SQUIRE PATTON BOGGS

Pensions Quick Guide

Corporate Transactions for Pension Trustees

What Do Pension Trustees Need to Know About Corporate Transactions?

Three main types of corporate transactions are likely to have an impact on an occupational pension scheme: sale of an employer (share sale), sale of an employer's business (business sale) and a group reorganisation (which could take the form of either a share sale or a business sale, or a mixture of the two). Pension trustees should, therefore, be familiar with the basics of corporate transactions, as it is likely that at some point over the lifetime of a pension scheme, there will be a corporate transaction involving one or more scheme employers. In this quick guide, we set out some of the key things that trustees should consider when faced with corporate activity.

Will the Trustees Be Involved in the Transaction Process?

Most employers would normally ask the pension trustees to sign a non-disclosure agreement in relation to a potential transaction. Trustees should take legal advice on any non-disclosure agreement to make sure the agreement is appropriate.

A purchaser will usually undertake a due diligence exercise on the employer and/or business being purchased, and that is likely to include a review of the pension arrangements. The trustees may be asked to produce documents and information, which will be passed to the purchaser. The purchaser will look for information to enable it to ascertain the liabilities it will assume. The information sought can, therefore, include deeds and rules, accounts and valuation documentation, as well as information about ongoing disputes. It will usually want detail on common areas for unidentified risks, such as historic closures to accrual or methods for equalising retirement benefits between men and women. Trustees should not disclose personal data about members or other third parties without first concluding that they have a lawful basis for doing so and obtaining appropriate assurances about how it will be used and protected. Trustees should take legal advice to make sure commitments given are adequate and binding.

Sometimes, trustees are asked to agree to actions to facilitate the transaction. For example, they might be asked to amend the scheme's rules, to admit new employers or to agree to apportion liabilities between one employer and another. They might also be asked to agree to changes in funding or covenant support arrangements. Sometimes, they will be offered something beneficial (e.g. a cash injection or a guarantee) in order to mitigate against some other detriment that will follow from the transaction (e.g. loss of the access to a wider group covenant). In all cases, they need to satisfy themselves that they have the power to do whatever is asked of them and, looking at the impact on the scheme and its members, that it is an appropriate course of action. They will need legal advice and often actuarial and covenant advice to be able to reach a decision.

TIP: Act promptly once notified of a potential corporate transaction. Corporate transactions are often fast paced, so trustees will not necessarily have the luxury of waiting for the next scheduled trustee meeting before taking action.

Will the Trustees Need to Seek Clearance From The Pensions Regulator?

Trustees would not normally seek clearance from The Pensions Regulator. The Pensions Regulator has the power to take action against parties involved in an event that might be materially detrimental to a defined benefit pension scheme. It can also require an employer or connected/associated party to make a payment into an underfunded pension scheme or to provide some other form of financial support to it. These powers are often referred to as The Pensions Regulator's "anti-avoidance" powers. The seller and/or purchaser may, therefore, wish to seek advance clearance from The Pensions Regulator that it will not use its anti-avoidance powers in relation to the proposed sale. The trustees would not ordinarily seek clearance themselves, as it is unlikely that The Pensions Regulator would exercise its anti-avoidance powers over them, save in exceptional circumstances.

The Pensions Regulator expects the employer to keep trustees fully informed about any clearance application relating to the scheme and will want to know the trustees' view on the clearance application. It is likely to ask the trustees what advice they have received (and may ask for a copy of that advice) and what mitigation they have sought. Trustees should take legal advice before sharing professional advice with The Pensions Regulator, or others, in order to ensure that "legal privilege" in the advice is protected where appropriate.

TIP: Ensure that any agreements reached with the employer are legally binding. This is good practice in any situation, but even more so in the case of a corporate transaction when the ownership or management might be about to change.

What Are the Possible Consequences of the Proposed Transaction for Employer Funding Obligations?

Trustees should identify whether the transaction will trigger an employer debt and, if so, whether the employer wishes to use one of the easements available under legislation to manage that debt (see our employer debt quick guide for more information.) They should also make sure that any consequences of the end of participation in the scheme by an employer are understood and acted on as necessary. Some common situations are described in the table below.

