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9 August 2010

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Department for Work and Pensions
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Dear Mike

The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 (SI 2010/725)

We are writing with regard to the above-named regulations, which were effective 6 April 2010.

We are writing to draw to your attention a couple of significant points in the new regulations which we would encourage you to address quickly. In addition, we list a number of important areas that were omitted from the final amending regulations where we believe clarification is still required. There are, of course, a number of further issues that remain to be resolved, and as you indicate in paragraph 17 of the response to the consultation, we look forward to being a stakeholder in conjunction with this additional work.

"Updated Liabilities Assessment" definition

Regulation 4(2) (f) and (g) of The Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 (SI 2010/725) substituted a new definition of "updated liabilities assessment" for the old definition of "updated actuarial assessment" in the 2005 Employer Debt regulations, but we believe there is an error in the new definition.

The old definition in Reg 2(1) of the Occupational Pension Schemes (Employer Debt) Regulations (SI 2005/678) required the solvency liability from the latest valuation date to be adjusted to the applicable time by assessing the changes between the two dates. The new definition is written differently and requires the actuary to make an assessment of any *changes* in the liabilities between the valuation date and the applicable time. It does not, however, make it clear that this assessment of the change should be aggregated with the starting liability value.

A literal interpretation of the new definition would therefore give a meaningless result, and may well result in no deficit at all even where a scheme was significantly underfunded on a Section 75 basis. Since this clearly advantages the exiting employer, any scheme actuary taking a more pragmatic interpretation of the new regulations (in line with the policy intention) theoretically runs the risk of a subsequent challenge that the debt was overstated (along with

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potential claim for the overpayment on the grounds that the certificate was not prepared in accordance with the legislation).

In view of the possibility that a literal interpretation of the legislation could lead to understated debts, we encourage the DWP to take action to correct the regulations. In the meantime, a further statement of the policy intent (and the intention to backdate any future correction to 6 April 2010) would be helpful.

Form of required certificates

The 2010 amending regulations made some changes to the wording of the actuarial certificates in regulations 16, 18 and 19. These changes were effective from 6 April 2010 and, unlike the 2008 regulations, there are no other provisions on commencement or transitional provisions.

We have encountered different legal views as to whether the amended regulations have retrospective effect where certificates are produced after 5 April 2010 in relation to debts triggered between 6 April 2008 and 5 April 2010.   Many of the changes to the certificates are helpful clarifications and it should not matter in practice whether they are retrospective. However, one significant change is the introduction of the “updated liabilities assessment”. Is your policy intention that this should have retrospective effect?

It is important that scheme actuaries and trustees have certainty over the form of the required certificates, to avoid any possibility that employers can subsequently declare that a certificate is invalid. Please could you therefore confirm whether the policy intention is, in fact, for the April 2010 changes to apply retrospectively to debts certified after 5 April 2010 where the cessation event occurred prior to 6 April 2010.

Other outstanding employer debt issues

A number of other issues were omitted from the final 2010 amending regulations. Some of these issues continue to create practical problems and others are still open to legal interpretation, meaning that outcomes may not always be in line with the policy intention and may sometimes be detrimental to the scheme. We encourage you to revisit these. The most important ones, in our opinion, are as follows:

1) Restructuring easements

The current restructuring easements, whilst welcome, are of extremely limited use, mainly because they only apply to one-to-one restructurings. We believe that some additional flexibility, allowing the easements to apply to more complicated restructurings, would be of significant benefit to corporate restructuring activity. We note DWP’s stated intention to revisit the possibility of extending the easements to multi-employer restructurings and suggest that early action should be taken.

2) Scheme apportionment arrangements – there are significant practical problems due to the lack of clarity over whether apportionment arrangements should provide for a fixed (i.e. monetary) or floating (i.e. percentage) amount to be apportioned to a remaining employer(s) and whether it is the liabilities or the debt that should be apportioned.   These problems make apportionment arrangements very difficult to implement in practice, with legal advisers insisting on complex documents to attempt to overcome the deficiencies in the Regulations.

Your statement (in the September 2009 consultation document) that the policy intention is *not* to apportion the departing employer's liabilities (which instead become orphan liabilities) is not necessarily consistent with the regulations and neither does it appear to be adequately reflected in the calculation of subsequent liability proportions (regulation 6(4)). This gives rise to significant practical issues in calculating subsequent debts for a scheme where an earlier scheme apportionment arrangement included an apportionment of both an amount and the associated liabilities. We would note that, in our experience, a large number of scheme apportionments put in place since 6 April 2008 have in fact been set up assuming both liabilities and amounts are apportioned, so this is an issue of immediate practical import.

3) Determining Amount B in withdrawal arrangements – Schedule 1A is not clear about the calculation of floating amount B, a fact which can cause significant problems and legal debate. The lack of clarity in the regulations risks some trustees setting up withdrawal arrangements that do not meet the policy intent, in spite of their best endeavours.

4) Attributing liabilities to employers – Regulation 6(4) of the 2005 regulations continues to be unclear and open to legal interpretation. This can cause disagreement between employers and trustees and may result in liabilities being attributed in a way that is contrary to the policy intention and, in some cases, significantly detrimental to the scheme. For example, transfers-in for members who have only had one employer within the scheme may arguably still be treated as orphan liabilities (because regulation 6(4)(b) may not apply).

We hope this letter will be helpful in the formulation of your future plans for the employer debt legislation. Please contact Martin Hewitt, Pensions Practice Manager on 0207 632 2185 or via Martin.Hewitt@actuaries.org.uk if anything is unclear or we can help further.

Yours sincerely

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Please reply to the Institute, London