

Draft Clearance Guidance - Response to Consultation

The comments contained below are Sackers' formal comments ("the Response") on the Draft Clearance Guidance published for consultation by the Pensions Regulator ("TPR") on 10 September 2007.

1. General Comments on the Guidance

- Clearance is intended to be a voluntary process, however we note there is increasing pressure on companies to apply for clearance. The draft guidance suggests that trustees should in effect blow the whistle to TPR if clearance is not being sought. Although the original intention was as a guide for companies in order to establish whether they should apply for clearance (and to outline the process for doing so), we understand that the guidance now "focuses on [TPR's] expectations of professional advisers working with trustees and employers in considering events that may have a detrimental impact upon a pension scheme". Therefore, it now seems to be designed as a negotiating tool.
- We note that trustees are being pushed to the forefront of the clearance process when it was originally the aim that companies should be in the driving seat. If this is the intention this should be explicit in the guidance.

2. Principles not Rules

- Additional examples and guidance would be helpful to establish when clearance is available. At present, the reliance on principles not rules means that employers and trustees will need professional advice in order to interpret the guidance.

3. Employer Covenant

- As the guidance recognises, the employer covenant is at the heart of the availability of clearance. It would be helpful if further guidance was given on this issue. Dependent on the circumstances, it may not be necessary for the trustees to conduct covenant reviews of all companies in the group (for example, where trustees have no

legal claim over such a company) – perhaps this could be explained more fully in the guidance?

- In addition, we note that in order to assess the employer covenant, trustees and employers will be more reliant on professional assistance.

4. Apportionment

- We have found that, in recent years, scheme apportionments have increasingly found favour. In our experience, it is difficult to advise trustees to accept an apportionment arrangement in the context of an at arm's length transaction, except where stringent commitments on future funding have been given. In such cases, we do not believe that clearance would be sought. (In addition, it seems unlikely that applications for clearance will be made where the event is merely the introduction of an enabling power, not the exercise of that power).
- However, we believe that apportionment and Scheme Apportionment Arrangements (SAAs) proposed by the draft Employer Debt Amendment Regulations¹ remain a valuable area of flexibility in relation to pension schemes. We comment further on SAAs under section 7 below.

5. Mitigation

- We sense that this is the area about which there is most confusion amongst trustees as to TPR's expectations. In particular, we are concerned that many trustees will focus on the clearance guidance without proper consideration of the scheme's balance of powers and their legal rights to enforce mitigation. This could cloud the real issue that mitigation is aimed at compensating the trustees for TPR giving up their right to use the anti-avoidance powers.

¹ The draft Occupational Pension Scheme (Employer Debt)(Amendment) and Pension Protection Fund (Multi-employer and Entry Rules) (Amendment) Regulations (the Employer Debt Amendment Regulations)

- In light of this, further advice on, and examples of, appropriate mitigation would be helpful. We would specifically like to see this tied to factual examples with details of the trustees' legal position under the pension scheme governing documentation.

6. Interaction with Notifiable Events

- It would be helpful for the Code on Notifiable Events to be re-considered given the revisions to the clearance guidance.
- It may not be appropriate to apply for clearance on all compromises because of the factual circumstances. The compromise of a debt is, in any case, a notifiable event and so TPR will be alerted to the compromise if it feels it is necessary to take action.

7. Interaction with Employer Debt

- We note that TPR remains concerned that schemes will be abandoned (highlighted in TPR guidance on this issued in May 2007) and that this concern was fed into the draft Employer Debt Amendment Regulations.
- We note, with appreciation, on behalf of many of our clients that the Department for Work and Pensions announced on 27 September 2007 that the current draft formulation of the definition of "employment cessation event" will be amended to ensure that it does not apply to trigger a section 75 debt "when a company closes its scheme to future accruals, whilst continuing to fund the scheme".
- We believe that the interaction of clearance guidance and SAAs would benefit from further scrutiny. We understand from the draft Employer Debt Amendment Regulations that SAAs will operate as a statutory overlay on current scheme apportionments, and have a number of safeguards built in. Given this, we wonder whether the seemingly additional layer of regulation provided in the draft clearance guidance (which states that the "use, amendment or insertion of an apportionment rule is a type A event", subject to certain exceptions) will be proportionate in terms of time and cost to the additional comfort provided.

- Our major concern though is whether a Cessation Agreement (CA) will need clearance. In a transaction, the parties will often not wish to enter into an approved withdrawal arrangement because of the need to get TPR approval which is perceived to add time and cost to the process. The need to get clearance for a CA could cancel out the benefit of not having to get TPR approval if the parties are entering into a CA.

8. Miscellaneous

- We support the focus on Type A Events, as in our experience the terms Type B and C Events were rarely used.
- Relevant funding basis – the draft guidance says that the higher of the FRS17/IAS19, technical provisions or section 179 should be used – it would also help if there was a little more clarity on this. However, once the scheme has conducted a scheme funding valuation, we would anticipate the appropriate basis would be the technical provisions (as the trustees, in setting the technical provisions, will have considered the other bases).
- In order to streamline the application process for both applicants and TPR we would suggest that the provision of documents is limited only to those documents that are relevant to the particular application. Additional documents could always be provided on request.

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