

Consultation report

A response from the Pensions Regulator,
the Pension Protection Fund and the
Financial Assistance Scheme
(as part of the Department for Work and Pensions)

- 1) The regulation of schemes in wind-up and in a Pension Protection Fund assessment period: A statement by the Pensions Regulator, the Pensions Protection Fund and the Department for Work and Pensions in respect of the Financial Assistance Scheme; and
- 2) Avoiding delays in winding up pension schemes: Good practice guidelines from the Pensions Regulator

June 2008

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1. Introduction

On 3 March 2008 we began a consultation aimed at speeding up both the winding up and passing through a Pension Protection Fund assessment period of occupational pension schemes. The consultation consisted of two documents entitled:

- ‘The regulation of schemes in wind-up and in a Pension Protection Fund assessment period: A statement by the Pensions Regulator, the Pension Protection Fund (PPF) and the Department for Work and Pensions (in respect of the Financial Assistance Scheme)’; and
- ‘Avoiding delays in winding up pension schemes: Good practice guidelines from the Pensions Regulator’.

The consultation period ended on 15 April and we received 17 responses from a broad cross-section of interested parties including legal organisations, actuarial bodies, insurers, administrators and trustees. A list of respondents is attached at Annex A and we are very grateful for all the responses received.

We are pleased to report that the majority of respondents supported our overall approach, particularly our commitment to joint working. While there were some helpful suggestions about how we might make further improvements there is no evidence that we should fundamentally alter the approach articulated in the consultation documents. We have made some amendments to both documents to reflect comments, where we considered it appropriate to do so.

Section 3 sets out our response to issues raised.

Our expectations remain that:

- for schemes outside the PPF already winding up – at least the key activities are completed as soon as practically possible, and certainly within a two-year period from the date of publication of this report;
- for schemes outside the PPF commencing wind-up from the publication of this report – at least the key activities are completed within a two-year period from the date of wind-up;
- for schemes that qualify for FAS – they should be in a position to transfer all residual assets and membership data as soon as possible once legislation is in place and certainly within two years; and
- for schemes in a PPF assessment period – parties should put in place the necessary arrangements to ensure swift passage through assessment, as it is likely to last for a minimum of one year, and trustees are expected to have completed all tasks as soon as reasonably practicable within the following twelve months.

2. What the consultation said

The regulator, the PPF and FAS (as part of DWP) fully support government aims of reducing the time occupational pension schemes take to wind-up or pass through a Pension Protection Fund (PPF) assessment period, because:

- members remain uncertain about the level of benefit they will receive until the key activities of winding-up are completed; and
- scheme assets may be depleted by costs incurred. Not only does this have the potential to impact detrimentally on members' benefits but, in the case of a PPF assessment period, on the levy payer.

We recognised that, while some schemes already demonstrate good practice in winding up and completing the PPF assessment period, too many take a disproportionate amount of time to complete the activities involved. Our aim is to provide a framework for minimising such delays.

The tripartite statement outlined that all parties will work together to ensure a consistent approach where it is appropriate to do so. It also outlined our respective expectations, the support we will provide and when we will intervene.

As some parties already demonstrate good practice in winding up pension schemes we wanted to ensure this is shared through the provision of the regulator's good practice guidance. The guidance is not intended to be a guide on how to wind up a pension scheme and therefore does not cover all the activities involved. This information can be found elsewhere, for example, the trustee toolkit modules on wind-up.

While respondents were free to provide comments on any aspects of the statement, we set out three questions in both the tripartite regulatory statement and the regulator's 'Good practice guidelines on avoiding delays in winding up pension schemes', on which we specifically sought responses:

Tripartite regulatory statement

Question 1 Have you any other suggestions on how the regulator, PPF and DWP in respect of FAS can work together so as to ensure approaches are aligned in a way that contributes to speeding up wind-ups and schemes passing through an assessment period?

Question 2 Do you agree with the exceptions we have specified for schemes winding up? If you consider there to be a case for further exceptions, what is the evidence for this?

Question 3 Are there any other issues you would like to see addressed?

