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FRESH APPROACH TO DISCLOSURE REGULATION

1 INTRODUCTION

With spring in the air, the Department for Work and Pensions (DWP) has issued its latest consultation outlining a fresh approach to disclosure.¹ Having been identified in the Deregulatory Review² as an area which could lead the way in terms of a principles-based approach to regulation, the DWP is seeking views as to how the existing legislation on disclosure for pension schemes could be reformed.

The consultation (which closes on 6 May 2009) seeks to balance the need to help schemes by reducing administrative burdens, whilst ensuring that members receive appropriate information. In this Alert, we consider the key features of the Government's proposals.

2 KEY POINTS

- The DWP plans to simplify the disclosure requirements for pension schemes by adopting a principles-based approach to regulation (see section 3).
- The consultation puts forward the application of a single overarching principle, complemented by obligations for specific circumstances (sections 4 and 5).
- Fixed time limits currently set out in the legislation will be replaced by "reasonable periods" (section 6).
- Legislation will finally recognise the ability of trustees and employers to deliver information electronically (section 7).

¹ Review of Disclosure of Information Requirements applying to Occupational, Personal & Stakeholder Pension Schemes

(<http://www.dwp.gov.uk/consultations/2009/pen-scheme-disclosure-reqts-consultation.pdf>)

² Chris Lewin and Ed Sweeney (July 2007): Deregulatory Review of Private Pensions: An independent report to the DWP

(<http://www.dwp.gov.uk/pensionsreform/pdfs/ReviewPaperJuly2007.pdf>)

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3 BACKGROUND

The inspiration behind the Deregulatory Review was the realisation that many layers of pensions legislation could be removed, merged or simplified. The authors of the review were tasked with seeking “consensus on the balance between member protection and encouraging employer provision of pensions”.³

Disclosure was singled out as a “good place to start” in the creation of a “sensible and straightforward regulatory framework”. With more than a dozen different sets of regulations establishing the disclosure obligations of pension schemes, it was envisaged that these could be greatly simplified by adopting a “principles-based” approach to regulation.

The new obligations will have their roots in the EU Pensions Directive⁴, which sets out the key requirements for pension scheme disclosure (see section 5) and will apply to most forms of private pension provision. They will generally apply to occupational pension schemes (whether or not they are tax registered), including cross-border schemes, but are expected to have only limited application to public sector schemes. There will also be requirements for personal pension schemes which are specifically designed to avoid duplication with the disclosure requirements of the Financial Services Authority.

4 FROM LITTLE ACORNS...

The approach put forward in the consultation is that there should be one overarching principle, complemented by specific disclosure requirements where required for particular circumstances. As currently drafted, this principle states that:

“Members should be given sufficient information that allows them to understand the benefits to which they will be entitled and any other relevant information that will enable each member to make decisions in his or her

³ See our Alert: “Deregulatory Review - The Simple Life?” dated 27 July 2007

⁴ Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision

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own best interests.”

The Government hopes that by adopting a broad approach to disclosure regulation, trustees and employers will have the flexibility to communicate with members in a way which is appropriate for the circumstances of their own arrangements. However, to ensure that members still have clarity, specific requirements will be retained in certain circumstances (see section 5).

It is intended that schemes which already comply with the current regulations will be able to retain their existing procedures.

5 THE NEW DISCLOSURE BUDS

The existing Disclosure Regulations⁵ prescribe around 30 paragraphs of basic information about a scheme with which members have to be provided (this is the information usually found in the scheme booklet). Although specific disclosure requirements will still exist, it is intended that these should be simplified, by focusing primarily on key information relating to a scheme and the benefits it provides, as well as the requirements of the Directive. The examples given in the consultation are:

- “the rights and obligations of the parties involved in the pension scheme;
- the financial, technical and other risks associated with the pension scheme;
- the nature and distribution of those risks.”

Annually, money purchase scheme members will still need to be provided with an update of their benefits. Where appropriate, statutory money purchase illustrations will also still need to be provided, although the intention is for the current “very detailed and prescriptive requirements” to be simplified. Defined benefit (DB) scheme members will still be entitled to a summary funding statement each year, and be able to request (also annually) information to enable them to understand their

⁵ The Occupational Pension Schemes (Disclosure of Information) Regulations 1996

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current pension position and/or likely income in retirement.

The requirements for annual reports also look set to be simplified, as it is proposed that schemes should be left to decide for themselves what information should be included.

6 REASONABLE PERIODS

In line with changes to other elements of pensions legislation, such as internal disputes resolution (IDRP), fixed time limits are to be replaced by “reasonable periods”. (This concept also stems from the Pensions Directive, which requires that changes to pension scheme rules are notified “within a reasonable time”.) If this approach is adopted, the Pensions Regulator will be required to produce a code of practice, outlining its expectations regarding reasonable periods in different disclosure scenarios. As with IDRP, what is reasonable is likely to depend on a scheme’s own circumstances, as well as on the type of information which is to be disclosed.

An exception to the general approach would apply in respect of new employees commencing “pensionable service”. Given the forthcoming requirement to enrol employees automatically into the personal accounts scheme or a qualifying occupational scheme⁶, the consultation suggests that basic information about the scheme should be provided within 14 days. This is to ensure that employees have “adequate information on which to base their decisions on scheme membership, within the auto-enrolment timeframe”.

The Regulator will retain the power to impose civil penalties for non-compliance (up to £5,000 for an individual and £50,000 in any other case), so it will be important for trustees and employers to be able to justify the time taken to disclose information in each case.

7 ELECTRONIC COMMUNICATIONS

In a most welcome legislative spring clean, the consultation brings with it the opportunity to drag pensions communications into the electronic age. The Disclosure Regulations currently require schemes to furnish basic

⁶ Expected to come into force during 2012

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information in writing, with information deemed to have been given if it is sent by post to the member's last known address.

Given the reliance by businesses and individuals alike on electronic communications (such as email and websites/intranets) to disseminate information generally, the pensions requirements are somewhat archaic. Therefore, the proposal in the consultation that schemes should be able to satisfy the disclosure requirements "by means of information provided electronically, either via the internet/intranet and/or provided to members by email" is likely to be warmly welcomed. However, individual members will still be able to request hard copy information.

8 NEXT STEPS

Once the DWP has considered the responses to this consultation, it plans to carry out a further consultation "later this year" on draft regulations to implement the new requirements.

The consultation offers a glimpse at a simplified disclosure future for trustees, employers and members alike. But with possible implementation not until April 2010, whilst the seeds of a new approach to regulation may have been sown, they are clearly not going to grow overnight.