

Surplus to requirements or just right?

Pensions Briefing

On 10 June DWP issued a consultation paper on draft regulations for release of surplus from ongoing schemes to sponsoring employers. The Pensions Regulator also published its “early views” on how trustees should approach surplus release and says it intends to publish more detailed guidance for consultation later this year.

The new regime is likely to come into force in April 2027 and both employers and members may want to encourage trustees to consider releasing surplus. Trustees should be prepared for this. Sponsors will also need to consider whether release is achievable or desirable.

Draft legislation is also expected later this year to allow trustees flexibility to release surplus to members over normal minimum pension age.

The new legislation will be an important factor in endgame planning: whether to target buy-out and wind-up or whether to run-on with periodic releases of surplus at agreed funding levels, possibly as part of a structured transaction which is ultimately aimed at the transfer of the scheme to a third party.

Although the Government is in favour of the release of surplus (with appropriate protections), it is too early to speculate what schemes will do in practice. It may only take a few to move first and the herd will follow. The new regime may also provide encouragement for those currently considering structured transactions.

Pension Schemes Act 2026

The Act will allow trustees to amend the scheme by resolution where they have no power to refund surplus (or an existing power is subject to onerous restrictions).

The draft regulations

The new draft regulations are accompanied by detailed commentary in the consultation paper. There is also a helpful illustration of process and timings. The consultation paper follows engagement and testing with industry bodies including actuaries. However, it's important to note that the new regime will not provide a safe harbour for surplus release, allowing it to be done without challenge, simply a process and set of conditions which represent the minimum required.

The process

Under the new provisions, surplus release will work as follows:

- **Power in the rules:** The parties need to consider whether trustees should and indeed can make use of the resolution making power in the Act to amend their scheme rules. Trustees will need advice on what factors they should take into account.
- **Actuarial assessment:** If a release is being considered, the trustees will need to ask the scheme actuary to carry out an “actuarial assessment”. The actuary will need to determine the value of liabilities on a low dependency basis. Based on advice, the trustees need to tell the actuary the value of the assets and the date on which they were valued. The whole process may or may not form part of an actuarial valuation.
- **Agree proposal:** Once the assessment has been completed and assuming it shows a surplus, trustees must take advice from the actuary and consult the employer about both the amount of any release and the proposed date of any payment.
- **Benefit for members:** Any augmentation to member benefits will need to be done under the relevant provisions in the scheme rules and is not covered by the process set out in the draft regulations.

However, the draft regulations do refer to a new form of authorised lump sum payment. The Government stated in the last budget that it intended to allow one-off surplus payments to members over normal minimum pension age. The draft regulations suggest that these lump sums can be awarded to younger members and deferred until they reach minimum pension age but will need to receive statutory revaluation to ensure that they maintain their real value. This could be complex to administer.

- **Employer consent:** Employers need to consent to the proposal to make a payment to them.
- **Notice to members:** At least 3 months before the proposed date of any release, the trustees must give written notice to members telling them about the release, the target date and, if relevant “that the

trustees have decided to award improvements to member benefits". There is however no requirement to invite members to make representations (which contrasts with the winding-up regime).

- **Actuarial certification:** Around the end of the member notice period (or possibly later), the scheme actuary will need to provide the trustees with an actuarial certificate confirming that two conditions are met:
 - the scheme assets are greater than the liabilities on a low dependency basis; and
 - during the three years following the certificate, in the actuary's opinion, the assets are "at least as likely" as not to continue to be greater than liabilities on a low dependency basis. This is intended to provide "trustees with... assurance that... a release will not unreasonably threaten the scheme's funding position over time".
- **Payment to employers:** Once the actuarial certificate has been given, any payment must be made to the employer within 5 working days. It must be the amount that was agreed at the preliminary stage and notified to members – there is no scope to pay more or less, if the parties want to do that, they may need to redo some of the stages discussed above.

The 5-day timescale is tight, especially given that the current regime allows 15 months. It also means that if trustees are planning a phased surplus release, they will need to get a new certificate for each payment.

- **Notification to the Regulator:** The trustees have one week after making a payment to notify the Regulator. The current regime requires this also but significantly more information will be required in the future including the amount of the surplus, the amount of the payment and "the value of any improvements to member benefits" – although it is not clear how this value is to be established. No pre-approval will be required from the Regulator.

The Pensions Regulator's "early views"

The Regulator has issued its **preliminary views** on the things that trustees should consider when considering surplus distribution. More detailed guidance will be issued for consultation later this year.

The Regulator **has previously said** that it expects trustees and employers to negotiate in good faith and work collaboratively and that employers should not put trustees under undue pressure.

Where trustees and employers are starting to look at release of surplus, trustees should check whether they have a surplus policy and, if not, consider putting one in place. They should also ensure that the scheme's funding

and investment strategy aligns with their surplus policy and if necessary, consider how it should be amended.

Part of understanding whether a refund can be made requires trustees to be clear about what scheme liabilities are, including where the scheme is with GMP equalisation and Virgin Media issues and whether further work is required in these or other areas.

The Regulator also suggests that trustees should document discussions around surplus release to demonstrate their decision-making process and rationale, in case of any future challenge.

When reaching a decision about whether to release surplus, trustees' fiduciary duties require them to consider all relevant factors and ignore irrelevant ones. The Regulator suggests that relevant factors might include:

- Scheme rules and discretionary powers. This might also require for example a consideration of what the winding-up rule provides.
- The funding level and the right level for surplus release and over what period. This means considering "the size of the financial buffer above low dependency" (which suggests that there should be one).
- Whether running on the scheme and releasing surplus in the long term is a viable option and the planned length for running on.
- The current strength of the employer covenant and future prospects.
- Contingent assets which may be particularly useful if the scheme is funded above low dependency but not at a full buyout level.
- Benefit to members. Although there is no legal requirement to provide additional benefits for members and "the policy intent... is not to mandate the use of surplus for any particular purpose", member expectations should be considered.

In deciding whether to grant additional benefits, trustees might want to consider the extent to which members have contributed to the scheme, whether benefits have been reduced, capped or augmented in the past, the level of indexation provided and what member expectations are (e.g. have they been granted discretionary increases in the past).

- The impact on the investment strategy and whether changes are required.
- Employer support for the scheme and how it has engaged in the past.

Timing

Consultation on the proposed regulations closes on 2 September 2026. The legislation is intended to come into force in April 2027.

The Pensions Regulator is expected to publish detailed guidance for consultation later this year.

The Finance Bill 2026-27 should set out further details of amendments to the tax legislation to treat member surplus payments as authorised payments and these changes are also intended to come into force on 6 April 2027.

Next steps

Trustees and sponsors should start to consider how they should approach this incoming legislation. This should include a consideration of the funding level at which a release might be triggered – which could well be above low dependency.

Risk assessment and mitigation options will be key. Depending on the funding threshold adopted for surplus

release, trustees may want a covenant protection mechanism to be put in place.

The parties will also need to consider whether any release would involve additional benefits being granted to members and what member expectations and likely responses to any proposals might be as well as how they might want to communicate with members.

Trustees and sponsors also need to consider whether other options might achieve their aims better than surplus release. It might for example be possible to use DB surplus to meet DC contributions, either in the same scheme or as part of a transfer to another DC arrangement.

[Please do get in touch with your usual Slaughter and May contact if you wish to discuss this further.](#)

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