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news

sackers extra

pensions reform

Anti-avoidance – guidance issued on Clearance Statements

Amongst the new Pensions Regulator's "super powers", the anti-avoidance provisions are aimed at preventing employers from dodging pension scheme liabilities. Anyone concerned that their actions might fall foul of the anti-avoidance provisions can seek a binding clearance statement from the Pensions Regulator (TPR). This newsletter looks at the sort of "actions" or "events" TPR might be interested in, the clearance procedure and the role of scheme trustees.

Pensions Act 2004

TPR's powers

- Broadly, TPR can issue contribution notices (CNs) where it believes pension scheme debts are being avoided.
- CNs can be issued against an employer (or those connected or associated with it) requiring a contribution to the pension scheme.
- Also, in certain circumstances, TPR can require financial support for an underfunded scheme[1].

Anti-avoidance

What actions are relevant?

- Examples of corporate acts or events potentially in TPR's firing line include:
  - granting (or extending) a fixed charge or floating charge to other creditors;
  - capital reductions through dividend payments or asset stripping;
  - a change of employer or participating employer.

When will TPR step in?

Financially detrimental act

- Before TPR will intervene the pension scheme must have a deficit (initially, subject to limited exceptions, assessed on an FRS17 basis).
- TPR will then consider whether an action or event is financially detrimental to the pension scheme. This depends principally on:
  - how it affects the priority of the pension scheme as an unsecured creditor (when compared to other creditors);
  - any deterioration in the employer's current or future ability to pay adequate contributions to the pension scheme (the strength of the employer's covenant).

1 TPR can issue financial support directions where it considers the employer in relation to a scheme is a service company or is insufficiently resourced to meet the scheme's liabilities

Clearance

When to apply

To help parties decide whether to apply for clearance, TPR classifies acts / events into the following types:

- Type A (clearance required) - e.g. changes in priority, return of capital, change in control structure;
- Type B (clearance not required) - e.g. commercial transactions at arms length[2];
- Type C (may require clearance) - e.g. events pointing towards a deterioration in the employer's covenant.

Clearance procedure

Making an application

- TPR is after "concise, relevant and accurate information" and has made an application form available.
- Clearance will be given either because:

  - the act does not fall foul of the anti-avoidance provisions; or
  - it would not be reasonable to impose liability.
- Clearance is binding provided that the circumstances described in the application do not differ materially from the actual action taken.

Trustees' role

Large unsecured creditor

- Trustees need to understand the sponsoring employer's financial position, the strength of its commitment to funding the pension scheme and the impact any act will have on this.
- Trustees should monitor corporate activity and obtain information on proposed actions at an early stage.
- Where the pension scheme's position could worsen, TPR expects trustees to negotiate with the employer to improve security[3].

Closer relationship?

- Sponsoring employers will have to take trustees into their confidence and keep them informed of corporate activity.
- Trustees will need to respect their duty of confidentiality (and watch out for conflicts).
- To fulfil their role, trustees are likely to need independent advice.

2 But this might still include a Type A event which requires clearance
3 For example, by increasing or insuring contributions or by establishing an escrow account

This edition of Sackers Extra news has been produced by our Clearance Team to help guide you on the new anti-avoidance provisions and the role of clearance statements. If you would like further information on the clearance procedures please contact:

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