

# The Pensions Regulator

Frank Field MP  
Work & Pensions Select Committee  
House of Commons  
LONDON  
SW1A 0AA

20 May 2016

Dear Mr Field,

Thank you for your letters of 13 May and 16 May requesting further clarification on The Pensions Regulator's (TPR) evidence to the Work & Pensions and Business, Innovation & Skills Select Committees.

I note that your requests are made on the proviso that they can be met without damaging our ongoing investigation into whether it would be appropriate to use our avoidance powers into the BHS pension schemes. We have endeavoured to meet your requests as fully as possible. However, you will appreciate that the information in this letter is limited to what we feel we are able to share at this stage.

## **Timeline of TPR's actions with regards to BHS, encompassing:**

### **a. Opening of a recovery plan case in May 2010 to BHS first 'crossing the radar' of the PPF in March 2012**

*All Defined Benefit (DB) pension schemes are required to complete a triennial valuation of their assets and liabilities. These must be submitted to TPR along with a recovery plan when the scheme is in deficit. Our role is not to agree recovery plans – this is for the trustee and employer to agree – but we will open cases to raise issues with the parties where we have concerns or wish to better understand the agreed recovery plan. Cases are opened with reference to an internal assessment of risk-based criteria that include the size of the scheme, strength of the employer and length of the recovery plan. TPR has the power to impose a recovery plan if the parties cannot come to a satisfactory agreement. When we are satisfied with a recovery plan we will confirm that we intend to take no action in respect of it.*

**April 2010:** Valuation documents and recovery plan submitted to TPR.

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**June 2010:** TPR opened a funding case to challenge trustees on (i) recovery plan length of 12.5 years and (ii) technical provisions assumptions.

**Mid-late 2010:** Request for further information from the trustees and subsequent engagement. During this contact we learned that the trustees' negotiation had secured improvements over the company's original recovery plan proposal.

**March 2011:** In view of the improvements obtained by the trustees, we decided to close the case with comments for the trustees to focus on for the next valuation.

**Note on the PPF guarantee:** Arcadia's letter dated 11 May 2016 to the BIS and W&P Committees states that the Davenbush guarantee remains effective. As the PPF has explained, it did not provide sufficient value for them to recertify it in respect of the schemes' levies in the levy year 2012/13. As the PPF explained in their evidence to the WPSC, the Davenbush guarantee was put in place purely for purposes of reducing the PPF levy. It was not relevant to our discussions with the trustee and employer regarding scheme funding.

## **b. From March 2012 to the receipt of the recovery plan for the 2012 valuation in September 2013**

*As set out in pensions legislation, schemes in deficit have up to 15 months from the effective date of their triennial valuation to complete the valuation and, if the scheme is in deficit, submit a recovery plan to TPR.*

During this period the 2010 recovery plan and schedule of deficit recovery contributions (DRCs) was in effect and TPR did not have any significant engagement with the trustees or sponsoring employer.

More generally, TPR undertook some proactive funding work with selected schemes ahead of the 2012 valuation cycle. This proactive work is limited by the available resource. The BHS scheme did not meet at this time the criteria we used to select schemes for proactive work.

There were a number of schemes larger than BHS completing valuations in 2012 – in its 2009 valuation BHS was the 130<sup>th</sup> largest scheme based on liabilities in the tranche of valuations and as a result because of its size and risk it did not meet the criteria for proactive intervention.

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## **c. From September 2013 to the opening of collaborative discussions with the pension fund trustees in summer 2014**

**June 2013:** The trustees notified TPR that the 2012 valuation would be late. We advised we would take no regulatory action if the valuation was submitted by the end of September.

**September 2013:** Valuation documents and recovery plan submitted to TPR. We opened a funding case in order to review the information provided and if necessary challenge it.

**Late 2013:** Review by TPR. Initial concerns included the length of the recovery plan (23 years) and a significant reduction in the value of deficit recovery contributions compared to the 2009 valuation, as well as the strength of the employer and the level of risk in the investment strategy.

