



DWP issues consultation on “The powers of the Pensions Regulator: Amendments to the anti-avoidance Measures in the Pensions Act 2004”

As highlighted in our news alert on 15 April, the DWP has now published its consultation, setting out proposals to extend the Regulator’s anti avoidance powers.

Why now?

The particular focus of the Government’s attention appears to be the developments in the “buy out” market which has been causing them concern since last Autumn.

Their concern centres on what they see as the focus of these business models which, in their view, among other features, may look to sever the link between the employer and the pension scheme in order to “operate well-funded occupational pension schemes for profit.”

Key features

The consultation sets out what the government believes to be the key features of these business models:

- Moving the employer or pension scheme to another jurisdiction;
- Splitting the operating company from the pension scheme without appropriate mitigation for the pension scheme;
- Splitting the assets from the operating company without appropriate mitigation for the pension scheme;
- Transferring scheme assets and liabilities to another scheme which did not have adequate support from an employer;
- Running a scheme for profit without adequate account being taken of member interests;
- Business models in which risk is predominantly borne by scheme members, but high investment returns would benefit investors.

Extension to the Regulator’s anti avoidance powers

The consultation proposes the following extensions to the Regulator’s anti avoidance powers:

- Introducing a new alternative test that could trigger the issue of a Financial Support Direction (FSD) - at present, a single entity must be identified who would be able to provide financial support before the FSD is issued, but, under these extensions, the FSD could be broader and spread the requirement for support among a number of parties.
- Introducing a new alternative test that could trigger the issue of a Contribution Notice (CN) - this would enable the Regulator to issue CNs where a course of conduct is materially detrimental to the scheme's ability to pay members' benefits; and
- Removing 'otherwise than in good faith' from one of the limbs of the existing test for issuing a CN.

The Regulator’s parallel statement

In an attempt to provide a level of certainty for business as to how these alternative tests would be applied in respect of transactions occurring between 14 April 2008 and the date the legislation comes into force, the Regulator issued a statement in parallel with the DWP consultation. The Regulator’s statement makes it clear that it will not apply these amendments to the grounds for the exercise of these powers in respect of these transactions unless one or more of the actions or situations listed above is the subject of the proposed use of the power.

The Regulator’s statement seeks to assure business that the changes will remain “appropriately targeted”. Additionally, it draws attention to:

- The Regulator's Clearance Guidance;
- Statutory matters that the Regulator must have regard to in order to act reasonably in using its CN and FSD powers; and,
- Existing protections against the unreasonable issue of FSDs, for example, to persons who have not been involved with a pension scheme.

Further safeguard?

The consultation also proposes a future safeguard provision for a ‘statutory defence’ against the use of the new powers in relation to CNs. This would apply if a party can demonstrate that they could not reasonably have foreseen the effect of a transaction would not be the subject of a CN.

Concerns over bulk transfers

The consultation states that “The ability to transfer members in bulk between schemes is a valuable tool for scheme sponsors and trustees, and the majority of bulk transfers are undertaken for sound reasons.”

However, the consultation states that the Government has identified unforeseen effects in the way the legislation operates in the context of acts or bulk transfers, and considers that the following amendments are necessary:

- clarifying that the Regulator can issue a CN following a course of conduct rather than only in response to an isolated act or failure to act - this change would not permit the Regulator to withdraw clearance that has already been given. If a clearance statement has been issued in relation to an individual transaction, then that transaction could not form part of a 'course of conduct' triggering the issue of a CN;
- if the Regulator would have issued a CN but for the fact a bulk transfer has taken place, it could do so after the transfer; and
- if the bulk transfer itself is materially detrimental to the likelihood that members' benefits will be paid, the Regulator could issue a CN - this could include, for example, circumstances where the bulk transfer has frustrated the Regulator's power to issue an FSD

Effective date of changes: a retrospective

Retrospective effect is the name of the game in relation to the proposed changes. The proposal, clarifying that a CN may be issued in respect of a course of conduct will have retrospective effect from 27 April 2004. The other changes will have retrospective effect from 14 April 2008.

Clearance

The proposals, of themselves, have no effect on clearance, which remains a voluntary process and a commercial call for the parties following professional advice.

The proposals are, however, likely to push employers into seeking clearance in cases where it would not have been sought in the past. That in turn can only lead to an increased role in corporate transactions for the Regulator and for trustees.

Consultation timetable

The consultation runs until 20 June 2008. We will be preparing a response to the consultation document and would be happy to discuss any comments you may wish us to include on your behalf.

The government has stated that it will be similarly consulting on the draft regulations (designed to bring into effect the proposals) "in due course" and we will certainly keep you informed of the progress.

If you would like to discuss the implications of the proposals, or have any comments for our consultation response, please do not hesitate to get in touch with your usual Mayer Brown International LLP contact or Philippa James (pjames@mayerbrown.com or 020 7782 8700).

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