

DWP consultation on the powers of the pensions regulator

Today the Government is publishing a consultation on the powers of the Pensions Regulator and has issued the following statement on the retrospective effect of the proposed changes.

On 14 April 2008, the Government announced its plans to increase powers requiring employers to provide contributions to a pension scheme if their actions could threaten the security of members' pensions. The proposals will be subject to a formal eight-week consultation period, but (subject to one amendment which would be effective from 27 April 2004) the announced intention was that the core amendments should be effective from the date of the announcement i.e. 14 April 2008.

The particular focus of the Government's attention in announcing these changes is the launch of new business models which, 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 but to the possible detriment of scheme members, and outside the regime regulated by the Financial Services Authority. For convenience, such arrangements have been described by some commentators as 'non-insured buy-out models' or 'alternatives to buyout'. The Government considers that these business models are characterised by the following kinds of features:

- 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.

The Government is aware that its announcement has been misunderstood by some to mean that entirely normal business activities could somehow be affected by these changes. This was despite the reassurance given at the time that the overwhelming majority of pension schemes would not be affected by the proposed changes. This statement is to confirm that reassurance. Alongside this statement, the Pensions Regulator is today issuing a statement in relation to:

- The new alternative test that could trigger the issue of a Financial Support Direction;
- The new alternative test that could trigger the issue of a Contribution Notice; and
- The removal of the words 'otherwise than in good faith' from s. 38(5)(a)(ii) of the Pensions Act 2004.

The Regulator's statement makes it clear that it will not apply these amendments to the grounds for the powers in respect of transactions occurring between 14 April 2008 and the date new regulations come into force unless one of the actions or situations listed above is the subject of the proposed use of the power.

The safeguards set out at s. 43(7) of the 2004 Act, which detail matters to which the Regulator must have regard when deciding whether it is reasonable to issue a Financial Support Direction will continue to apply and provide further reassurance.

As set out in the previous statement, the Government considers that it is necessary for the Regulator to have the ability to make use of two amendments in relation to transactions or bulk transfers occurring after 27 April 2004 and 14 April 2008 respectively: the clarification that 'an act or a deliberate failure to act' may be constituted as a series of acts, and amending s. 38 of the 2004 Act to remove the loophole by which bulk transfers may frustrate the use of the Regulator's moral hazard powers. In the first case, this is because the Government considers the legislation should always have been read in this way; in the second, this is to prevent features of current legislation highlighted by the 14 April announcement being exploited to avoid liabilities to pension schemes.

The Government consultation document makes it clear that the proposed clarification, that 'an act or a deliberate failure to act' may be constituted as a series of acts, would require a 'course of conduct' in which the individual acts were connected in a relevant way and occurred within a reasonable timescale. 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 Contribution Notice though, as now, that clearance would fall if facts prove to be materially different.

Minister for Pensions Reform Mike O'Brien publicly re-emphasised on 23 April 2008 that the proposed changes were targeted at new business models described above.

Mike O'Brien said today –

'I confirm that safeguards will be included in the modified regulatory framework to regulate the potential detrimental effects of these new business models, as already required where the Regulator considers it reasonable to do so, without frustrating normal business activity.'

'We are not against these models in all circumstances, but we need to ensure that the correct balance is struck between encouraging innovation and protecting pension members and the Pension Protection Fund.'

'Having worked closely with the CBI, NAPF, BVCA and many others, we will continue to engage in active consultation with all stakeholders during the next eight weeks'

END

25 April 2008

Notes:

The safeguards referred to by Mike O'Brien will include:

- Guidance from the Pensions Regulator on the application of its powers;
- A statement from the Pensions Regulator on the situations in which it will use its new powers in the period between 14 April and the date the regulations come into force;
- Provision for a 'statutory defence' against the use of the new powers in relation to Contribution Notices, such that a party who can demonstrate that they could not reasonably have foreseen the effect of a transaction would not be the subject of a Contribution Notice;
- Statutory matters that the Regulator must have regard to in order to act reasonably in using its powers
- Existing protections against the unreasonable issue of Financial Support Directions – for example, to persons who have not been involved with a pension scheme (see s. 43(7) of the Pensions Act 2004).

The consultation period will run from 25 April for eight weeks.