

EXPLANATORY MEMORANDUM TO

THE OCCUPATIONAL PENSION SCHEMES (EMPLOYER DEBT – APPORTIONMENT ARRANGEMENTS)(AMENDMENT) REGULATIONS 2008

2008 No. 1068

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments..

2. Description

- 2.1 The Occupational Pension Schemes (Employer Debt – Apportionment Arrangements)(Amendment) Regulations 2008, made principally under sections 75 and 75A of the Pensions Act 1995 (as amended and inserted, respectively, by sections 271 and 272 of the Pensions Act 2004 (the 2004 Act)), amend the Occupational Pension Schemes (Employer Debt) Regulations 2005 (S.I. 2005/678) (the Principal Regulations). These amendments are seen as necessary because of a gap in the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2008 (S.I. 2008/731) (“the First Amending Regulations”), which came into force on 6th April 2008. During the laying stage of the First Amending Regulations the gap was identified and these Regulations correct it.
- 2.2 The regulations apply to multi-employer defined benefit (DB) schemes.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 These Regulations breach the 21-day rule. The Department regrets this, but in this case the breach is seen as necessary. After the First Amending Regulations had been laid but before they came into force the Department was made aware of concerns in the pensions industry that the Regulations contained a gap. The Department agrees that the Regulations as they stand do not fully deliver the policy intention, and that the unintended consequence of increasing trustees’ powers could have a serious and detrimental effect on some employers. To avoid the unintended consequence having any greater detrimental impact in the industry than is necessary, the Department have concluded that it is necessary to bring these Regulations into force as soon as possible.
- 3.2 In the Department’s view there will not be any detrimental impact to the industry as a result of breaching the 21-day rule. Indeed, we understand that the industry will welcome such action on the part of the Department to close an unintended gap, and to seek to clarify the intention of a regulation that the industry regard as ambiguous.
- 3.3 Because these Regulations correct an omission in the First Amending Regulations, they are being issued free of charge to all known recipients of that Statutory Instrument.

4. Legislative Background

- 4.1 During the laying stage of the First Amending Regulations which came into force on 6th April 2008, the pensions industry and press reported concerns with the operation of certain aspects of regulation 16 of the Principal Regulations (as substituted by regulation 12 of the First Amending Regulations).

- 4.2 This regulation allows trustees to change the amount of an exiting employer's debt to his pension scheme in line with existing legislation. However, the effect of this regulation taken with the rest of the Regulations is that the trustees could unfairly apportion a debt which was greater than the employer's original debt, without his consent. This was not our policy intention and the amendments rectify and clarify this.
- 4.3 These Regulations constitute the fifth exercise of the powers contained in sections 75 and 75A of the 1995 Act (as amended) and amend the Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678).

5. Territorial Extent and Application

- 5.1 This instrument extends to Great Britain.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

Previous Provisions

- 7.1 Regulation 16 of the Principal Regulations (as substituted by the First Amending Regulations) allows the trustees to change pension scheme rules so as to enable one of the possible arrangements under Regulation 6(2). Apportionment arrangements allow a debt to be shared out amongst the sponsoring employers of the pension scheme, in a way that is different to their calculated liabilities.
- 7.2 Currently the provision allows for trustees to change the size of an employer's debt which that employer is liable to pay on exiting a pension scheme.

Reason for change

- 7.3 The Department became aware of concerns about the interpretation of regulation 16 of the Principal Regulations, as substituted by the First Amending Regulations which came into force on 6th April 2008. New regulation 16 makes provision enabling trustees to amend pension scheme rules to change an employer's liability for the purposes of regulation 6(2) (as substituted by the First Amending Regulations). Stakeholder concerns suggested that regulation 16 could be interpreted as having changed significantly since consultation to give wider powers to the trustees to reallocate scheme liabilities to employers in a wholly different way. They interpreted such allocations as being possible outside the options set out in new regulation 6(2). The Department does not agree with this interpretation, and it is not in line with the policy intent, which has not changed since the consultation exercise. Any apportionment arrangements implemented as a result of new regulation 16 are intended and expected to be in line with the arrangements outlined in new regulation 6(2). The Department - whilst not agreeing that the effect of the new regulation 16 will allow apportionment of the liability outside of the options - believes that amendment of the cross-reference would be a helpful clarification. The amendment will re-limit this power to expressly refer to scheme apportionment arrangements (SAA) and regulated apportionment arrangements (RAA) only. This amendment is achieved in regulation 2(4) of these Regulations.

- 7.4 However, the Department accepts that stakeholders' primary concern is that the effect of new regulation 16, taken together with the effect of the regulations that come before, is that trustees could amend their scheme rules to impose a greater liability on an employer than would otherwise be the case under the regulations. The Department does not believe that this problem can be remedied by a new amendment to regulation 16, although the clarification referred to above will we believe assist. In the Department's view this gap appears elsewhere in the regulations, as a result of their being no express provision in the regulations that certain employers must agree to the proposed apportionment arrangement. This lack of express provision, taken together with the power in new regulation 16, has an unintended effect which could have a serious detrimental impact. The Department accepts that this could lead to unfair demands to be made on either exiting or remaining employers in cases where there was an increase to the debts of any party without that party's express agreement. The Department has therefore concluded that a provision requiring employers' consent in a case where an employer's liability is increased is necessary, and that these provisions must come into force as a matter of urgency. Therefore regulation 2(2) and (3) of these Regulations bring in amendments to the provisions detailing the conditions for a scheme apportionment arrangement and a regulated apportionment arrangement, to insert a provision requiring such employer consent. In cases of RAAs employer consent will only be needed if the assessment period has not already commenced

Consultation

- 7.5 These amendments did not go out for public consultation as the insertion of employer consent in certain cases was considered to correct a loophole which would have given trustees unlimited powers. This could have resulted in detriment to the operations of defined benefit pension schemes. These amendments deliver the policy intention as it stood during the previous consultation exercise. We have however informally consulted and taken into account the views of representatives of the Association of Pension Lawyers, the Pension Protection Fund and the Pensions Regulator.

Guidance

- 7.6 These Regulations are of interest to pension lawyers, pensions scheme actuaries and trustees and the amendments are technical. It is therefore inappropriate to issue specific guidance.

Consolidation

- 7.7 The Government accepts the need for consolidation in due course. However, most users of pensions legislation are pensions professionals who will have access to their own online resource materials. In addition the Department for Work and Pensions publishes the "Blue Volumes", which can be accessed by members of the public. The Blue Volumes contain the legislation for which the Department is responsible. The legislation is presented in a consolidated format and is updated regularly. The weblink is:

http://www.dwp.gov.uk/advisers/docs/lawvols/bluevol/pdf/c_0031.pdf

8. Impact

- 8.1 A full impact assessment has not been published for this instrument as it has only a negligible regulatory impact on the private and voluntary sectors.
- 8.2 The Regulations have no impact on the costs of the public sector.

9. Contact

Allyson Brook at the Department for Work and Pensions, Tel: 020 7962 8340 or e-mail: allyson.brook@dwp.gsi.gov.uk can answer any queries regarding the instrument.