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The end of the pension scheme – liability management, wind-up and the PPF

Current legal issues

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Agenda

1. The Pensions Regulator's guidance on winding up
2. Liability management before winding up
   > enhanced transfer value exercises
   > buying out benefits and the "Ilford" case
3. Termination and winding up
   > the distinction and why it is so important
   > closing a scheme to future accrual without triggering a wind up
   > "nuclear provisions" and the role of the scheme actuary
4. Section 251 – payments to employers

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The Pensions Regulator's guidance on winding up

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The Pensions Regulator's guidance on winding up

> Guidance issued in June 2010
> Provides suggestions of good practice
  > Administration issues
  > Planning a scheme wind up
  > Conduct of outgoing administrators
  > Data cleansing
  > Member tracing
  > Contracted-out liabilities
  > Member option exercises
  > Buying out annuities

> Complete key activities within 2 years

> Also PPF's guidelines for trustees managing pension schemes through the PPF assessment period

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Liability management before winding up

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Enhanced transfer value exercises

> What are enhanced transfer value exercises?
> Why are enhanced transfer value exercises an issue?

> The Pensions Regulator's original guidance on inducement offers (January 2007)

> Joint statement by the Pensions Regulator and the Financial Services Authority on enhanced transfer value exercises
  > presumption that enhanced transfer value exercises are not in members' interests

> Financial Services Authority factsheet on pension transfers – who can do what and when?

> The Pensions Regulator's consultation document – guidance on transfer incentives (July 2007)
  > Understanding the 5 principles
  > Problems that can arise for members
  > Considerations for Employers and Trustees

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Buying out benefits and "Ilford"

> *Independent Trustee Services Limited v Hope & others (November 2009)*

> Buying out benefits
  > Reason v purpose of buying out benefits
  > PPF – relevant or irrelevant factor?
  > Improving position of members v worsening position of PPF
  > Duty of care to PPF?

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Termination and winding up

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The distinction and why it is important

> Termination and winding up often used interchangeably

> Trust Deed and Rules

> > Partial termination / termination triggers – balance of power?

> > Default position on termination – wind up?

> > When might Trustees exercise power to continue scheme after termination?

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Implications of winding up – section 75

> Pensions Act 1995, section 75

> Triggers

> > participating employer exiting an ongoing scheme when at least one other participating employer still employs at least one active member

> > Insolvency event

> > Winding up

> Full "buy out debt"

> > lose ability to "apportion" or otherwise deal with section 75 debt on a winding up

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Issues on closing a scheme to future accrual

- Full closure v retaining future salary linkage
- Implementing closure
  - Amendment power (pensionable service and ending salary linkage)
  - All participating employers ceasing to participate at same time
  - Combination of amendment power (pensionable service) and agreement on future salary increases being non-pensionable (ending salary linkage)
  - Contractually?
- Implications – triggering a termination?
- Continuing to contribute in respect of past service deficit

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"Nuclear" provisions and the role of the Scheme actuary

Three examples:

- *"If the Trustees shall at any time be of the opinion that the objects for which the Scheme was established no longer exist or that the administration of the Scheme cannot conveniently be carried on, the Scheme shall be wound up."*
- *"The Scheme shall terminate if the Actuary certifies that the Scheme is insolvent and the Employers fail, in the Trustees' opinion to comply with the action required to remedy the position."*
- *"The Trustees will terminate the Scheme if the Trustees receive actuarial advice that the contributions being paid by the Employers and reasonably expected from them in the future are so low as to prejudice seriously the long term financial position of the Scheme."*

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“Nuclear” provisions and the role of the scheme actuary

> Interpreting the wording in the Trust Deed and Rules
> Actuarial considerations
  > difficult advice for Scheme Actuary to give – partly due to implications of giving it
  > Present and future funding position
  > Employer covenant
> Challenge by Employer?
  > Trustees acting reasonably?
  > Improper use of power?
  > Best interests of “members” v best interests of “beneficiaries”?

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Section 251 – payments to employers

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Repayment of surplus to employers

> Pensions Act 2004, section 251 (payment of surplus to employer: transitional power to amend scheme)
  > Repayment of surplus from ongoing scheme
  > Repayment of surplus from scheme which is in wind up
  > Reimbursements of administration expenses
  > Lien provisions

> The solution
  > Notice to members – at least 3 months before effective date of Trustee resolution
  > Trustee resolution

> BUT
  > DWP's proposed legislative amendment when "suitable opportunity arises"

> Pass resolution "just in case" v "wait and see"

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Questions?

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