**January 2014:** Comprehensive request to the trustees for further information. Replies received from the trustees and scheme actuary.

**Early-mid 2014:** TPR continued to engage with trustees and request further information to gain a better understanding. A meeting was requested, however, due to trustee and adviser availability this could not be arranged until July.

**June 2014:** Trustees notify TPR of a company proposal for a “business reorganisation” with implications for the pension scheme. At neither this nor any other point did TPR agree the BHS scheme’s 2012 valuation and recovery plan.

## **d. From summer 2014 to notification on 6 February 2015 from Arcadia Group that “a decision had been taken to market the BHS business.”**

*Whilst the best security for a DB pension scheme is a strong, ongoing sponsoring employer, we recognise that in some situations this support may no longer be possible. Where an employer is at serious risk of insolvency it is important for employers, trustees and their advisers to explore the available options for the pension scheme. One such option is a Regulated Apportionment Arrangement (RAA)<sup>1</sup> – effectively this is a means to permit a scheme’s controlled entry into the PPF or the continuation of the scheme without recourse to the original employer, whilst allowing the sponsoring employer to continue in business. RAAs are very uncommon and must be approved by TPR, whilst the PPF must also confirm they do not object to the RAA. TPR very*

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<sup>1</sup> <http://www.thepensionsregulator.gov.uk/docs/regulated-apportionment-arrangements-statement-august-2010.pdf>

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*rarely approves RAAs and will only approve a proposal where it is reasonable to do so and criteria are met, including:*

- *Whether insolvency of the employer would be otherwise inevitable or whether there could be alternative solutions which would avoid insolvency;*
- *Whether the scheme might receive more from an insolvency;*
- *Whether a better outcome might otherwise be attained for the Scheme by other means, including the use of the Regulator's powers (for example, anti-avoidance powers) where relevant;*
- *The position of the remainder of the employer group; and*
- *The outcome of the proposals for other creditors.*

*It is important for trustees to be fully engaged in such transactions and we will actively seek the views of the trustees as part of any consideration. In order for an RAA to complete, the trustees are required to sign scheme documentation. Therefore it is important that employers provide the trustees and TPR with all necessary information and are prepared to respond to trustees' and our questions.*

**July 2014:** On 3 July TPR received a summary of the company's proposal (named Project Thor) from the trustees. This was followed up by a call with the trustees and their advisers (KPMG, Eversheds and Towers Watson) on 7 July and, on 10 July, a call with Adam Goldman (Arcadia) and their advisers (Deloitte and Nabarro Nathanson).

On 17 July a draft Clearance and Regulated Apportionment Arrangement (RAA) application was submitted to TPR. TPR notified the PPF of this proposal.

On 28 July TPR emailed Deloitte stating that TPR would be unable to provide any view on the application as the trustees were still awaiting information to undertake the analysis they would be expected to do in relation to an RAA; we did, however, make some observations about gaps in the information provided that would ordinarily be expected in an RAA application.

**August 2014:** On 22 August TPR had a conference call with the trustees who advised they were still waiting for further information from Deloitte. TPR advised on the importance of the trustees undertaking a moral hazard analysis. This would typically involve a detailed legal and business covenant review, an analysis of the employer and the wider corporate group. Typical areas we would expect trustees to independently investigate as part of this analysis would

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include, but are not limited to, dividend payments, corporate restructurings, management charges, property transactions, financing arrangements and tax. As a key element in an RAA the trustees undertake this analysis, with independent financial advisers, in order to establish whether there could be a better outcome for the scheme in the Regulator using its moral hazard powers. Having undertaken a full moral hazard analysis, as well as any other work that is required, the trustees should be in a position to conclude whether they feel the RAA is appropriate. The advice the trustees have received from independent financial advisers will be a fundamental and integral part of what the Regulator will consider.

On 28 August TPR spoke with Arcadia, BHS and advisers and set out the criteria required for an RAA and advised that insufficient information was available to assess its impact on the pension scheme and the trustees were awaiting further information to complete their assessments which would also be a central part to any RAA application.

