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## Return of surplus

### Introduction

In recent years, the issue of return of surplus is unlikely to have arisen at many trustee or employer meetings. There has been some uncertainty surrounding the law in this area but a recent Government announcement has now clarified the position. From 6 April 2016 a change to the law means that some schemes may need to pass a resolution if they want to preserve any option they have to return an ongoing surplus in the pension scheme to the employer. Trustees do have some breathing space to act but if a resolution is not passed before 6 April 2016 the new law will override any rules permitting refunds to the employer which were in place before 6 April 2006.

### 10 steps to successful return of surplus

1. Only schemes that **before 6 April 2006** had a power to return surplus on an ongoing basis to the employer may need to take steps to preserve this power. If your scheme was set up before this date, check your rules carefully to ensure that a return of surplus power existed at this time.
2. To protect the return of surplus power the trustees of the scheme must **pass a resolution** allowing the power to continue. The trustees can specify that the power to return surplus is subject to different or additional conditions to those set out in the existing return of surplus rule.
3. Schemes have 10 years from A-day (6 April 2006) to amend their scheme surplus provisions before they are overridden by the new pensions law. This means the resolution must be passed before the **6 April 2016 deadline**.
4. The trustees must give the employer and scheme members at least **3 months' notice** of the proposed resolution. To save administrative time and costs the member notice could be sent out with an already scheduled member communication such as the annual report and accounts or benefit statements.
5. If the return of surplus power is preserved, the **power to make payments to the employer** out of scheme assets can only be exercised by the trustees (irrespective of what the scheme rules say).
6. To pass the resolution, the trustees must be satisfied that this is in the **members' best interests**. Employers who are unable to benefit from a surplus might be reluctant to contribute more than the statutory minimum to their pension schemes or might turn to less generous defined contribution schemes. This may satisfy trustees of the long-term benefit to members of passing the resolution.
7. Further down the line, before making any surplus payment trustees must again be satisfied that this would be in the interests of members. This is likely to be a more difficult hurdle to clear and in practice, it may be difficult for trustees to justify any payment to the employer in an ongoing scheme unless they have **also secured some additional benefit for the members**.
8. It is a pre-condition of a surplus payment that the scheme be **fully funded on the buy-out basis** (that is all members' benefits could be secured by purchasing annuities).

9. An **actuarial valuation** will be required to confirm this.
10. Schemes and employers should note that a **tax rate of 35%** will apply to any return of surplus payment.

## Further reading

The Pensions Regulator's guidance on payment of surplus to employers can be found in its scheme funding [FAQs](#).

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Comments and ideas for further topics are welcome...

e-mail [stephen.scholefield@pinsentmasons.com](mailto:stephen.scholefield@pinsentmasons.com)

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