The regulator's good practice guidelines

- Question 1 Is the structure and layout logical and easy to navigate?
- Question 2 Do you think the key issues that cause delays to wind-ups have been identified? If not, please provide details of other issues you think should be included and explain the difficulties you have faced, providing good practice examples where appropriate.
- Question 3 Do you think the good practice guidelines outlined will help you deal with the issues efficiently? Are you aware of any other guidelines that should be included?

3. Main points raised in responses

We have addressed the main common issues raised in the responses to the consultation below.

Tripartite regulatory statement

- Question 1* Have you any other suggestions on how the regulator, PPF and FAS can work together so as to ensure approaches are aligned in a way that contributes to speeding up wind-ups and schemes passing through an assessment period?

Consistency between the regulator/PPF/FAS

There was a widespread welcome for the three parties to work together to ensure a consistent approach is taken where appropriate. Some concerns were expressed about whether this was deliverable in practice.

We recognise the concerns raised. It is undoubtedly true that joint working requires continuous effort and there is an onus on us collectively to keep up the momentum in this area. That said, all three parties see this as a crucial element to achieving success and are committed to close working where it is appropriate to do so. We are continually identifying areas for joint working; for example, we are currently investigating how existing regulator processes – such as the trustee appointment process – can be applied to FAS schemes.

Further evidence of our engagement includes:

- joint workshops with trustees held by PPF, with the involvement of the regulator, to help resolve issues faced during an assessment period as well as being used as a forum for sharing information;
- the regulator sharing information with FAS – where it is appropriate – ranging from information received on section 72a wind-up reports to providing general information about qualifying FAS schemes;

- representatives from both the regulator and PPF, along with industry professionals, attending the FAS Advisory Panel involved in the development of the revised FAS scheme; and
- joint visits including the regulator, PPF and FAS with external parties.

We also work together in producing information and educational tools including:

- the development of an additional trustee toolkit module in the wind-up series entitled: 'Dealing with a DB scheme: Insolvent employer';
- the PPF consulted the regulator on its good practice guidance for trustees on the PPF assessment period and its document on equalising compensation to allow for differences in the GMP formula – both of which have been issued for consultation. Details can be found on the PPF website www.pensionprotectionfund.org.uk;
- FAS issues regular updates to trustees and is currently working on guidance for issue later in the year – where appropriate they will liaise with both the regulator and PPF.

Expanding the tripartite arrangement

There were calls for an expansion of the tripartite arrangement to include the National Insurance Services to Pensions Industry (NISPI) and legislators.

We fully understand why this was suggested. The rationale behind the tripartite arrangement was in recognition of the similarities in our respective functions regarding schemes either in wind-up or passing through an assessment period. We are talking further to NISPI about how best to move forward in this area, including how we might – in the future – include them in this arrangement.

To give some assurance that we do recognise the important role that NISPI plays, here are some examples of current joint initiatives:

- quarterly meetings between NISPI and PPF – and where there are common issues to address, the regulator is invited to attend;
- the regulator is continuing its work with the 10 administrators and insurers with the largest portfolios of schemes in winding up to progress their wind-up portfolios, and discussions with NISPI will take place to identify and discuss any issues arising on GMP reconciliation;
- links are being put in place to allow the regulator to share information with NISPI when a scheme begins to wind up.

Question 2 Do you agree with the exceptions we have specified for schemes winding up? If you consider there to be a case for further exceptions, what is the evidence for this?

Respondents considered that the listed exceptions to the time frame were appropriate. However, there were a number of suggestions of how the list could be extended. While we have considered the suggestions we remain of the view that it would not be appropriate to introduce a blanket exception for all schemes in the areas suggested. Where we become aware that schemes have not met the relevant timeframes then we will consider intervention that is proportionate, taking into account the specific circumstances of the scheme.

GMP reconciliation

We recognise that GMP reconciliation can be a lengthy task and that in some complex cases unforeseen difficulties can arise. However, we remain of the view that the timeframe set out is reasonable for most schemes – particularly where schemes have been well managed and maintained on an ongoing basis.

We are aware of difficulties surrounding the shared workspace tool. HMRC has assured us that it remains committed to the provision of the shared workspace as a tool to help speed up scheme wind-ups and urges schemes to be proactive in their use of it. NISPI's working practices to assist the GMP reconciliation process mean that each scheme administrator using shared workspace has a nominated contact to ensure delays are kept to a minimum and issues identified at the earliest opportunity

We therefore do not believe that delays in GMP reconciliation is an appropriate ground for a further exception to the two-year timeframe set out in the statement. We will engage with NISPI in particular over the expected timeframes.

