

April 2008

New tougher Regulator powers on the horizon?

On 14th April 2008, the Government announced what some have called “emergency legislation” to strengthen the Regulator’s powers to go after employers connected or associated with pension schemes who have acted nefariously to escape their pension obligations.

There is going to be an eight-week consultation period to determine how the changes will be implemented through new legislation. However, the Government have stated that, when enacted, the changes will be effective from 14th April 2008. We understand that the Government’s swift actions are largely in response to some of the innovative new products in the market which look to “sever the link between employer and scheme”.

So what are the changes?

It is proposed that the Contribution Notice “test” be amended such that:

1. the Regulator no longer needs to be prove that there has been a deliberate act or failure to act, only that the effect of an act is “materially detrimental to a scheme’s ability to pay members’ current and future benefits”;
2. parties will no longer have the excuse that they acted in good faith in taking actions which had the effect of preventing a debt becoming due; and
3. it will be made clear that a Contribution Notice can be triggered by a series of acts, and not just a single act aimed at avoiding a debt to a pension scheme.

The Financial Support Direction power will be changed so that the resources of the whole group of companies may be considered when judging whether to issue a Financial Support Direction when there is an under-resourced employer rather than requiring the Regulator

to identify one single ‘person’ which is sufficiently resourced to enable the issue of a direction.

But what does this really mean?

It is without question that the changes to the Contribution Notice power have made it easier, at least in theory, for the Regulator to issue its first Contribution Notice. In particular, we believe that it would have been extremely difficult for the Regulator to ever prove a “deliberate act or failure to act” and that a party’s actions were not in good faith. However, in practice any properly advised party connected or associated with a defined benefit pension scheme would be well aware of the risk of a Contribution Notice and would never have been able to claim ignorance when acting to the detriment of the pension scheme.

The extension of the Contribution Notice power to cover a series of acts rather than one single act seems on the whole to be a sensible tidying of the powers.

The change in the definition of the trigger of Contribution Notices from the previous focus of avoiding Section 75 debts to causing material financial detriment to the scheme aligns the scope of the Contribution Notice powers with the clearance regime. It is worth noting that the Regulator always claimed that the Contribution Notice powers did allow him to pursue people for causing significant detriment to the scheme as this could always be considered to have the consequence of reducing prospective Section 75 debts.

The change to the Financial Support Direction power also makes it easier for the Regulator to take action against connected or associated parties where a sponsoring employer is “insufficiently resourced”. However, this change seems designed to close a loophole in the existing legislation which would allow potentially valuable groups of businesses to avoid a

Financial Support Direction by dividing their business into a number of operating businesses, none of which, in isolation, would be sufficiently resourced. It would not appear to be aimed at private equity which in most situations would be theoretically exposed to a Financial Support Direction in relation to portfolio companies with defined benefit pension schemes in any event.

Importantly, the often overlooked reasonableness test is retained which means that the Regulator will not be able to take action against parties that have not benefited from their association with a business which sponsors a defined benefit pension scheme.

Conclusion

Unlike many commentators on this matter we do not believe that the changes made to the Regulator's powers by the Government significantly change the pensions landscape or the way in which private equity and other entities connected or associated with defined benefit pension schemes should act. The minor alterations made actually seem to "make sense" by tightening one or two loopholes.

However we will have to await the formal consultation document and ultimately the regulations amending the relevant legislation before we are able to provide any definitive advice.

Where can I get further information?

This briefing note is provided for general information only and should not be relied upon as advice on your specific circumstances. For specific advice, please get in touch with your usual Punter Southall Transaction Services contact.

Email info@pstransactions.co.uk or visit our website at www.pstransactions.co.uk