**September 2014:** On 4 September a detailed letter was sent to the trustees by TPR setting out the significant areas where further analysis was required.

On 24 September TPR received notification from Deloitte (company advisers) that BHS and Taveta Investments Ltd had decided to pause Project Thor to consider their options and to revisit matters in January. TPR requested that the application was formally withdrawn because any return to the matter by the company would not be for a considerable period. Hence a new application would be needed to reflect the new circumstances. TPR agreed internally that further work on the funding case would remain on hold until the new year in anticipation that a new proposal might be received at this time.

**October 2014:** On 3 October 2014 the RAA and Clearance application was formally withdrawn by BHS/Taveta.

On 13 October TPR wrote to Deloitte to advise that any new application that may be submitted in the future will be reviewed by the Regulator at that time.

**January 2015:** On 8 January 2015 TPR contacted the trustees requesting an update and were advised that Deloitte would be calling with an update. A call was received on 14 January from Deloitte to discuss Project Thor. After some discussion TPR advised that as they did not have an application no firm view could be given.

In response to a press story on 26 January regarding the possible sale of BHS, TPR again requested further information from the scheme trustees. On 28 January the trustees advised

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that they still did not have all of the outstanding information necessary from the company to complete their analysis.

- e. From 6 February 2015 to the public announcement on 12 March 2015 of the sale of BHS to Retail Acquisitions Ltd and our subsequent immediate launch of an anti-avoidance investigation.**

*TPR has no power to approve or to stop corporate transactions such as the sale of a business. Our avoidance powers can subsequently be used in respect of events going back over a considerable period of time. We can provide 'Clearance' at the request of the parties involved in respect of corporate transactions or scheme-related events which may be materially detrimental to the position of a DB pension scheme. The decision to apply for Clearance is at the discretion of the parties concerned, i.e. it is voluntary, and TPR's provision of Clearance does not constitute approval of a transaction – rather, it gives the parties involved comfort that we will not seek to use our avoidance powers in respect of the transaction. We only give Clearance if we have received an application, have sufficient information to judge the possible material detriment and proposed mitigation and where it is appropriate to do so.*

**February 2015:** Deloitte contact TPR on 6 February to advise of the decision to market the BHS business. TPR notified the trustees that it was important for them to complete their own analysis in respect of whether TPR's moral hazard powers might be engaged and that as a sale can take time, it was important to continue working on the 2012 valuation. The trustees advised they had not been provided the necessary information to complete their analysis but were fully engaged in the sale process.

On 25 February TPR was emailed by the chair of trustees to say he had met Sir Philip Green and representatives of the proposed purchaser.

On 26 February TPR called the chair of trustees who advised that the potential purchaser was called Swiss Rock.

**March 2015:** On 2 March TPR had a call with the chair of trustees who confirmed that he had met with the company and the prospective purchaser the previous week.

On 3 March TPR wrote to Adam Goldman (Arcadia Group Company Secretary) setting out its concerns including the fact the trustees were awaiting critical information about the sale. In that letter TPR requested an urgent meeting to discuss concerns over the impact of the sale on the pension scheme.

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On 4 March TPR sent an email to Arcadia and Deloitte setting out the proposed agenda for the meeting and the attendees from TPR. At 18:30 TPR met with Sir Philip Green, Adam Goldman, Paul Budge and Chris Harris along with a number of their advisers and the chair of trustees, Chris Martin. In that meeting TPR advised that they understood there was an imminent transaction and that limited information had been provided on that. Sir Philip Green gave an overview of the possible sale. Project Thor was discussed at the meeting and TPR again set out the criteria that would need to be met and the information that would need to be provided. At this point in time no application for either Clearance or an RAA had been received by TPR since the last application was withdrawn in October 2014.