Different types, sizes and complexities of schemes and industry issues that do not involve court action

We remain of the view that the two-year timeframe is reasonable for all types of schemes and for most circumstances. Therefore we do not consider an exception for each complex activity or issue that might arise during a scheme wind-up to be appropriate. However, where it comes to our attention that a scheme will not meet the timeframe, we will take a proportionate approach when considering appropriate action.

Relaxation of the timeframe for trustees who are appointed once wind-up has commenced

We have evidence from evaluating the performance of independent trustees that the regulator appoints, which indicates that it takes an average of 13 months to wind up a scheme following appointment. This is a very pleasing outcome for all concerned, and strengthens the argument in our view that an exception is not appropriate for this circumstance.

Question 3 Are there any other issues you would like to see addressed?

Introduction of a clearance process

A number of respondents called for the introduction of a clearance process, whereby the regulator, or other body, directs trustees to take a specific course of action. The rationale being that trustees will be more decisive as the direction will guard them against any subsequent legal challenge on the decision and protect any personal liability.

We do not deny that some decisions during wind-up are difficult. However, our position remains that it is the trustees' responsibility to make the decisions in relation to the scheme after taking appropriate advice – and that this applies to both lay trustees and professional independent trustees whether or not a scheme is in wind-up. It is not the role of the regulator to act as a 'quasi-trustee'.

Trustees should also note section 61 of the Trustee Act 1925. This means that, where trustees have made a decision which is subsequently challenged on the basis of a breach of trust, the court has the power to relieve trustees of liability for the breach where it is satisfied it is proper to do so and that they consider trustees to have acted honestly and reasonably. We would expect the trustees' legal adviser to provide trustees with appropriate advice on this point.

The Pensions Regulator early intervention

Some respondents suggested that the regulator should intervene in a scheme wind-up at an early stage in order to resolve wind-up issues.

We do not wish to impose a burden on schemes by becoming more involved in the day-to-day wind-up process as we firmly believe that is not the regulator's role. Trustees are responsible for the wind-up process and should manage that in a way that suits them best in order to meet the required timeframe.

In saying that, we take a proactive approach when we are informed that schemes have commenced wind-up by contacting these schemes to ensure they are aware of the availability of information, for example through this guidance and the trustee toolkit, and to encourage appropriate plans to be put in place.

We look closely at the section 72a wind-up reports we receive and take a proportionate approach in deciding on appropriate action to take.

We have also put in place a process for evaluating the performance of any independent trustees we appoint to ensure appropriate plans are in place to meet the relevant timeframe and that their budget for doing so is well managed and provides value for money. As mentioned above, early indications are that schemes managed by independent trustees are taking an average of 13 months to wind up.

Clarification of position on FAS schemes

We were asked for clarification on how trustees should deal with qualifying FAS schemes in view of the recent announcements and proposed changes to the structure. In particular, respondents asked whether wind-up activities should continue.

In relation to qualifying FAS schemes and wind-up – as a general rule schemes should continue with the wind-up activities that can be carried out, such as data cleansing, member tracing and GMP reconciliation. This includes the calculation of final scheme benefits and the individual asset share of each member. Completing this work will help schemes in progressing the transfer of data and assets to the FAS once the final details of the revised scheme become clear.

It is worth noting, however, that there continues to be a prohibition on the purchase of annuities for qualifying FAS schemes, unless approval has been given by the FAS scheme manager, or trustees entered into a binding commitment to purchase annuities before 26 September 2007. FAS schemes should be in contact with their FAS caseworker to ensure appropriate wind-up activities are undertaken.

The draft regulations that will widen the scope of schemes which can qualify for FAS – including some solvent schemes – were laid on 18 June 2008. The FAS team is continuing work on developing the final details of how the revised FAS scheme will work and will take into consideration the responses received as part of this consultation.

FAS continues to issue updates for trustees to inform them of developments and what it means for their schemes. Further guidance will be produced in due course once the regulations are debated and finalised. All trustee updates issued to date can be found on the FAS website.

