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PROPOSED EXTENSION OF ANTI-AVOIDANCE POWERS

1 GREATER PROTECTION FOR PENSION SCHEME MEMBERS

The Department for Work and Pensions (DWP) has announced its intention to enhance the Pensions Regulator's powers "to require contributions to pension schemes when sponsor actions materially reduce the security of member benefits". This announcement comes amidst growing Government concern over the introduction of "business models that look to sever the link between employer and scheme", which are seen as potentially undermining the traditional employer/trustee relationship to the possible detriment of members.

The statement is available from the DWP's website at the link below:

http://www.dwp.gov.uk/consultations/2008/planned-consultations/powers-pensions-regulator.pdf

2 KEY POINTS

- "Contribution Notices" will no longer depend upon the intention of parties to an act, but on the effect of that act or course of conduct on members' benefits (see section 4).
- The "good faith" escape clause will likewise be removed (section 4).
- Legislation will clarify that it is the resources of a whole group of companies which will be assessed in determining whether to issue a Financial Support Direction (section 4).
- Although the legislation is not yet in place, the proposed changes will generally take effect from 14 April 2008 to coincide with the date of the Government's announcement (see section 5).

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3 BACKGROUND

The Pensions Act 2004 introduced anti-avoidance powers to enable the Regulator to act where corporate transactions were aimed at avoiding debts to pension schemes, in the form of:

- **Contribution Notices (CNs)**: which can require a contribution to a pension scheme where there is behaviour aimed at avoiding a debt to a pension scheme or preventing such a debt becoming due; and
- **Financial Support Directions (FSDs)**: which require a parent company or other person connected or associated with the employer to put support in place for a pension scheme whose sponsor is either under-resourced or a service company.

As well as protection for scheme members, these powers are designed to safeguard the Pension Protection Fund (PPF). But since the anti-avoidance powers were first introduced in 2005, in the Regulator's experience, there are acts which present risks for member benefits which may not trigger the issue of a CN.

4 PROPOSED CHANGES

The DWP therefore proposes:

- that CNs may be issued where the effect of an act is materially detrimental to a scheme's ability to pay members' current and future benefits. The Regulator would no longer need to prove <u>intent</u> on the part of a party to avoid funding the scheme, but that the <u>effect</u> of an act or course of conduct "posed a materially detrimental risk to members' benefits";
- removing the "good faith escape clause". (The Regulator is currently prevented from issuing a CN where, even though the actions of a party have had the effect of preventing a debt becoming due to the scheme, that party has acted in good faith);

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- to ensure that the use of the anti-avoidance powers will not be frustrated by bulk transfers of members between pension schemes; and
- to clarify its policy intentions that the issue of a CN can be triggered by a series of acts (not just a single act aimed at avoiding a debt), and to ensure that the resources of a whole group of companies can be considered when judging whether to issue a FSD when there is an under-resourced employer.

5 WHAT HAPPENS NEXT?

The DWP's proposals are set out in a statement published on its website on 14 April 2008. It will consult for a period of 8 weeks from the issue of the formal consultation document.

It is intended that the amendments will take effect from 14 April 2008 (the date of the announcement), except for the change relating to the "series of acts" triggering a CN, which will be backdated to 27 April 2004 (as it is seen as a clarification of an existing provision which became effective on that date).

Like the DWP, the Regulator has been monitoring developments in the pensions market. It has welcomed the proposed package of changes and made it clear that the proposals will not change the Regulator's established clearance process (which already focuses on the potential detrimental effect on the security of members' benefits).

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