

# **New Notifiable Events may Trump Criminal Sanctions as the Biggest Potential Disruptor of Corporate Activity**

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The new Pension Schemes Act 2021 paved the way for potential changes to the notifiable events framework which is intended to give The Pensions Regulator (TPR) early warning of possible calls on the Pension Protection Fund.

The Department for Work and Pensions (DWP) has now issued draft regulations (Draft Regulations) and consulted on proposed changes to the notifiable events framework to introduce new requirements to notify TPR of material corporate activity that may affect a pension scheme, with high penalties for failure to comply. The consultation closed on 27 October 2021, and the regulations are expected to come into force in April 2022.

## **New “Super” Notifiable Events**

The Draft Regulations establish two new notifiable events and update an existing notifiable event, each treated as “super” notifiable events, addressing material corporate sales and granting or extending certain security.

The two new ones are:

- Where there has been a decision in principle by the employer to sell a material proportion, of its business or assets. For this purpose, for a business sale a material proportion is 25% or more of the annual revenue of the business (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). A material proportion for an asset sale is 25% or more of the gross value of the employer’s assets. Both are assessed by reference to the employer’s most recent annual accounts or, where the employer is not required to file annual accounts, its accounting records.
- Where there has been a decision in principle by the employer to grant or extend security over 25% or more of its assets or revenue, such that, should the employer become insolvent, the secured creditor would rank above the pension scheme in the order of priority for debt recovery. Certain grants of security are not caught, including the refinancing of an existing debt (other than where this involves the granting of a security mentioned above), security for specific assets, or financing for company vehicles.

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An existing notifiable event where a controlling company relinquishes control of the employer company will change to become a notifiable event at the point at which a “decision in principle” is made by the controlling company, or there has been an offer to acquire the employer company.

It is worth noting that the obligation to notify TPR will be triggered by a decision in principle being made, rather than the occurrence of the event itself. There will be two stages in the process:

- An initial notification when a “decision in principle” is made.
- A notice with an accompanying statement when the “main terms have been proposed”.

### **What Is Meant by a Decision in Principle?**

Whilst the DWP has attempted to define what is meant by a “decision in principle”, the proposed wording is not clear for a number of reasons. The Draft Regulations do not specify who has the power to make a decision in principle, what constitutes the beginning of negotiations, or provide much detail on what the timing of the notification should be.

The Draft Regulations define a “decision in principle” 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 decides to go ahead with an action (for example to sell an asset). The consultation envisages that the employer will then start to negotiate the specific terms and draw up the contract.

It may be that a documented decision taken at a board meeting to start marketing a material proportion of the employer’s business and assets would constitute a decision in principle. But if this is just to “test the market” rather than a real intention to sell, would that trigger the notification? What about the situation where an employer has no intention of selling the business, but is approached by a potential purchaser, interested in buying a part of the business? The employer allows the purchaser to undertake some due diligence on the business and they discuss what might constitute an appropriate price. At what point in that scenario has a decision in principle been taken? Could internal conversations be enough to constitute a decision in principle? Could correspondence or discussion in a meeting be enough to confirm a decision in principle without that decision being formalised and/or voted upon?

This uncertainty raises a number of concerns as, without further clarity from TPR, legal duties to notify could be triggered without decision-makers becoming aware of them. Employers will be wondering how specific or definite a decision needs to be to trigger a notification requirement.

### **Notice and Statement Requirements in Relation to “Super” Notifiable Events**

The three “super” notifiable events will require an “appropriate person” to provide a notice and a statement to TPR, as soon as the main terms of the event “have been proposed” (which will be at some point in the transaction **after** the decision in principle has been made and notified to TPR, but **before** completion of the transaction). This notice 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. The change must be notified as soon as reasonably practicable after an “appropriate person” becomes aware of the change. This has already caused some consternation within the

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industry. Will it be necessary, therefore, to constantly submit updated notifications each time the terms of the deal change as is often the case during the course of a negotiation? Furthermore, will TPR have the resources to review and assess all of the submissions that are made?

The notice and statement must be provided to the pension scheme trustees at the same time. An “appropriate person” will generally be the employer or a person connected or associated with it.

The Pension Schemes Act 2021 sets out a non-exhaustive list of what information may be contained in the statement, and the Draft Regulations supplement this. Broadly, the statement must cover a description of the event (transaction), any adverse effects of the event and the employer’s ability to meet its legal obligations to support the scheme, steps taken to mitigate those adverse effects and a description of any communication with the scheme trustees.

## **Other Changes**

Wrongful trading (an existing notifiable event) will be removed as an employer notifiable event. The consultation states that TPR has never been notified of wrongful trading under the notifiable events framework and, given the nature of the notifiable event, it is unlikely that TPR would ever receive such a notification.

## **Fines and Penalties**

Potential fines have increased to up to £1 million for failure to comply with the notifiable events regime including a failure to comply with the notice and statement requirements. In its draft policy on how it proposes to use its new financial penalty powers, TPR has said that where a regulatory breach has *minimal* impact the penalty will be of an amount up to £100,000! There is therefore no room for complacency.

## **Further Guidance and Advice**

Employers and their parent companies will no doubt welcome examples and guidance from TPR to aid their understanding of when the new notifiable events duties are triggered. In any event, this is a key risk area in which legal advice should be sought, including to:

- Clarify the extent of the new duties (particularly after the Draft Regulations are finalised) and how and when these duties apply to any actual or proposed corporate activity. Employers and parent companies should consider providing key staff with training on this updated regime sooner rather than later and ensure that all key personnel are aware of the new requirements.
- Assess the risk of non-compliance and ensure these risks are appropriately managed and mitigated, including the adoption of new procedures for both companies and trustees to ensure compliance and appropriate governance around the new duties so that reporting procedures and communication protocols are clear.
- Support appropriate decision-making in the employer’s provision of and trustee response to a “super” notifiable event notice and statement.

*Patricia Bailey contributed to this article.*

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