



**Draft Occupational Pension Schemes (Employer Debt)  
(Amendment) Regulations 2017**

RESPONSE FROM ICAS TO  
THE DEPARTMENT OF WORK AND PENSIONS

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## Background

ICAS is a professional body for more than 21,000 world class business men and women who work in the UK in more than 100 countries around the world. Our members have all achieved the internationally recognised and respected CA qualification (Chartered Accountant). We are an educator, examiner, regulator and thought leader.

Almost two thirds of our working membership work in business; many leading some of the UK's and the world's great companies. The others work in accountancy practices ranging from the Big Four in the City to the small practitioner in rural areas of the country.

We currently have around 3,000 students striving to become the next generation of CAs under the tutelage of our expert staff and members. We regulate our members and their firms. We represent our members on a wide range of issues in accountancy, finance and business and seek to influence policy in the UK and globally, always acting in the public interest.

ICAS was created by Royal Charter in 1854.

## General Comments

The ICAS Pensions Panel and the ICAS Charities Panel welcome the opportunity to respond to the Department of Work and Pensions (DWP) consultation on the draft Pension Schemes (Employer Debt) (Amendment) Regulations 2017.

In May 2015, we responded to the DWP's call for evidence on reform of section 75 of the Pensions Act 1995 and strongly advocated urgent reform of the employer debt regulations at the time. While we welcome the proposals for deferred debt arrangements, the proposals do not go far enough. We believe it is essential that non-associated employers participating in a multi-employer scheme have the option of closing to future accrual without the risk of triggering an employer debt provided they remain fully responsible for the accrued liabilities. Finding a solution remains urgent: one solution would be to allow complete exemption from the employer debt trigger of Regulation 6ZA(1) for all non-associated employer schemes.

Employers participating in the Local Government Pension Scheme (LGPS), which are not public bodies, face similar challenges in that they may wish to cease future accrual but are unable to do so without triggering an employer debt.

This is an issue which is well documented and is just as urgent a matter to address as it is for employers participating in private sector multi-employer schemes. We believe that the UK Government should also review the approach taken by LGPS scheme funds towards employer debt. We very much hope that more fundamental reform of the section 75 employer debt rules is forthcoming and that this provides an impetus for change in the local government sector across the UK, including Scotland where this is a devolved matter.

In our responses to the consultation questions on the proposal for deferred debt arrangements, set out in the Appendix, we highlight some areas where we believe that further amendments and/or regulatory guidance may be necessary to strike the correct balance between the trustees' responsibilities to protect members' benefits and the employer's ability to remain financially sustainable.

The DWP's Green Paper 'Security and Sustainability in Defined Benefit Pension Schemes' closed for comment on 14 May 2017 and the ICAS Pensions Panel submitted a separate response to this. An issue central to the Green Paper is the potential for defined benefit (DB) schemes to consolidate. We believe that the employer debt regime is a barrier to consolidation therefore this should provide the UK Government with additional impetus for reforming the employer debt regulations.

Any enquiries should be addressed to Christine Scott, Head of Charities and Pensions, at [cscott@icas.com](mailto:cscott@icas.com)

## RESPONSES TO CONSULTATION QUESTIONS

### The deferred debt arrangement

#### Question 1

We would welcome your views on the deferred debt arrangement proposal. In particular, will it be helpful to employers of non-associated multi-employer schemes in managing an employer debt when they cease to employ an active member?

#### Question 2

Will the proposed conditions to enter into a deferred debt arrangement work in practice for the employer and the trustees and managers of the scheme?

#### Question 3

Do you envisage any difficulties in the practical operation of the deferred debt arrangement?

#### Question 4

Do you agree with the list of circumstances in which the deferred debt arrangement would end, and can you identify any other circumstances in which it will end?

#### Question 5

The deferred debt arrangement is available to employers who have entered into a period of grace. Should the deferred debt arrangement be available to employers who have already used one of the other arrangements for managing their employer debt?

