

**AMENDMENTS TO THE ANTI-AVOIDANCE MEASURES
IN THE PENSIONS ACT 2004**

RESPONSE TO CONSULTATION

The comments set out below form Sacker & Partners LLP's formal response ("Response") to the consultation on "Amendments to the Anti-Avoidance Measures in the Pensions Act 2004" published in April 2008.

The consultation paper asks for contributions from the pensions industry, including pensions professionals. Sackers is a firm of solicitors specialising in pensions law.

General Comments

1. We support the Government's stated aim of making the amendments to the anti-avoidance powers "to ensure that they remain appropriate to address material risks, without imposing undue burdens on pension schemes, employers or the wider business community".
2. We note that the primary target of the proposed amendments is the "new business models" referred to in the consultation paper. However, the characteristics listed in the consultation paper could equally apply to "normal" everyday transactions as well as to these business models. It would help if there were further detail in the legislation (and associated guidance) regarding the "new business models" with a clearer indication of what businesses are the targets for the Regulator.
3. More generally we are concerned that increasing the Regulator's powers in this area, with the aim of flexibility, comes at the expense of certainty for parties to transactions. We note that there are a number of remedies available to clearance applicants but given the significant discretion granted to the Regulator in this area it will be difficult to challenge a decision. This is in addition to the normal barriers which exist to obtaining any judicial remedy – i.e. that any case is expensive and time-consuming to pursue.
4. We also note that as well as the changes proposed in this consultation, there is an intention to insert a general regulation-making power into the Pensions Act 2004 "which is sufficiently broad-based to enable amendments to be made to

ensure that the Regulator has effective powers to deal with the risks resulting from innovation in the market". We are concerned about the uncertainty which the prospect of further changes on the horizon creates, and also the width of such a regulation-making power.

5. In addition, it is our view that the lack of clarity in the legislation, both in the context of whom the powers may be targeted at, and the move from an objective test to a largely subjective test in respect of Contribution Notices (CNs) (which we discuss at paragraphs 14 to 16 below), will mean that more clearance applications are made in future.
6. We also have a number of comments to make about how the specific proposals in relation to Financial Support Directions (FSDs) and CNs are to be implemented.

Retrospective Legislation

7. We are generally not in favour of the use of retrospective legislation as we believe our clients should be entitled to have certainty regarding the law. It remains a key tenet of English law that legislation should not be made retrospectively except in the most exceptional circumstances.
8. It is intended that all bar one of the amendments is to come into force on 14 April 2008 (the date of the announcement of the changes). The use of an announcement may counter the argument that retrospective legislation is unfair.
9. We note that this technique has been used before in pensions, for example, when the employer debt on a solvent wind-up was increased from the minimum funding requirement to the buy-out debt (by way of an announcement on 11 June 2003). However, on that occasion the period between the announcement and the implementation of the changes in March 2004 was very unsatisfactory and led to a lot of unease. Therefore, because during the intervening period the parties are effectively in limbo, we believe that an announcement should only ever be used in very limited circumstances. With this in mind, we note with approval that it is the Regulator's intention only to apply its proposed powers to "new business models" during this period. Nonetheless, we remain concerned that this method has been chosen to implement these changes.

10. The final change - clarifying that a CN can be issued following a course of conduct rather than on a specific event - is proposed to have retrospective effect to 27 April 2004 (the date the anti-avoidance powers were first introduced). We understand from the consultation paper that this route has been justified on the basis that the change is a clarification of, rather than an amendment to, the legislation. Even though the consultation paper states that clearance granted on the basis of the current test will not be withdrawn as a result of the changes, there may be other unintended consequences. Given this and the concerns over making retrospective amendments, we believe it may be more appropriate to only make the change going forward. The Government could then rely on judicial interpretation of the provision in the period from introduction to the date of change to encompass the wider test used by the Regulator to date.

FSDs – Support from a number of parties

11. The change proposed so that financial support under an FSD can be sought from a number of parties rather than a single party is common sense and we support this aim.

12. However, it may also make sense to reconsider the levels of funding (to shift it up from the 50% currently required) to make allowance for this change.

CNs – Series of Acts

13. Leaving aside the issue relating to retrospective legislation, we support the proposed change so that a CN can be issued where the risk stems from a series of events as well as a single event.

CNs – Course of Conduct Materially Detrimental

14. We see this as the most significant change in the package of changes announced extending the Regulator's anti-avoidance powers. Currently a CN can only be issued when there is an immediate risk to the scheme i.e. when there is an intention to prevent recovery of the whole or any part of a debt. In future, if this change is implemented in its current form, it would be possible for the Regulator to issue a CN where a course of conduct is "materially detrimental to the

scheme's ability to pay members' benefits" i.e. even where there is no immediate risk to the scheme.

15. Although the extension to the power is significant, there are no current proposals in the consultation document providing an alternative to issuing a CN where the new test is met but there is no immediate risk to the scheme. Given that this power can be applied to individuals as well as to companies and that it would require an immediate payment to the scheme, the issue of a CN may not be the most appropriate and proportionate action for the Regulator to take.

16. Alternatives to issuing a CN in these circumstances might include:

- requiring some sort of financial support, in a similar way to an FSD; or
- making the payment of the amount under the CN contingent on certain events (in a similar way to the guarantee under an Approved Withdrawal Arrangement).

CNs - Removal of "good faith" defence

17. We understand from the consultation document that the proposed removal of the "good faith" defence to the imposition of a CN is as a result of "operational experience which has shown that this requirement can be easy to circumvent".

18. Rather than removing this defence altogether, it may be appropriate to reverse the burden of proof so that the party to the transaction is required to show that he has acted in good faith.

CNs – Statutory Defence

19. We are concerned that "reasonably foreseeable" could be interpreted very widely, and could catch an act which has a number of possible outcomes for the pension scheme (some of which could be quite remote).

20. It may be more appropriate to use the phrase "reasonably likely" which suggests that the effect on the pension scheme has a good chance of materialising or is more probable than not, which would give a degree of comfort and certainty.

Bulk Transfers

21. We understand from the consultation document that the Regulator is concerned that bulk transfer powers can be used to frustrate the Regulator's powers to issue a CN by breaking the nexus between the employer and the scheme in which the section 75 debt arises. We support the aim of allowing a CN payment to be made to a receiving scheme in these circumstances (and for it to be ring-fenced for the affected members).

22. However, as the transferring and receiving trustees would normally be required to consent to the transfer, we wonder whether this alone would offer adequate protection to the members where the reason for the imposition of a CN was the possible detrimental effect of the bulk transfer (the example given is where security may be inadequate), rather than the avoidance of a debt. It may therefore be appropriate to limit the power to issue a CN to circumstances where there is power to make a bulk transfer without trustee consent.

Sacker & Partners LLP

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