The main point raised by respondents in response to this question is that the wording relating to each mechanism, in particular the tests attached to each, should mirror the wording of the regulations more closely. Related to this, several respondents also commented that the timings for carrying out the steps under the new restructuring and de minimis mechanisms should be more clearly set out.

We have revisited the text in this section and sought to ensure that the requirements of the regulations are clearly set out, without in all cases restating the regulations word for word, as we do not believe that this would be useful or add value for trustees or employers.

**Are there any other key considerations that it would be appropriate to include in this section?**

Several respondents noted that the guidance does not include mention of non-statutory compromises and the potential effect that such arrangements might have on a scheme's eligibility for the Pension Protection Fund (PPF). We have taken this on board and sought to address this, although not in this particular section of the guidance, which is intended to cover the statutory mechanisms only.

Some respondents requested further explanation in relation to regulated apportionment arrangements (RAAs). Our statement on RAAs and employer insolvency, published in August 2010, sets out the process to be followed for RAAs, and we have included reference to this in the final guidance.

In addition, some respondents asked that we consider including some examples of criteria the regulator might require for approving AWAs and RAAs. We have considered this and have concluded that it is not appropriate to include specific examples due to the individual nature of these arrangements.

Several respondents noted that it would be useful for the guidance to include flowcharts or a table summarising each of the mechanisms for departure. We have considered this and included in the final guidance a table, which identifies the most important characteristics of each mechanism and allows a comparison between the mechanisms to be made.

## The way forward

Our expectation is that trustees adopt the approach we have identified as appropriate to their scheme and events which may affect it. The focus of our recent DB campaign clearly demonstrates the importance we place on properly assessing and placing appropriate value on the employer covenant, and that this is particularly important and often more complex for multi-employer schemes.

## Appendix

The following organisations provided responses to the consultation:

1. ACA
2. APL
3. Capita Hartshead
4. DLA Piper
5. Eversheds
6. Hewitts
7. Hymans Robertson
8. ITS Limited
9. Mercer
10. PMI
11. Punter Southall
12. Sackers
13. SPC
14. Towers Watson
15. USS

## How to contact us

Napier House  
Trafalgar Place  
Brighton  
BN1 4DW

T 0870 606 3636

F 0870 241 1144

E [customersupport@thepensionsregulator.gov.uk](mailto:customersupport@thepensionsregulator.gov.uk)

[www.thepensionsregulator.gov.uk](http://www.thepensionsregulator.gov.uk)

[www.trusteetoolkit.com](http://www.trusteetoolkit.com)

Consultation response

**Defined benefit multi-employer schemes and  
employer departures: guidance for trustees**

© The Pensions Regulator November 2010

You can reproduce the text in this publication as long as you quote The Pensions Regulator's name and title of the publication. Please contact us if you have any questions about this publication. We can produce it in Braille, in large print or on audio tape. We can also produce it in other languages.

The Pensions  
Regulator