### Response to questions 1 – 5

We believe it is essential that employers in multi-employer schemes who wish to cease future accrual can do so without triggering a cessation debt (employer debt), provided they remain responsible legally to contribute in respect of accrued liabilities. Reform in this area is long overdue and the proposals do not fully address this issue. However, we welcome the proposals and believe that these will be helpful to employers of non-associated multi-employer schemes.

We agree that a deferred debt arrangement should be arrived at through a dialogue between the trustees (or scheme managers) and the employer and that the trustees should be satisfied the funding test has been met before entering an arrangement.

There are aspects of the proposals where we believe further amendments may be required to the employer debt regulations and/or additional regulatory guidance published:

- Ultimately it is the responsibility of the trustees to protect member benefits. We recognise that trustees will enter discussions with employers in good faith and are under a general duty to act reasonably. As such, there will effectively be a presumption that if the funding test is met a deferred debt arrangement would be entered into.
- In assessing whether the funding test has been met, we expect the trustees to take into consideration the reduced risk to the scheme of the employer ceasing future accrual. In the event of the funding test being met, we would not wish to see trustees seeking security over employer assets as a condition of entering a deferred debt arrangement unless this was justified in particular circumstances. The meeting of the test, in itself, should normally be viewed as sufficient for the purposes of security of member benefits.
- For deferred debt arrangements to be taken up in practice, we believe an employer debt should not be triggered at the sole discretion of the trustees. We believe a more balanced position would be that this should only be possible with the agreement of the employer or in the event of a breach by the employer of the deferred debt arrangement. Additional guidance and parameters could be set in TPR guidance on the trustees' assessment of employer covenant weakening in the following 12-month period to enable trustees to deal with this along with input from employers. Fleshed out points in the guidance could deal with the timing and content of covenant information to enable this aspect to be dealt with efficiently and fairly.

We have a specific comment on new Regulation 6F(6), inserted into the employer debt regulations by amendment Regulation 7: Regulation 6F(6) should confirm that an employer debt is triggered on the date that the trustees and the employer agree it will be triggered. Therefore, a reference to new Regulation 6F(5)(b) is required in 6F(6)(c).

### **Commentary on the draft Regulations**

#### **Question 6**

- i. Will this amendment work in practice where an organisation's restructuring is limited to changing its status and are there any further situations it should cover?
- ii. Are any changes needed to regulations 6ZA and 6ZB of the Employer Debt Regulations to provide for a restructuring where the receiving employer is the new legal status of the exiting employer?

#### **Response**

We support the proposal to enable an organisation to change its legal form without triggering an employer debt.

We believe that other restructuring arrangements could maintain or strengthen rather than weaken the employer covenant, therefore, we would have preferred the scope of the regulations to have been extended to other restructuring arrangements albeit with safeguards. However, we accept that developing regulations to facilitate this would be more complex and we would not wish to delay changes to the employer debt regulations while additional amendments in this regard were considered.

#### **Question 7**

- i. Is the funding test appropriate for the deferred debt arrangement?
- ii. Are any further changes needed to the test to ensure it works in practice?
- iii. Are there any circumstances in which it would be unnecessary?

#### **Response**

We welcome the proposed approach whereby the funding test must be met before a deferred debt arrangement can be put in place. We comment in our response to questions 1 to 5 on where we see there being scope for further amendments to the employer debt regulations and/ or additional regulatory guidance. We believe that further amendments and or guidance may be necessary to strike the correct balance between the trustees' responsibilities to protect members' benefits and the employer's ability to remain financially sustainable, including by ceasing future accrual. Additional regulatory guidance should take into consideration that the trustees' understanding of a non-associated employer's circumstances may not be as strong as would be the case in relation to associated employers or to a single sponsoring employer.

If anything, the funding test is likely to be easier to meet for a deferred debt arrangement than for an apportionment arrangement as the employer is still liable to contribute to the scheme. Through being able to cease future accrual through entering a deferred debt arrangement, there will be fewer liabilities for the employer and the scheme to fund once the deferred debt arrangement is in place.

