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Yet more changes to "employer debt" legislation

The Government is proposing to amend (for a twelfth time!) the Regulations under s75 Pensions Act 1995. The amendments would make it easier to vary the basis on which liability is shared between employers.

Background – the Regulations as they stand

Under a multi-employer scheme, each employer is potentially liable to make good a share of any buy-out deficit. The Regulations specify a default basis for determining the employers' respective shares. Under the default basis, an employer's share depends on the scheme liabilities which relate to that employer. But the Regulations go on to say that the shares of employers can be varied, by means of a scheme apportionment arrangement (**"SAA"**).

FAAs – the next big thing?

The SAA option will remain, but the Government plans to introduce a new alternative – the flexible apportionment arrangement (**"FAA"**).

Under an FAA, trustees would be able to release an employer (**"A"**) from all of its liability under s75, provided that another employer (**"B"**) agreed to step into A's shoes for the purpose of the Regulations. If and when B subsequently became liable to pay a s75 debt, its share of deficit would be calculated on the basis of scheme liabilities relating to both A and B. So, put crudely, what gets apportioned to B are A's scheme liabilities – whereas, under an SAA, what gets apportioned is an amount of A's s75 debt.

Trustees cannot put in place an SAA unless a "funding test" is met. A similar rule would apply in respect of FAAs, but the Government proposes that there should be greater flexibility. If a number of FAAs were to take effect at much the same time, trustees might determine that only one funding test was needed.

Other amendments

The Government proposes some other minor amendments to the Regulations. In particular, trustees would be given the option to extend the "period of grace" for s75 purposes, in circumstances where an employer temporarily stopped employing active members. If trustees so chose, the prescribed 12-month period could be stretched to anything up to three years.

The Government has shied away from addressing some significant ambiguities in the Regulations, for example about what it means for an employer to trigger a s75 debt by ceasing to employ "active members". This was on the agenda last year[1]. But the Government says that, in view of the drive towards deregulation, any bottom-up review of the legislation has been shelved.

Timetable

The proposed amendments to the Regulations would take effect from 1 October 2011. The consultation period runs until 10 August.

Comment

The FAA concept is appealingly simple: one employer agrees to take over the s75 responsibilities of another. Provided the Government gets the small print right, FAAs are likely to become commonplace on corporate sales and restructurings.

But it's disappointing that the Government has dropped its plan to overhaul the Regulations. They are a confusing hotchpotch, and some key provisions are unclear. If the aim of the deregulatory review is "to make the private pensions framework simpler", the employer debt legislation would be a good place to start.

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[1] See our March 2010 update: www.mayerbrown.com/pensions/article.asp?id=8720&nid=11078

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