The regulator's good practice guidance

Question 1 Is the structure and layout logical and easy to navigate?

There were no major issues received over the structure or layout of the document. We will continue to keep this under review as the guidance expands and restructure as and when it is required. The idea was that it would be a dynamic document which would change as new issues emerged.

Question 2 Do you think the key issues that cause delays to wind-ups have been identified? If not, please provide details of other issues you think should be included and explain the difficulties you have faced, providing good practice examples where appropriate.

Most respondents felt that the key issues were covered, although there were some individual suggestions put forward – for example, information on section 61 of the Trustee Act 1925; scheme returns and wind-up; and links to information on the

contracting out certificate. Where we thought it appropriate we have included information in the current guidance; for others we have provided our response as an addition to the guidance which we hope will be helpful.

Question 3 Do you think the good practice guidance outlined will help you deal with the issues efficiently? Are you aware of any other guidance that should be included?

Practical solutions

There were a few criticisms that the guidance does not provide enough by way of practical solutions.

The good practice guidance set out some common, practical solutions and approaches that can be taken to assist parties in winding up their schemes. We have avoided being overly prescriptive as we are acutely aware that each scheme is different and parties need to consider how and if the guidance can be applied to their particular scheme. We would encourage parties to provide further examples of good practice from industry so that we can consider whether they are appropriate to include in subsequent versions of the guidance.

GMP equalisation

A number of respondents continue to call for a definitive view on whether and how schemes should equalise GMPs; in particular, there were requests for DWP to put a definitive view in legislation. The regulator has approached DWP on this matter and it has confirmed that there are no proposals to put such legislation in place. The DWP's view is that the current legislation is clear in that the GMP is a component of overall scheme benefits and it is the overall scheme benefits that are required to be equalised. It is the responsibility of the trustees to consider the most appropriate action for their scheme and members after taking advice.

The guidance sets out examples of approaches already taken by schemes, and trustees should consider whether any are appropriate for their scheme. These approaches to equalisation continue to apply to schemes winding up outside of the PPF. We do not suggest that these are the only approaches that can be taken and we welcome further examples to include in our guidance from those who have considered whether to undertake such an exercise.

We should point out that the PPF consultation document 'Consultation on the requirement under section 171 of the Pensions Act 2004 to equalise compensation to allow for differences in the GMP formula' only addresses schemes in a PPF assessment period. The consultation period ends on 28 July 2008 and we will update our guidance where appropriate in light of the PPF response.

We should reiterate, however, that at present schemes in a PPF assessment period should discuss GMP equalisation with their PPF caseworker before any action is taken.

Data

Some respondents felt that it was not appropriate to undertake activities such as data cleansing, data audit and member tracing while the scheme is ongoing in view of both the financial and time resources – particularly in relation to small schemes.

However, we take the view that record-keeping and other aspects of good administration are important for all schemes, those that are ongoing as well as those that are winding up. Further material from the regulator on record-keeping will be published shortly.

4. The way forward

The regulator, PPF and FAS stand by our commitment to working together – where it is sensible – to help make both the wind-up and assessment period processes smoother and we will continue to identify further opportunities for joint initiatives.

We very much recognise the importance of ensuring NISPI is a part of ongoing discussions and we are taking steps to identify how we can work more closely together.

The final version of the tripartite regulatory statement will be available in PDF format.

The final version of the regulator's good practice guidance on avoiding delays in winding up pension schemes will be in web-based format and will include appropriate links to ensure easy navigation and access to relevant information. It will also be available as a PDF download.

We will review the documents on a regular basis to ensure they reflect the position of schemes in wind-up and those passing through an assessment period and will look at how we can engage with those parties involved in both processes in a way that is efficient and effective.

Annex A

The following organisations provided responses to the consultation:

Association of Consulting Actuaries
Association of Pension Lawyers
AXA Life Insurance
Bridge Trustees
Capita Hartshead
Hammonds
HBOS Insurance and Investment
Hewitt
Hymans Robertson
Legal and General
Mercer
NAPF
Pearl Life
Pensions Management Institute
PricewaterhouseCoopers
Prudential
Society of Pension Consultants