#### **Question 8**

- i. Does this adequately address the problems the schemes have faced in calculating an employer debt in relation to more than one employment-cessation event?
- ii. Is this provision a fair way to attribute liabilities to an employer who has undergone two sequential employment-cessation events?
- iii. Does there need to be any related assessment of the schemes funding position in relation to it?
- iv. Does this provision pose any risk to the funding of pension schemes and members pensions?

**Response**

We believe that it is sensible to amend the regulations such that an employer debt is not required to be met more than once in respect of the same liabilities. We have no comments on the draft amendment regulations in respect of this issue.

**Question 9**

Will a three-month period allow sufficient time for both employers and trustees to process a period of grace application?

**Response**

We support the increase from two months to three months.

**Question 10**

- i. Will the arrangements enabling a deferred debt arrangement to follow on from a period of grace arrangement work in practice?
- ii. Are any further changes needed to facilitate this?

**Response**

We support the proposal to enable a deferred debt arrangement to follow on from a period of grace.

We have a comment on Regulation 5(2)(c) of the amendment regulations which amends Regulation 6A(1)(b): the amendment suggests that an employer can enter a period of grace because it intends to enter a deferred debt arrangement. However, the change is not fully tracked through the draft amendment regulations creating contradictions. We recommend that the DWP checks that this change is intended and, if so, that the change is tracked through the amendment regulations as necessary.

**OTHER COMMENTS****The debt trigger**

We believe the legislation surrounding section 75 debts in non-associated multi-employer schemes remains a fundamental issue notwithstanding the proposal to introduce deferred debt arrangements. In particular, the impact of Regulation 6ZA(1) of the Employer Debt Regulations will continue to cause problems. This provides that a section 75 debt is triggered when an employer ceases to employ active members while another employer continues to do so.

This continues to have a disproportionate impact on a significant number of employers in non-associated multi-employer schemes which are forced to continue benefit accrual and therefore steadily increase the liabilities of the scheme because a section 75 debt being triggered would be potentially ruinous. This prevents the employer from taking effective steps to put the scheme on a sustainable long-term financial footing, and as a result it is the security of members' benefits that is ultimately eroded.

We believe reform of this area is urgently required and the deferred debt arrangement does not address this fundamental issue. One solution would be to allow complete exemption from the trigger of 6ZA(1) for all non-associated employer schemes. We are aware that finding a long-term solution which enables an employer debt to be legally compromised would give rise to other issues, which would need to be thought through, such as the scheme and the employer's relationship with the Pension Protection Fund.

**The Local Government Pension Scheme**

The amendments to the employer debt regulations impact on private sector multi-employer DB schemes. Non-associated employers participating in LGPS, which are not public bodies, face similar challenges to those articulated in the consultation paper in that they may wish to cease future accrual but are unable to do so without triggering an employer debt.

This is an issue which is well documented and is just as urgent a matter to address as it is for employers participating in private sector multi-employer schemes. It is custom and practice for LGPS funds to trigger an employer debt when an employer ceases to have an active member in the scheme. It would be possible for Government ministers to require scheme funds to take a different approach or for scheme managers to apply their discretion.

While we are urging the UK Government to look again at the application of section 75 to non-associated employers in private sector scheme, we believe the Government should also review the approach taken by LGPS scheme funds towards employer debt.

In Scotland, this is a devolved matter and we are aware that the Scottish Government and Scheme Advisory Board are examining the challenges faced by admission bodies which cannot afford to cease future accrual but cannot afford the additional liabilities they are accruing.

We very much hope that there will be broader reform of the section 75 employer debt rules and that this will provide an impetus for change in the local government sector.

From a DWP perspective, broader reform of the employer debt rules and the adoption of similar practice by the LGPS would ease the pressure on participating employers, such as charities, which arise from increases in the minimum auto enrolment contributions from 1% of qualifying earnings to 2% from April 2018 and from 2% to 3% from April 2019 onwards.