	Share Sale		Business Sale	
	Single Employer Scheme	**Multi-employer Scheme**	**Single Employer Scheme**	**Multi-employer Scheme**
Will the employer continue as a participating employer in the pension scheme?	Yes, usually (but check the scheme rules for any change of control provisions)	Not usually (but check the scheme rules)	Yes, usually (but check the scheme rules)	Not usually (but check the scheme rules)
Will the employer continue as a statutory employer of the pension scheme?	Yes	No, assuming employer debt to the scheme is satisfied/ dealt with	Yes	No, assuming employer debt to the scheme is satisfied/dealt with
Will the transaction trigger an employer debt?	No	Yes, assuming the employer leaves the scheme and/or its employees are no longer eligible for membership	No	Yes, assuming the employer will not retain any employees who are eligible for membership
Are any debt easements available?	N/A	Yes, but it is more likely that a purchaser would want the finality of the debt being demanded and paid at the point of completion (having first sought an indemnity from the seller)	N/A	Yes
Will there be a notifiable event?	Yes, if the sale is out of the group	Yes, if the sale is out of the group and/or a debt easement is used	Yes, if the employer ceases to trade in the UK	Yes, if the employer ceases to trade in the UK and/or a debt easement is used

The employer debt will represent the departing employer's share of the shortfall in the pension scheme between the value of the scheme's assets and what is needed to buy annuities and secure all pensions in full (plus winding up expenses).

A statutory employer is an employer that continues to be treated as a scheme employer for the purposes of the employer debt legislation and the scheme funding legislation. It will continue to be responsible for the funding of the scheme until the scheme winds up, unless the employer takes steps under the employer debt legislation to trigger and satisfy its employer debt.

What Else Will Trustees Need to Consider on a Corporate Transaction?

Conflicts of Interest	Trustees will need to carefully manage any conflicts of interest, especially if some of the trustees are officers of the employer or other group companies. Some conflicts can be managed by a trustee absenting themselves from trustee meetings at which the proposed transaction is discussed. Confidentiality conflicts (i.e. where the trustee becomes aware of confidential information that would be useful to their co-trustees), however, are more difficult to manage. These are best addressed at the outset and might result in a trustee having to resign their position as trustee pending completion of the transaction.
Master Trust Implications	Trustees of a scheme that provides defined contribution benefits (other than simply through additional voluntary contributions arrangements) should consider carefully whether a transaction might result in an employer that is not connected with the group participating in a multi-employer pension scheme. If an employer is not (or ceases to be) connected with the group, this could inadvertently render the scheme a master trust subject to the new regulatory regime.
Notifiable Events	Trustees should establish which events are notifiable by the trustees. A notifiable event must be made on Exchange as soon as reasonably practicable. This usually means within 24 hours. If the employer fails to make an appropriate notification, the trustees may have a whistleblowing duty to inform The Pensions Regulator (see our quick guide on reporting breaches of the law for further information).
Disclosure Requirements	When a transaction results in employees who were active members of the pension scheme becoming deferred members, the usual provision of information requirements for deferred members will apply.

Some Practical Points

Do	Don't
Do consider whether the transaction might affect any contingent assets that the trustees have in place.	**Don't** provide personal member data to a purchaser as part of any due diligence exercise without ensuring there is a lawful basis and adequate legal protections. Trustees should generally only provide anonymised membership lists, etc.
Do check the scheme rules on the sale of an employer out of a multi-employer scheme to see whether this automatically triggers the departure of that employer from the scheme and/or a partial winding up.	**Don't** forget to update Exchange with any relevant information, such as change of participating employers in the scheme.
Do keep to the terms of any non-disclosure agreement (save where to do so would be a breach of trust or contrary to pensions legislation). Whilst such documents are difficult to enforce, a lot of goodwill would be lost if they were breached.	**Don't** get caught unawares by member queries. Ask to be kept informed by the employer of any employee consultation process.

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