

**This article appeared in Pensions Week March 2005**

**Keep your eyes on the ball**

**By Peter Murphy, Associate and Ian Cormican, Senior Solicitor**

**Trustees should monitor corporate actions more closely to prevent an employer from avoiding its pension scheme liabilities. They can seek help from the Pensions Regulator which can use its new powers to minimise the risk to schemes.**

We have all been told that the Pensions Regulator, successor to the Occupational Pensions regulator Authority (Opra) intends to use its new anti-avoidance powers to protect pension benefits and minimise the risk of schemes falling into the Pension protection Fund (PPF). But what, in practical terms, might this mean for employers with final salary pension schemes and for the trustees of those schemes?

Broadly speaking, contribution notices can be issued where there has been an attempt by an employer to avoid its pension scheme liabilities. There a number of criteria to meet and a couple of exceptions exist, but that is the main thrust. Surprisingly, fairly routine corporate actions could be scrutinised by the regulator:

- The granting of fixed or floating charges;
- Capital reductions through dividend payments and de-mergers; and
- Corporate restructuring.

If a pension scheme is regarded as an unsecured creditor, then such actions could result in an employer being unable to fund a scheme properly and potentially pushing it towards the PPF.

So it appears that the regulator will have to be notified of these types of action. It will be important for corporate advisers to bear this in mind, as, on the face of it, these actions do not appear to affect pension schemes.

On being notified, the regulator will look at the funding position of the scheme (probably on an FRS 17 basis) and the strength of the employer's covenant.

If the regulator believes that, as a result of the action, the scheme's position as a creditor has been materially weakened, it will expect the trustees of the scheme to have been informed and consulted on the proposed corporate activity and to see money going towards the scheme's liabilities.

The regulator will expect trustees to get involved and assert their rights as an unsecured creditor. This means a shift in approach for employers, who will need to consider informing trustee o commercial dealings at an early stage.

Trustees will also need to monitor corporate activity and take independent advice as to whether they should be seeking additional funding for the pension scheme in light of the employer's proposed actions.

Although the anti-avoidance provisions will only apply where the main purpose, or one of the main purposes, of the action is to avoid pension scheme liabilities, the regulator is the judge of the purpose.

It may be difficult for employers to persuade the regulator of its good intentions if it is distributing profits to shareholders without sending some cash or security in the direction of its beleaguered pension scheme.

A source of comfort for any person concerned that a corporate action might result in a contribution notice is the opportunity to obtain a clearance statement from the regulator.

### **Binding decision**

Before the action takes place, an application may be made to obtain a binding decision from the regulator that either the applicant will not be caught by the anti-avoidance provisions is it was to take part in the action, or that it would not be reasonable to impose liability on the applicant in any event.

Although clearance statements will provide obvious benefits, it is also important to bear in mind some potential difficulties.

Opra has indicated, informally, that it expects the regulator to be able to issue clearance statements within 48 hours of receipt of the application. The legislation requires a response 'as soon as reasonably practicable'. But even with the benefit of external professional help, 48 hours could prove an ambitious target.

Time will also need to be factored in for advisers and applicants to put together the information required by the regulator. This may include an independent accountant's report to assess the strength of the employer's covenant. Advisers need to bear this in mind and ensure preparations are made at an early stage.

Companies may be concerned about providing price-sensitive information which could potentially be disclosed to trustees or even competitors.

Although there are statutory restrictions on the information the regulator may disclose, no such restrictions apply to trustees. Given the regulator's likely approach to the involvement of the trustees, employers may wish to have robust confidentiality agreements in place with the trustees.

There is power for regulations to authorise the regulator to charge fees to meet the costs it incurs in connection with clearance applications.

Although no details of these potential fees have yet been released, there is no reason to believe that they will be nominal, flat rate application fees. If the regulator does call on external professional assistance, it could pass on these significant costs to the applicant.

Regulations on anti-avoidance and guidance on clearance are awaited. These should clarify the position enormously. However, trustees should be aware that they will need to monitor corporate actions more closely and be prepared to take their role as an unsecured creditor seriously.