Dear Sir/Madam

Inquiry: Pension Protection Fund and the Pensions Regulator

This is a response from the Employment, Pensions and Benefits department of Freshfields Bruckhaus Deringer LLP to the invitation dated 8 August 2016 to submit written evidence to the Work and Pensions Committee (the “Committee”) seeking views on defined benefit (“DB”) pensions regulation by the Pensions Regulator (“TPR”) (and other areas relating to the regulation of pension schemes).

Freshfields Bruckhaus Deringer LLP is a leading international law firm advising national and multinational corporations and financial institutions. The pensions team within our Employment, Pensions and Benefits department has extensive experience advising large employers and trustees of DB pension schemes on a full range of legal issues, with particular experience in corporate transactions, funding issues and situations involving companies in distress.

Although the terms of reference of the Committee include a number of areas in relation to TPR and the Pension Protection Fund (the “PPF”), we have limited our response to comments on three specific points considered.

Members of the pensions team have also been involved (with numerous other law firms) with preparing the response to the Committee from the Association of Pension Lawyers, which provides evidence to the Committee on a broader range of issues.

1. Executive summary

1.1 TPR has wide enough powers: Our view is that TPR already has an extensive range of powers under the current regulatory regime in the Pensions Act 2004, both in relation to scheme funding and in relation to corporate activity through the “moral hazard” regime and that those existing powers should (if exercised appropriately) be sufficient for TPR to meet its statutory objectives.

1.2 Issues of detail could improve the powers: There are points of detail in the current regulatory regime which do present an unnecessary barrier to effective supervision by TPR. The specific point of concern which has caused us particular difficulties when dealing with companies in distressed situations is the statutory period that has to pass between TPR issuing a warning notice that it intends to approve a regulated apportionment arrangement (“RAA”) and the final notice from TPR approving the RAA (see section 2 below).

1.3 Compulsory clearance could bring additional risk: There has been suggestion that the regulatory regime should be strengthened by introducing a requirement for compulsory clearance of certain corporate activity. We have significant concerns about whether such a compulsory regime could be structured to provide effective additional protection for schemes without an undue burden on corporate groups (and indeed TPR) (see section 3 below).
1.4 *TPR’s practice:* Finally, as a more general point, on some occasions we have encountered difficulties with the way TPR implements and exercises its powers in practice, both in scheme funding discussions and on corporate transactions where clearance is being considered. These difficulties include: (i) not being helpful/commercial e.g. by raising concerns but not disclosing details of those concerns to enable trustees and employers to resolve them effectively and efficiently; and (ii) rigidly applying its policy due to fear of setting a precedent regardless of the merits of individual circumstances (e.g. by refusing to contemplate clearance where there is no “Type A event” regardless of the merits of the underlying request for clearance and commercial need for clearance in the particular circumstances). That said, where TPR has chosen to engage in a constructive way or where matters fall within its policies, we have experience of it being very flexible, acting quickly and responding to commercial timescales in a helpful manner.

2. Regulated apportionment arrangements

2.1 Regulated Apportionment Arrangements (“RAAs”) under the Employer Debt Regulations are a crucial tool for implementing pensions compromises in distressed situations. We would welcome the removal of the statutory period that has to pass between TPR issuing a warning notice that it intends to approve a regulated apportionment arrangement (“RAA”) and the final notice of approval from TPR which enables the RAA to take effect.

2.2 Under the current legislation, there is a 28 day period. In our experience, which includes advising on a number of RAAs over the last few years, the period of 28 days serves no purpose and positively endangers the change of successfully restructuring distressed companies to the benefit of all stakeholders (including the PPF). This is because the effect of the 28 period is to artificially restrict the period in which agreement on pensions can be reached, such that agreement on pensions has to be reached 28 days before the point the distressed company would otherwise run out of funds (and suffer an insolvency event). This makes no sense - a distressed company might not be able to continue trading for the duration of the 28 day period, even though a pensions deal has been reached.

2.3 This is compounded by the fact that in circumstances where an RAA is contemplated there will often be complex negotiations with the trustees, TPR and the PPF in relation to the pension scheme at the same time as complex negotiations with other affected parties (including banks, employees, landlords etc.) are being undertaken. Even if agreement on pensions is reached 28 days in advance, (and the 28 day period is started) there is a risk that the RAA will still not be effective because the circumstances of the company change materially due to ongoing negotiations with other affected parties during the statutory period (unless the warning notice is reissued taking into account the revised circumstances, which would re-start the 28 day period).

2.4 The 28 day period seems unnecessary, particularly compared to the clearance process which does not require a minimum period between the issue of the warning notice and the final determination notice. We have advised on many transactions involving clearance where TPR has (helpfully) issued the warning notice and final determination notice very close together (sometimes within a few hours). We understand that the aim of the 28 day period is to allow directly affected parties to make representations to TPR about the warning notice, but in practice the only directly affected parties will already have agreed to the proposed
RAA at the point the warning notice is issued, rendering the representation period wholly unnecessary.

3. **Compulsory clearance**

3.1 We have significant concerns as to whether a compulsory TPR clearance regime could be structured which would provide effective additional protection for schemes without being an undue burden on corporate groups (which in turn would damage the employer covenant supporting schemes).

3.2 If clearance were to become compulsory, our view is that it would be difficult to capture all the specific circumstances that would require clearance - there are a wide range of issues/events that could impact a DB scheme and the process determining those circumstances is subjective.

3.3 If compulsory clearance were limited to a narrow range of objectively defined circumstances (e.g. sales of a company which operates a DB pension scheme), then it would inevitably involve clearance being required in many cases where there is no detrimental impact on the scheme, whilst clearance would not be required in many cases which could have a significant detrimental impact (such as dividend payments and refinancings).

3.4 If the circumstances of compulsory clearance were drafted widely (and more subjectively), there would be considerable business uncertainty which would inevitably lead to many more clearance applications, which in turn would require additional TPR resources and would be a significant additional burden for businesses. We hope this is helpful.

Yours faithfully

Freshfields Bruckhaus Deringer LLP

*September 2016*