

The Pensions Regulator

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

6 July 2016

Dear Mr Field

As you know, the Work & Pensions and Business, Innovation & Skills Committees decided not to hear evidence from The Pensions Regulator (TPR) on the Committees' inquiry into BHS on 28 June as planned, due to the availability of members of the Committees.

We would have welcomed the opportunity to give further evidence to the Committees orally; however following discussions with the Clerk to the Work & Pensions Committee, we appreciate that the Committees have determined not to hear further oral evidence ahead of Parliament rising for the summer recess in order to focus on writing their preliminary report in the time available.

In view of this I am writing to you in order to correct several points of fact in evidence the Committees have heard in recent evidence sessions on 15, 28 and 29 June, regarding the role of TPR in relation to the BHS pension schemes and the legal framework, as well as to update the Committees on our recent engagement with respect to the BHS pension schemes since our oral evidence of 9 May.

I. Recent engagement

1. In response to suggestions made by Sir Philip Green at the Committee's session on 15 June that TPR has not been open to dialogue regarding the BHS pension schemes, we issued a clarification statement confirming that we are and continue to be open to consider credible proposals in respect of the BHS pension schemes, as is our normal practice in such situations.
2. A meeting was arranged which took place on 27 June. Discussions such as these are complex and can take some time, but I can assure the Committees that TPR will approach these negotiations robustly and with the intention of achieving the best possible outcome for

Napier House
Trafalgar Place
Brighton
BN1 4DW

Customer support: 0845 600 0707
Email: customersupport@tpr.gov.uk
Website: www.thepensionsregulator.gov.uk

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the members of the BHS pension schemes and the PPF. At this point in time, the outcome of any such negotiations is not certain; accordingly our anti-avoidance investigation remains open.

3. The Committees will appreciate that we are limited in the information we can provide on these discussions at this time, but we would be happy to write to you or appear at a later time to discuss the eventual outcome of this case. TPR also plans to publish a Section 89 report on our activities in this case when it is appropriate to do so.

II. Evidence of 15 June

i Project Thor

4. In his evidence to the Committees, Sir Philip asserted that the Project Thor proposal submitted to TPR in July 2014 would have provided benefits to members that were “*a better solution than the PPF*”. To clarify, whilst a draft Clearance Application (outlining a Regulated Apportionment Arrangement (RAA)) was made to TPR outlining the Project Thor proposal, critical aspects of that proposal were missing, notably key supporting information that was necessary for us to determine the merits of the proposal presented, including the potential impact on members.
5. The Project Thor report¹ provided to the Committees (published on the Work & Pensions Committee’s website on 20 June) estimates that the proposal would have significantly cut the schemes’ liabilities. This represents a significant reduction in the value of members’ benefits through a change to indexation and the terms on which winding up lump sums would have been priced. As can be seen from the Project Thor Report, Project Thor was likely to have cost members of the BHS pension schemes considerably more, in terms of lost future benefits, than it would have cost Arcadia/BHS in additional funding.
6. TPR sets a high bar for considering such transactions to ensure that members’ benefits are protected as far as possible. These criteria therefore include that we must be satisfied that insolvency is otherwise inevitable and that the proposal represents a better outcome for

¹ <http://www.parliament.uk/documents/commons-committees/work-and-pensions/Correspondence/Deloitte-Project-Thor-Disclosures-1-Presentation-Jan-2014.pdf>

The final column of the table shown on p22 shows an estimated fall in liabilities from £750m to £416m with £98m having been paid to members taking up a “WULS”. So the net saving in the liabilities through the reduction in members’ benefit indexation and the basis used to calculate WULS was £236m. The proposed cost to Arcadia of achieving this was £54m.

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members than they would achieve either through insolvency, or through us engaging our anti-avoidance powers. Additionally, the proposal needs to treat other creditors equitably with the scheme and the employer should provide equity to the scheme or the PPF as an anti-embarrassment protection.

7. Therefore it is not sufficient for a proposal to provide benefits higher than PPF compensation if we are unable to satisfy ourselves that the other conditions are met and that this is not the best possible outcome for scheme members. The advisers to Arcadia and BHS would have been very familiar with these criteria, and we were very clear in setting out that they would need to be satisfied. This included the provision by BHS and Arcadia of information to assess whether our anti-avoidance powers might be engaged. In any event, we did not have the information necessary to make these assessments. Project Thor was withdrawn by the applicant subsequent to a request for additional information from TPR.

