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WHEN DRAFT REGULATIONS ARE BORN!

1 INTRODUCTION

The Department for Work and Pensions (DWP) has started its Christmas countdown by bearing gifts for the pensions industry; publishing consultation draft regulations which propose a number of amendments to rules governing pension schemes. Consultation closes on 30 January 2009.¹

The draft Occupational, Personal and Stakeholder Pensions (Miscellaneous Amendments) Regulations 2009 (Regulations)² cover a broad spectrum of changes ranging from minor policy and consequential amendments, through to more substantive ones. Here we highlight those changes which are likely to be of most interest to trustees and employers.

2 KEY POINTS

- A so-called “statutory override” is proposed to help schemes amend their rules (where needed) to introduce the lower statutory caps on revaluation and indexation by means of a trustee resolution (see section 3).
- New sanctions will apply if employers fail to consult when making “listed changes” under the Employer Consultation Regulations³ (section 4).
- Investment regulations will be updated to remove transitional provisions applicable to employer-related investments (section 5).

¹ The consultation will last 8 weeks (instead of the usual 12) as the changes are regarded as being “of a technical, specialised nature”

² <http://www.dwp.gov.uk/consultations/2008/pensions-misc-regs-2009.pdf>

³ The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006

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3 AMENDING SCHEME REVALUATION / INDEXATION PROVISIONS

Revaluation of deferred final salary benefits

The Pensions Act 2008 will reduce the statutory cap on revaluing final salary deferred pensions from 5% to 2.5%.⁴ This change, which will apply to future accrual only, is expected to come into force from 6 April 2009.

For some schemes, the new lower cap will apply automatically (for example, because the rules make direct reference to the relevant provisions of the Pension Schemes Act 1993). In contrast, schemes which identify a specific rate of revaluation (say, 5%) will probably need to amend their rules if they wish to take advantage of the 2.5% cap.

Recognising that a rule change may not be possible for all schemes (due to the restrictive nature of some scheme amendment powers), the DWP is proposing to allow trustees to amend scheme rules by resolution⁵. This "statutory override" harks back to the Deregulatory Review's recommendation in July 2007 that restrictions in scheme rules should be overridden where they prevent schemes from taking advantage (for future service) of legislative easements designed to alleviate the burden on employers.

Indexation of pensions in payment

In a similar vein, a statutory override will also be introduced from 6 April 2009 to allow schemes to take advantage (albeit some four years on) of the lower statutory cap on pension increases.

The requirement to index pensions in payment by the increase in the Retail Prices Index, subject to a cap of 5%, was introduced by the Pensions Act 1995 and applied in respect of service from 6 April 1997. Subsequent relaxations (under the

⁴ Please see our Sackers Extra Alert: "Pensions Act 2008 - The Road to 2012" dated 5 December 2008

⁵ Under section 68 of the Pensions Act 1995

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Pensions Act 2004) reduced this cap to 2.5% for service from 6 April 2005. However, as with the new lower cap on revaluation, for some schemes this change was not automatic and rule changes have proven problematic.

4 CONSULTATION

Since 6 April 2006, employers have been required to consult affected members before making a "listed change"⁶ to their occupational pension scheme. (This requirement was phased in gradually but now applies to all employers with 50 or more employees.)

Despite this duty, failure to consult does not invalidate changes and there are no specific consequences for employers (although employees can complain to the Pensions Regulator). The draft regulations seek to redress this by giving the Regulator power to issue an improvement notice in these circumstances and also to impose a civil penalty on a person who has, "without reasonable excuse", failed to comply with the consultation requirements.

5 EMPLOYER-RELATED INVESTMENT

Back in December 2005, the Occupational Pension Schemes (Investment) Regulations 2005 (Investment Regulations) came into force. Like other regulations which came into being around the same time, the Investment Regulations were designed to implement the EU Pensions Directive⁷ (the Directive).

The Investment Regulations already limit the proportion a scheme's assets that may be invested in the sponsoring employer ("employer-related investments" or ERIs) to a maximum of 5% of the market value of the scheme's resources. However, transitional provisions exempt certain schemes which had ERIs in excess of 5% before 6 April 1997 from having to comply with these restrictions, as well as exempting investments in the sponsoring employer via Collective Investment Schemes,

⁶ For more information, please see our Alert: "Consultation! Consultation! - An update" dated 17 January 2006

⁷ Directive on the activities of Institutions for Occupational Retirement Provision (2003/41)

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ERIs derived from members' voluntary contributions and investment in "certain specified qualifying insurance policies".

The Directive prohibits the continuation of these transitional provisions beyond 23 September 2010, and the Regulations therefore provide for their removal from that date.

6 MISCELLANEOUS

Lump sum payments

The consultation sets out a number of consequential amendments in anticipation of changes being made under the draft authorised payments⁸ regulations. These regulations, published in draft by HM Revenue & Customs back in May 2008, are intended to implement measures announced in the 2008 Budget. Once implemented (now expected to be in April 2009) they will reclassify certain currently unauthorised payments as authorised (such as some overpayments of ongoing pension) and relax the rules on trivial commutation.

The Regulations include consequential amendments (for example, to the preservation, contracting-out and winding-up regulations), to ensure consistency with the above regulations from April 2009.

Scheme funding

Certain changes will be made to clarify the interplay between the statutory funding requirements and the scheme rules where the scheme actuary has the sole power to set the contribution rate under the rules without employer consent in a given set of circumstances.

⁸ The draft Registered Pension Schemes (Authorised Payments) Regulations

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Contracting-out

Schemes which are winding-up will no longer need to consult with trade unions on the surrender of a contracting-out certificate. Similarly, the provisions relating to “connected employer transfers”⁹ are to be updated to reflect policy intention by enabling schemes which were formerly contracted-out on a salary-related basis to transfer contracted-out rights.

Member Nominated Directors (MNDs)

Where a scheme's trustee structure involves two (or more) corporate trustees, one of which is a general trustee company (i.e. all of the directors are effectively lay trustees) and the other is a professional independent trustee, the Regulations will confirm that the independent trustee is not required to appoint MNDs.

7 GOOD TIDINGS TO ALL?

Although the Regulations are subject to consultation, some of the changes will not come as a great surprise and many may simply be viewed as “stocking fillers”.

⁹ Under the Contracting-out (Transfer and Transfer Payment) Regulations 1996