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sackers extra
alert

CLEARANCE – TPR MOVES THE GOALPOSTS?

1 INTRODUCTION

The Pensions Regulator (TPR) has extensive anti-avoidance powers aimed at preventing employers from dodging pension scheme liabilities[1]. However, a clearance procedure is in place which allows parties to seek a binding statement that TPR will not exercise its powers in relation to a particular event. (Clearance applications are optional.)

TPR's current clearance guidance says that, subject to limited exceptions, TPR will only intervene if a pension scheme has a deficit on an FRS17 (or IAS19) basis. But in a "clearance reminder" published today, TPR states that clearance may now be an appropriate consideration even if a scheme is fully funded on an FRS17 / IAS19 basis.

2 KEY POINTS

- A transaction involving a significant weakening of the sponsoring employer's covenant is within TPR's line of fire, irrespective of the scheme's funding position.
- In this context, TPR expressly identifies highly leveraged transactions as being within clearance territory.
- In such transactions, TPR considers that trustees should also consider whether to seek a "materially enhanced level of mitigation" in excess of FRS17 / IAS19.
- TPR has also published its final guidance on scheme abandonment (to which similar considerations apply).[2]

[1] For example, TPR can issue contribution notices against an employer (or those connected or associated with it) requiring a contribution to the pension scheme
[2] See our Sackers Extra Alert: "Scheme Abandonment – discussion paper and guidance issued" dated 15 December 2006

SACKER & PARTNERS
Solicitors specialising in pensions law
Sacker & Partners LLP
29 Ludgate Hill London EC4M 7NX
Tel 020 7329 6699 Fax 020 7248 0552
enquiries@sackers.com
www.sackers.com

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3 THE CLEARANCE PROCESS

Obtaining clearance from TPR grants the applicant immunity from TPR's powers to issue contribution notices and/or financial support directions[3]. Applying for clearance is a voluntary process.

Corporate activity potentially in TPR's sights include: (i) granting (or extending) a charge to other creditors; (ii) certain capital reductions; and (iii) a change in the control structure of a sponsoring employer's corporate group. TPR expects parties to apply for clearance where these "Type A" events have a material detrimental effect on the pension scheme.

Subject to limited exceptions, TPR's approach has been *not* to intervene where a pension scheme is fully funded on an FRS17 / IAS19 basis. To date, this has provided comfort to would-be clearance applicants whose schemes are in this position even if a Type A event occurs.

4 EXTENSION OF CLEARANCE?

The clearance process has always applied to a scheme with a buy-out deficit (regardless of its FRS17 funding status) if, at the time of a Type A event, there is any question over the employer's ability to continue as a going concern.

Corporate activity could also find itself in the clearance field of play where the trustees have set a funding level higher than FRS17 / IAS19 (this may become more significant with the advent of scheme-specific funding).

But today's announcement from TPR (outlined in section 2 above) may mean that, *regardless of the scheme's funding position,* private equity bidders in particular can expect greater pressure from trustees to provide funding materially in excess of FRS17 / IAS 19.

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[3] As part of its armoury of super powers, 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

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enquiries@sackers.com
www.sackers.com