Winding-up – Full buy-out for solvent employers

1 INTRODUCTION

On 23 February 2004, the Regulations[1] requiring solvent employers of defined benefit schemes ("DB") which are winding up to buy all members' benefits out in full were finally laid before Parliament.

The Regulations, which were first published on 11 June 2003, officially come into force on 15 March 2004. The Regulations will generally apply to all DB schemes which began to wind-up on or after 11 June 2003 where the employer is "not insolvent". ("Insolvency" is defined for the purposes of the Regulations to include a voluntary liquidation). Crucially, the Regulations now make it clear that if the date by reference to which the debt is calculated falls before 15 March 2004, the full buy-out provisions will not apply.

The Department for Work and Pensions ("DWP") has helpfully published a summary of the questions raised during the consultation process, together with a note of its responses. Some of the most significant issues are discussed below.

2 WINDING-UP ON OR AFTER 11 JUNE 2003

As already mentioned, the upshot of the Regulations is that solvent employers whose DB schemes wind up on or after 11 June 2003 will have to pay the cost of buying out all members' benefits in full. To the extent that the assets of the scheme are insufficient to meet this cost, the employer(s) will owe a debt to the scheme.

The Green Paper[2] made it clear that the Government intended to strengthen the protection for members whose solvent employer chooses to wind up its scheme. But the Regulations go further as they seem to apply regardless of whether it is the employer choosing to wind up or the trustees (assuming they have power to do so). This could place a powerful

[1] The Occupational Pension Schemes (Winding Up and Deficiency on Winding Up etc.) (Amendment) Regulations 2004 (SI 2004/403)

[2] Simplicity, security and choice: Working and saving for retirement (published on 17 December 2002)

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negotiating tool in the hands of trustees if they have a unilateral power to trigger a winding-up under the scheme rules.

3 WHAT IF THE EMPLOYER CANNOT MEET THE DEBT?

The Government's Action Plan[3] suggested that, if buying-out benefits in full puts the employer at risk, trustees "exercising their fiduciary duties" will be able to agree a lower amount. The Regulations do not cover this point. Presumably, employers and trustees would need to agree a compromise as to the level of the debt in these circumstances[4] (the DWP's note tallies with this). The DWP also points out that trustees should expect any compromise agreement with an employer to be scrutinised by the Occupational Pensions Regulatory Authority (Opra). Perhaps, therefore, the new Regulator (envisaged under the Pensions Bill) will consider this area to be fertile ground for a Code of Practice.

4 WHAT ABOUT DEPARTING EMPLOYER DEBTS?

The Regulations only deal with the debt owed by an employer which is not insolvent when a scheme is winding-up. It appears that the calculation of a debt owed by an employer departing an on-going multi-employer scheme will continue to be calculated, as now, by reference to the minimum funding requirement. It is possible that this position will alter once "the statutory funding objective" (the scheme-specific funding test put forward in the Pensions Bill) comes into force in Spring 2005.

[3] Simplicity, security and choice: Working and saving for retirement, Action on occupational pensions (published on 11 June 2003)

[4] In the Bradstock Group Pension Scheme case ([2002] PLR 327), the High Court approved the compromise of a debt under the existing deficiency regulations