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PROTECTING THE PPF – REPORTING NOTIFIABLE EVENTS

1 SUMMARY

As part and parcel of the Pensions Regulator's (TPR) responsibilities towards protecting against unnecessary calls upon the Pension Protection Fund (PPF), new reporting duties came into effect on 6 April 2005.

Those on the hook for reporting "notifiable" events are trustees and employers of schemes potentially eligible for the PPF. Subject to some exceptions (see paragraph 4 below), notifiable events will need to be reported to TPR in writing as soon as reasonably practicable whenever they arise. It is therefore essential that trustees and employers of relevant schemes have a procedure in place for dealing with this new responsibility.

The new duty is set out in regulations (which came into force on 6 April 2005), a direction published recently by TPR and a code of practice currently laid before Parliament (due to the General Election, this is unlikely to be issued in final form before July 2005).

2 THE FRAMEWORK

Essentially, written notice will need to be given to TPR of events:

- relating specifically to the pension scheme (scheme-related events);
- relating to the scheme's sponsoring employers (employer-related events).

Trustees (or scheme managers) need to notify scheme-related events, and employers are obliged to notify employer-related events. Trustees and employers who fail to notify may face civil penalties or other measures imposed by TPR.

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3 WHAT TO REPORT

There have been some significant changes from the proposed notifiable events put forward in the draft code of practice published in December 2004[1]. Most notably, there will no longer be a duty to report significant reductions in the number of active members or certain redundancies to TPR. The following events will need to be reported to TPR:

3.1 Scheme-related events (trustees)

3.1.1 trustees deciding to take "action which will, or is intended to, result in any debt which is or may become due to the scheme not being paid in full" (e.g. compromising a debt);

3.1.2. two or more changes of the scheme actuary or auditor within the previous 12 months;

3.1.3 a decision by trustees to make a transfer payment to or accept a transfer payment from another scheme where the value of the transfer exceeds the lower of 5% of the scheme assets and £1.5 million (for some schemes, this could mean quite frequent reporting);

3.1.4 trustees deciding to grant benefits or a right to benefits on more favourable terms than provided for in the scheme rules where either the additional funding recommended by the scheme actuary is not forthcoming or no actuarial advice is taken;

3.1.5 trustees deciding to grant benefits or a right to benefits to a member where the cost of doing so is more than the lower of 5% of the scheme assets and £1.5 million.

3.2 Employer-related events (employers)

3.2.1 any decision by the employer to take "action which will, or is intended to, result in a debt which is or may become due to the scheme not being paid

[1] See our Sackers Extra Alert "Protecting the PPF – draft code on notifiable events" dated 14 December 2004

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in full";

3.2.2 a decision by the employer to cease carrying on business in the UK;

3.2.3 the employer receiving advice that it is trading wrongfully or "circumstances being reached in which a director or former director of the company knows that there is no reasonable prospect that the company will avoid going into insolvent liquidation";

3.2.4 breach of a banking covenant unless the bank agrees not to enforce it (this would include breach of a covenant in an agreement with an "institution providing banking services");

3.2.5 any change in the employer's credit rating or the employer ceasing to have a credit rating;

3.2.6 if the employer is a company, a decision by a controlling company to relinquish control;

3.2.7 two or more changes in the Chief Executive or any "director or partner responsible in whole or in part for the financial affairs of the employer" within the previous 12 months;

3.2.8 the conviction of a director or partner for a dishonesty offence (in any jurisdiction).

4 EXCEPTIONS

TPR has issued directions setting out exceptions to the duty to notify. The exceptions are limited to specific events provided the following conditions are met in all cases:

- the scheme is funded at or above the PPF buy-out level (or 100% funded on the minimum funding requirement basis if no PPF valuation has yet been carried out); and
- within the previous 12 months, the trustees have not incurred a duty to report a materially significant failure by the employer to make a payment to the scheme in accordance with the scheme's schedule of contributions.

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Subject to the above conditions, the following exceptions apply to specific notifiable events (with extra conditions noted in certain cases):

Scheme-related events (trustees)

The events noted in 3.1.1 (compromising a debt), 3.1.2 (changes in actuary / auditor), 3.1.3 (transfers in / out) and 3.1.5 (benefits awarded above a minimum level).

As regards 3.1.1 (compromising a debt), the entire debt must be less than 0.5% of the scheme's assets. Given the low level of this threshold, this will rarely apply to employer debts but is probably aimed at other scheme debts, such as trustees deciding to waive a debt owed by a member resulting from an overpayment.

Employer-related events (employer)

The events referred to in 3.2.4 (breach of banking covenant), 3.2.5 (change in credit rating), 3.2.6 (decision to relinquish control) and 3.2.7 (two or more changes in key posts).

An additional condition applies in the case of 3.2.5 which is that the change in credit rating must be "other than from investment to sub-investment grade where the credit rating is provided by a recognised credit rating agency".

5 TIMING OF REPORTS AND PROCEDURE

An event must be notified to TPR "as soon as reasonably practicable". The events are intended to be straightforward to identify, with no decisions as to materiality required. As notification acts as an early warning system regarding potential calls upon the PPF, the code makes clear that this time-frame "implies urgency". The example given is that of a trustee becoming aware of a notifiable event on a Sunday with the code stating that TPR "should be notified on [the] Monday".

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Trustees "must take *all reasonable steps* to comply with the notifiable events duty". Employers "must comply with the duty to notify unless they have a *reasonable excuse* for not doing so". TPR therefore expects all trustees and employers to be aware of the notifiable events, know whether any of the exceptions apply in the case of their scheme and "have a procedure which enables identification and notification to occur".

To help trustees and employers, there is a standard form which can be used for notifying events available on TPR's website at: http://www.thepensionsregulator.gov.uk/.

6 FAILURE TO NOTIFY

Where there is a failure to notify, TPR can resort to a variety of measures including requiring training. But, where appropriate, civil penalties can also be imposed.

Although a failure to notify will not of itself result in a transaction being unwound, it can be taken into account by TPR "when deciding whether it is reasonable to issue a contribution notice" under its anti-avoidance powers.

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