

The DWP's consultation document on "The powers of the Pensions Regulator: Amendments to the anti-avoidance measures in the Pensions Act 2004"

A draft response by

The National Association of Pension Funds

June 2008

Introduction

1. The NAPF is the leading voice of workplace pensions in the UK, with over 1300 members, between them providing pensions to over 10 million working people. NAPF Member schemes hold assets of some £800bn.
2. We welcome the opportunity to respond to the consultation by the Department for Work and Pensions (DWP) on the important topic of anti-avoidance measures.
3. The NAPF welcomes innovation and recognises, as does the Government, that buyouts will be the right solution for some pension schemes and scheme sponsors. Nonetheless, we agree that new business models which may sever the link between employer and pension scheme, operating outside Financial Services Authority regulation, present new risks to pension scheme members. We also agree that the current powers of the Pensions Regulator (tPR) are not adequate to fully address these risks.
4. We are very supportive of the intention behind the proposals set out in the DWP document. However, we do have concerns that the proposed method of amending tPR's powers in respect of issuing Contribution Notices could create more uncertainty for employers than is intended, with the result that the continued provision of good quality defined benefit pension provision could inadvertently be threatened.

Comments

5. We fully support the Government's stated intentions here, as this is an area where additional protection for scheme members is essential. But we are concerned that there is clear apprehension within the business community, acknowledged in the consultation paper, about the greater regulatory uncertainty inherent in the new test for the issuing of Contribution Notices. Looking at the effect of a series of actions, compared to the current test of considering the intent of a single action, will inevitably force employers to consider the effects of corporate activity more closely and almost certainly add to their costs. It is likely that legal advice would be sought more often and that clearance application would be made to tPR more frequently, both of which could hinder corporate transactions.
6. We are not convinced that the proposed statutory defence – that the effect of the relevant actions could not reasonably have been foreseen at the time they were taken – will provide enough assurance to allay the concerns. We see a risk that some employers might begin to view the schemes they sponsor as a potential impediment to legitimate corporate activity. The related worry is that this could lead some to review the pension arrangements they provide for their staff, and that some may consider closing the defined benefit pension provision they currently offer.

7. We believe that the Government's intention could be put into effect with a relatively small change to the approach proposed, which should provide greater comfort and certainty for scheme sponsors. Our recommendation would give equal status to the list of actions and situations set out as characteristics of detrimental effect (para 2.35) as is given to the checklist of factors proposed in considering detriment (2.31) and to the factors listed in s38(7) of the Pensions Act 2004, to which tPR must have regard in considering whether it would be reasonable to issue a Contribution Notice (2.32).
8. We would like to see the proposed list of actions or situations characterising material detriment, those which tPR might examine in the context of considering a Contribution Notice, given authority in statute. Although additional detail regarding the list might be set out in secondary legislation, this would effectively provide a statutory definition of transactions likely to have a material detrimental effect on pension schemes, giving employers and scheme sponsors the clarity they need to undertake corporate activity. We would expect the 'definition' to have the retrospective effect outlined in the consultation paper - and we foresee it coping with further innovation in the non-insured buyout market by being open to revision through future regulations, as circumstances dictate.
9. We are conscious that, in this case, we are recommending a move away from principles-based legislation towards a rules-based approach. While we would usually be reluctant to adopt such a policy, we have looked at the effects on both business and pension provision of applying anti-avoidance measures to the new business models and we believe that it is appropriate in this case.
10. The DWP has gone some way towards preparing a list defining transactions likely to have a material detrimental effect with the list contained in the consultation. But, clearly, further work would be needed in producing a comprehensive list and the NAPF would be pleased to work with the DWP to develop this alternative approach should it be adopted.
11. The effect of this alternative approach is, we acknowledge, equivalent to that anticipated by Government and tPR in their respective statements of assurance. But by defining in legislation the circumstances under which the new power to issue a Contribution Notice will be considered, we believe that Government will also provide the clarity and certainty for employers that will enable corporate activity to continue unencumbered.
12. Finally, the NAPF is fully supportive of the consultation paper's proposals relating to Financial Support Directions and to Bulk Transfers.