SACKER & PARTNERS

FINANCIAL ASSISTANCE SCHEME

RESPONSE TO CONSULTATION

The comments set out below are the response ("**Response**") from the trustees (**"Trustees**") of the Data General Employee Benefits Plan ("**Plan**") to the consultation on "Draft Regulations – The Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008" published on 28 March 2008 by the Department for Work and Pensions ("**Consultation Paper**").

The consultation paper asks for views of interested stakeholders. The Plan is potentially eligible for the Financial Assistance Scheme ("**FAS**") by reason of the changes proposed in the draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008 ("**FAS Amendment Regulations**")[1]. This Response has been prepared by the solicitors acting for the Trustees, Sacker & Partners LLP.

We have focused on the "solvent employers" aspect of the draft FAS Amendment Regulations as this is the primary area of concern to the Trustees of the Plan.

Background

1. At all relevant times, the Plan was (and still is) a multi-employer scheme with a principal employer (EMC Europe Limited) and one participating employer (EMC Computer Systems (UK) Limited) (collectively, "**Employers**"). The Plan has never been and is not a sectionalised scheme.

2. By virtue of the Principal Employer giving notice in writing to the Trustees, the Plan commenced winding-up on 30 June 2002. At that time, the Plan was funded to a level above the Minimum Funding Requirement ("**MFR**") basis. However, in November 2000, the Trustees had made a demand against both Employers for a total of £5.33m which remained outstanding as at 30 June 2002.

[1] Please note that this is not a concession that the Plan would not otherwise fulfil the necessary eligibility criteria.

3. On 2 August 2002, the Trustees and the Employers entered into an agreement to release the Employers from "*any actual, potential or future claim that may arise for a debt payable by any of the Employers to the Trustees, whether under Section 75 [of the Pensions Act 1995 and the regulations made under that Section from time to time] or under the Rules or otherwise*" in consideration for the Employers' parent company, EMC Corporation Inc, paying £1.2m to the Trustees ("**Compromise Agreement**").

4. Given the terms of the release, the Trustees have not since sought to trigger the "applicable time" for the purpose of the Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996.

5. The Plan is significantly under-funded on a buy-out basis.

Extension to Solvent Employers

6. In December 2007, it was announced that FAS would be extended to certain schemes which wound up underfunded with a solvent employer.

7. In order to implement this announcement, the FAS Amendment Regulations were published with the Consultation Paper. Paragraph 63 of the Consultation Paper states that:

> "*Our aim is to include schemes where the employer has discharged their legal responsibilities to the scheme, but the scheme is left underfunded because the regulatory framework of the time did not require the employer to pay the full buy-out levels of debt.*"

8. The Trustees believe the Plan meets the policy test set out in paragraph 63 of the Consultation Paper given that:

   (1) the Plan was funded to the necessary MFR level at the time it commenced winding up; and

(2) the Compromise Agreement operates as an immediate release of the Employers from any further liability that might arise were the Trustees now to trigger the "applicable time".

9. However, the Trustees are concerned that the drafting of FAS Amendment Regulations does not properly meet the policy intention.

10. New Regulation 9(1)(c) requires that, in order to qualify for FAS in a multi-employer scheme, the employer must satisfy the condition in Regulation 12. New Regulation 12B(4) requires that, in relation to a multi-employer scheme which is not a sectionalised multi-employer scheme, the condition to be satisfied is that "… *the debt due under the section 75 of the Pensions Act 1995 was discharged … by the principal employer …*".

11. In the context of the Plan, no debt under section 75 of the Pensions Act 1995 was due at the date the Plan commenced winding-up. The last MFR certificate for the Plan had an effective date of 1 April 2004 and stated that the funding position was between 115% and 120% of the MFR level. Since then, the Scheme Actuary has not attempted to calculate the MFR funding level as it would be a complicated and very costly exercise, and one which has, at least up until now, been considered to have no benefit to the Plan.

12. The Trustees are concerned that if a section 75 debt is not triggered and certified by the Scheme Actuary (and that might not occur because of the high cost of and/or absence of any other reason for doing so, or because no MFR deficit might have arisen during the period in which the Trustees could nominate the "applicable time"), there may be neither a "*debt due under section 75*" nor a discharge of such a debt.

13. The Trustees do not believe that the policy intention behind the proposed extension is for pension schemes to be eligible where a section 75 debt (of, say, £1) has arisen and been paid (i.e. discharged) by the principal employer, but not to be eligible where a section 75 debt has not arisen because the pension scheme has been funded above the MFR level (perhaps by only £1) but below buy-out level.

14. The Trustees are concerned that the drafting of the FAS Amendment Regulations could exclude the Plan from being eligible for FAS where the policy intention seems clear that

the Plan should be so eligible. The Trustees would therefore strongly request that the proposed wording be revised to remove any doubt that the Plan might not be eligible for FAS. We would suggest that such revised wording remove the need for a section 75 debt to be due before then being discharged by the principal employer.

Sacker & Partners LLP

8 May 2008