ii Section 72

8. Sir Philip said in his evidence that in the aftermath of the sale of BHS, TPR began issuing Section 72 notices to various parties and indicated that he would have preferred TPR to contact the parties involved to *“sit down and see if we can put this to bed”*.
9. As previously advised to the Committees, we opened an anti-avoidance investigation immediately after the sale had taken place. Section 72 notices were first issued on 25 March and subsequently at later dates. Once TPR begins an anti-avoidance investigation, it is important that we are able to establish the full facts of a situation and ensure that critical documents and records are preserved. Section 72 is a key power given to TPR by Parliament to achieve this.
10. Prior to the sale being announced and in the absence of either party submitting a Clearance application, we had been provided with very little information about the circumstances leading up to the sale, the sale itself and the potential impact of that sale on the BHS pension schemes. As a result we issued Section 72 notices to various parties in order to obtain certain documents and determine what had transpired.
11. Since March 2015, we have issued Section 72 notices to a number of parties. To date we have received more than 70,000 documents in response. It is not correct to give the impression that all 70,000-plus documents received in response have been provided by Sir Philip Green (or parties connected to him / his commercial group) alone. The majority of these documents were provided by parties outside the Arcadia group.

iii The BHS CVA

12. In his evidence, Sir Philip stated that the Creditors Voluntary Arrangement (CVA) proposal would not have meant the BHS pension scheme going into the PPF. To clarify, this is not correct. A CVA is an insolvency event under Section 121 of the Pensions Act 2004 and would have triggered a PPF assessment period.
13. It should be noted that it was the filing of the nominee's report with the court, which is the preliminary step for launching a CVA proposal prior to convening the meetings at which the CVA proposal is voted upon, that triggered the schemes entering the PPF assessment period on 3 March 2016.

III. Evidence of 28/29 June

i Project Thor

14. In his evidence on 28 June, Neville Kahn indicated that at the time of the Project Thor proposal in autumn 2014, there had been "*confirmation from the regulator that they [TPR] were not concerned about moral hazard, based on what KPMG had told them.*" To clarify, this is not the case and no such statement was made to the sponsoring employer or any other party at this time.
15. In fact, as evidenced in TPR's letter to the trustees dated 4 September 2014 provided to the Committees by the Trustees, it is clear that TPR did have concerns regarding moral hazard which it raised with the Trustees for further consideration by the Trustees and their advisors.
16. As we have made clear to the Committees in oral evidence and written correspondence, TPR was not given enough information about the Project Thor proposal to properly assess the application and judge whether the criteria for accepting an RAA could be met. Therefore it is not correct to imply that TPR had given any comfort to any party regarding the prospect of our using our anti-avoidance powers or any other of the criteria.

ii The sale of BHS

17. In his evidence on 29 June, referring to the 4 March 2015 meeting instigated by TPR and which was attended by TPR, Arcadia (and its advisers) and the Chair of Trustees, Paul Budge stated that "*TPR saw [BHS] as a solvent business*" at that time. To be clear, TPR did not offer a view on the solvency of the BHS business at this meeting.

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18. One of the criteria for TPR agreeing to an RAA proposal is that the sponsoring employer must, without the proposal being agreed, be inevitably insolvent. We did not express a view on the solvency of BHS at the 4 March meeting. Rather, we explained that it was difficult to see how TPR could approve a proposed RAA shortly before or after the sale, as what was being proposed at this meeting was that the business would be sold on a solvent basis by Arcadia.

iii The regulatory framework

19. Mr Budge and Chris Harris both indicated in their evidence of 29 June, referring to Project Thor, that *“the way the pension regulation is set up”* (Mr Harris) is responsible for the fact that the proposal did not go forward, and that *“if it were set up in a different way we would not be here.”*
20. As we have made clear to the Committees in my letter of 24 June, we believe that the current regulatory framework operates as intended by Parliament. The criteria for considering an RAA application are stringent by design – TPR’s role is to protect the benefits of members and reduce the risk of calls on the PPF, and therefore it is important that any proposal to restructure either a scheme’s benefits or relationship with its sponsoring employer is subject to rigorous scrutiny to ensure that this is the best possible outcome. The criteria are well-known to the pensions industry – all parties in this case have been well-advised and would have been informed of the necessary criteria and supporting information required.
21. We do not accept that the regulatory framework was responsible for Project Thor, or other proposals, not being agreed. As stated earlier in this letter and previously, TPR was not given enough information about the Project Thor proposal to properly assess the application and judge whether the criteria for approving an RAA could be met. The decision to withdraw the proposal was made by Arcadia and BHS.

iv TPR’s presence at a March 2014 meeting at Arcadia’s offices

22. In his evidence to the Committees on 29 June, Mark Sherwood recalled a planned meeting that was to take place between himself, Dominic Chappell and Paul Sutton and Arcadia representatives sometime in March 2014. Mr Sherwood states that after arriving at Arcadia’s offices, Paul Sutton was led away and returned after 10-15 minutes to Dominic Chappell and himself stating that the meeting would not be taking place saying that *“They can’t do the meeting. The Pensions Regulator is here. They are in the next room. They can’t talk to us. We need to leave”*.

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23. It is unclear why TPR is referred to in this context; we have reviewed our records and TPR was not present at Arcadia's offices at that time.

I hope that this information will provide further clarification for the Committees.

We are aware that the Work & Pensions Committee intends to undertake a further inquiry into wider pensions law and regulation in the autumn of 2016, after the summer recess. TPR will be very happy to assist and contribute to this inquiry in any way the Committee would find useful.

If the Committees have any further questions, please do not hesitate to 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