

## New notifiable events and the declaration of intent

Alert | 9 September 2021



### Introduction

Against the backdrop of [PSA21](#), on 8 September 2021, the DWP published a [consultation](#) seeking views on changes to the notifiable events regime. In addition, the Government confirmed that it will press ahead with the introduction of a “Declaration of Intent” to be provided to TPR in relation to certain events.

### Key points

- Trustees and sponsoring employers of DB schemes are required to notify TPR of certain events relating to the scheme and/or the employer (known as “notifiable events”). Examples of existing employer events include breach of a banking covenant or a decision to cease trading.
- The draft regulations will introduce two new notifiable events, focusing on material sales and granting or extending certain security. Acknowledging its ineffectiveness, given that a director is unlikely to admit to it, the draft regulations will also remove the existing requirement to notify wrongful trading.
- Introducing an additional layer of potential notifications, a notice and accompanying statement will need to be provided to TPR in certain circumstances.
- We understand these changes are likely to come into force in 2022.

### Background

The Government’s 2018 consultation, “[Protecting DB Pension Schemes – A Stronger Pensions Regulator](#)”, looked at enhancing TPR’s powers. To this end, changes are due into force this autumn which will boost TPR’s ability to impose criminal and civil sanctions. In particular, going forward, breach of the notifiable events regime or the requirement to provide an accompanying statement without reasonable excuse will be punishable by a potential civil penalty of up to £1 million.

The purpose of the [notifiable events regime](#) is to assist TPR in reducing the risks of situations arising that may lead to calls on the PPF. In its [2019 response to consultation](#), the Government proposed two new employer-related notifiable events:

- a sale of a material proportion of the business or assets of a scheme employer which has funding

responsibility for at least 20% of the scheme's liabilities

- the granting of security on a debt to give it priority over debt to the scheme.

In addition, the Government announced that it would introduce a new “Declaration of Intent” to be provided to TPR in relation to certain events.

The draft regulations lay the groundwork for both of these new additions.

However, recognising the complexity and variation in the structures of multi-employer schemes and the potential challenges in establishing whether a particular threshold of liabilities has been met, the proposed 20% threshold described above has been removed.

## New notifiable events

Both of the new events will apply to all employers when a decision “in principle” has been taken. This is defined as “a decision prior to any negotiations or agreements being entered into with another party”. This is intended to coincide with the point at which an employer decided to go ahead, eg to sell the asset, and to then start negotiating the specific terms and to draw up the contract. It is at this point that the impact on the pension scheme and any mitigation that may be required should start to be considered.

### Material Sale

As such transactions frequently indicate a change in covenant support for a pension scheme, a notifiable event will be triggered where there is a decision in principle to sell a “material proportion” of a DB sponsor's business or assets.

A material proportion of the business of the employer is defined as one that accounts for more than 25% of its annual revenue, either on its own or together with other disposals decided upon or completed in the 12 months prior to the date of the notifiable event. Assessed in a similar way, a material proportion of the assets of the employer will be one that accounts for more than 25% of the gross value of its assets.

Both revenue and assets in this context are either as recorded in the most recent company annual accounts or, where the employer is not required to file annual accounts, its accounting records.

### Grant of security

An employer will be required to report a decision in principle to grant or extend a “relevant security” over its assets, where it would result in the secured creditor ranking above the DB pension scheme in the order of priority for debt recovery. The rationale here is that, should the employer become insolvent following such an event, the scheme would be more likely to receive a smaller amount of debt than if the security was not in place.

For these purposes, a “relevant security” is defined as a security granted or extended by the employer or one or more of its subsidiaries “comprising more than 25% of either the employer's consolidated revenue or its gross assets”. This includes both a fixed or floating charge over the employer's assets or those of the wider employer group, as well as an “all assets” floating charge which gives the charge-holder the right to appoint an administrator.

However, the following are out of scope:

- the refinancing of an existing debt, except where this entails the granting of a security mentioned above

- security for specific chattels, or
- financing for company vehicles.

## Notice and statement

In future, as soon as reasonably practicable after they become aware of a specified event, an “appropriate person” will need to give notices and statements to TPR setting out the implications for a DB pension scheme of certain employer corporate events, and how any risks to the scheme will be mitigated. The scheme’s trustees must be provided with a copy at the same time. Broadly, an “appropriate person” will be the employer or a person connected or associated with it.

The following events will be captured by these new requirements where the main terms have been proposed:

- the intended sale by the employer of a material proportion (see above) of its business or assets
- the intended granting or extending of a relevant security by the employer over its assets which would result in the secured creditor being ranked above the scheme in the order of priority for debt recovery
- where the employer is a company, the intended relinquishing of control by a controlling company.

Building on the latter event, a controlling company relinquishing control without actively taking any decision to do so will likewise be caught.

For these events, it is therefore intended that there will be at least two stages of notifications to TPR – an initial notification when a “decision in principle” is taken and a notice with an accompanying statement when the “main terms have been proposed”. Moreover, the second notice and accompanying statement must be updated where there is a “material change”, including a change to the main terms of the transaction or to any mitigation for the pension scheme.

As regards the contents of the accompanying statement, it must include a description of the event, the main terms proposed, and any perceived adverse effects on the employer’s ability to meet its legal obligations to support the scheme.

## Next steps

The consultation runs until 27 October 2021. While not stated in the consultation, it has previously been indicated that these regulations will be brought into force in 2022.

With the penalties for breach of the notifiable events regime potentially so much higher than currently (ie £5,000 for individuals and £50,000 in other cases), DB employers contemplating relevant corporate activity should take specialist pensions advice at the earliest opportunity.

If you have any questions on any of the above, **please speak to your usual Sackers contact.**

Sacker & Partners LLP  
20 Gresham Street  
London EC2V 7JE  
T +44 (0)20 7329 6699  
E [enquiries@sackers.com](mailto:enquiries@sackers.com)  
[www.sackers.com](http://www.sackers.com)

Nothing stated in this document should be treated as an authoritative statement of the law on any particular aspect or in any specific case. Action should not be taken on the basis of this document alone. For specific advice on any particular aspect you should speak to your usual Sackers contact. © Sacker & Partners LLP September 2021