TPR made it clear that we could not approve an RAA where the criteria are not met. TPR said that it would be wrong for the meeting to end with Sir Philip Green having the impression that TPR had agreed to an RAA as part of a sale, as this was not the case. The reason for this was that TPR still had not received enough information to know what any RAA might entail in full. TPR specifically asked the trustees if they had completed their due diligence and they replied that they had not. The trustee stated that they needed to understand what the ability to fund the schemes would be after the transaction and what the structure would be. TPR made clear that there was a process for the approval of RAAs and the giving of Clearance.

The meeting broke up with Sir Philip Green requesting time out to discuss matters with his advisers. Two of the advisers returned later and TPR again set out the key points for them, in particular it was unclear exactly what was being asked of TPR, whether there was going to be an RAA proposal put to TPR or whether it was just a request for Clearance in relation to the proposed sale. It was still unclear what deal was being proposed. TPR highlighted again that the trustees needed further information and that the RAA process is a statutory process and not a tick box exercise and whilst TPR would be happy to work on an urgent basis we need to be provided with adequate information. It was also not clear to us what knowledge or information the purchaser had about the matters being discussed at this meeting. As the purchaser was not present at the meeting and TPR had not met the purchaser it was unclear what their position or knowledge was. The meeting ended at 20:20 without any further interaction with Sir Philip Green.

**5 March 2015:** Sir Philip Green telephoned TPR to discuss the RAA and Clearance process and timings. He was advised that these matters can be dealt with quickly if all the necessary information was provided. TPR stated that a letter would be sent to him shortly confirming again what information TPR would require. The call ended. TPR wrote to Sir Philip Green further to the meeting setting out our concerns and requesting further information. The letter also highlighted the fact that as yet no application for either Clearance or an RAA had been received.

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**6 March 2015:** Telephone call with the chair of trustees to say he expected the sale to complete on Monday 9 March but that “the numbers are changing all the time.”

**9 March 2015:** Telephone call with the chair of trustees who said there was a continued lack of clarity on the position and the trustees had not received any of the information they had requested to complete their moral hazard analysis.

**10 March 2015:** Telephone call with the chair of trustee who said there was no update on the ownership or timing, and the trustees had not been provided with any more substantive information since the previous day.

**11 March 2015:** Sale of BHS to Retail Acquisitions Ltd. TPR was not informed of the sale completion or the name of the purchaser and was working on a letter to Sir Philip Green following up on our 5 March letter requesting further information.

**12 March 2015:** Sale is reported in the media. TPR opened an investigation into the transaction and whether it would be appropriate to use our anti-avoidance powers.

## **f. From the commencement of the TPR anti-avoidance investigation to the lodging of the Company Voluntary Arrangement proposals on 3 March 2016**

*In order to prevent abuse of the PPF safety net, Parliament has given TPR strong anti-avoidance powers to take action where we believe that an employer or individual has taken steps to avoid their obligations to a pension scheme.*

*Where we believe that a company or individual has acted to try to avoid their obligations or their action has detrimentally affected the likelihood of accrued scheme benefits being received we can issue a **Contribution Notice**. This requires those responsible to make a payment into the scheme, or to the PPF if the scheme is in the PPF, of an amount set out in the Notice.*

*Where the scheme sponsor is insufficiently resourced or a service company, we can issue a **Financial Support Direction** which requires ongoing financial support to be provided to the scheme by the legal person to whom the FSD is issued. Often this is used to ensure parent companies in corporate groups support the schemes of subsidiaries that cannot provide support on their own. Financial support can be provided in a number of ways including a lump sum payment into the scheme, a parent company guarantee or other additional financial resources being made available to the scheme.*

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As soon as we learned of the completion of the sale we immediately opened an avoidance investigation. We cannot discuss the detail of the investigation other than to say we have issued a wide range of statutory notices under Section 72 of the Pensions Act 2004 to gather information – we have received approximately 71,000 documents to date which have been in large part reviewed.

## **g. From March 2016 to date**

As above, we cannot discuss our investigation in detail other than to confirm it is ongoing and, as per our evidence to the committee on 9 March 2016, we aim to have made significant progress by the end of the year.

## **Points of clarification**

Your letter of 13 May 2016 asks for some points of clarification regarding TPR's letter of 11 May 2016 and Arcadia Group's letter to the Committee of 11 May 2016.

Regarding the proposed sale of BHS to Swiss Rock and the fact that there was insufficient information to assess the impact on the pension scheme as explained in our letter, the committee asks:

- a) What information was lacking*
- b) Any actions TPR took to attempt to rectify the information deficit*

The agenda for TPR's meeting with the trustees, Arcadia and their advisers on 4 March 2015, as outlined in Arcadia's letter of 11 May and included with this letter, outlines the additional information we were attempting to obtain. We did not have sufficient information about any of the items on this agenda to allow us to assess the potential impact of the proposed sale on the BHS pension schemes and were not in a position to approve either a potential Clearance application or a potential application for a Regulated Apportionment Arrangement without this information. This was made clear to Sir Philip Green at the 4 March meeting. As we did not receive this information at the meeting we wrote to Sir Philip on 5 March (a copy of which is disclosed with this letter) to restate our position and continued to speak with the trustees in an attempt to obtain sufficient information. It should also be made clear that at this point in time no application either for Clearance or for a Regulated Apportionment Arrangement had been submitted to the Regulator. This is detailed further in the timeline provided.

Regarding the discussions held with Arcadia in summer 2014 as stated in their letter to the Committee of 11 May, you ask:

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*Why please was the process paused?*

As detailed in the timeline provided with this letter, TPR received a draft application for a Regulated Apportionment Arrangement on 17 July 2014. TPR spoke with Arcadia and set out the criteria required for an RAA and advised that insufficient information was available to assess its impact on the pension scheme and that the trustees were awaiting further information to complete their assessments which would also be a central part to any RAA application. TPR then received notification from the BHS advisers on 24 September 2014 that the company had decided to pause discussions over Project Thor to consider their options and wished to revisit matters in January. TPR requested that the application was formally withdrawn because any return to the matter by the company would not be for a considerable period. Hence a new application would be needed to reflect the new circumstances.

## **Specific documents**

Your letter of 13 May requests copies of specific documents, subject to our confidence that these can be put into the public domain without damaging our investigation.

We are unable to provide the email of 6 February 2015 from Arcadia, or the minutes of the meeting with the trustees, Arcadia and advisers on 4 March. We have, however, provided the other documents requested by the Committee subject to some redaction to remove certain information we feel unable to disclose because it is germane to our investigation and the names of non senior staff.

## **Project Thor**

Your letter of 16 May asks for information on the Project Thor application further to the BBC's *Newsnight* report of 13 May.

With regard to the quote from *Newsnight* in your letter we hope that the timeline that we have provided with this letter will go some way to helping you understand the timing of events. In particular response to your letter, we can confirm that TPR received a proposal for a Regulated Apportionment Arrangement by way of a Clearance application from BHS. This was known as Project Thor. As set out in our timeline this application was made to us on 17 July 2014 and was then subsequently paused and then formally withdrawn by BHS and Taveta on 3 October 2014.

At no point during that application did TPR deny approval of the application. There had been an initial discussion with Arcadia about the application but, as stated, that application was

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subsequently withdrawn by the applicant. Project Thor continued to be talked about without any further detailed information being provided to TPR or any further formal application being made to TPR. The figure of £80m is not one that was ever put to the Regulator as part of the Project Thor application. To clarify the mention of £80m, separately – as has been set out in media reports, in 2016 Sir Philip Green made an offer of £40m in cash and the assignment of Arcadia's qualified floating charge that he valued at £40m, to the schemes. TPR made it clear that the level of this offer was not sufficient in the circumstances and therefore our investigation would continue.

We hope that this information and the disclosed documents will provide further clarity for the committee. We expect to write to you within the next two weeks with our initial view on whether there are any useful improvements that could be made to the legislative framework which governs the regulation of DB pension schemes.

If you or the Work & Pensions Select Committee have any further questions, please contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lesley Titcomb', with a stylized flourish at the end.

**Lesley Titcomb**  
Chief Executive