ASSOCIATION OF CONSULTING ACTUARIES

Association of Consulting Actuaries Limited · First Floor (129) · 40 Gracechurch Street · London · EC3V 0BT
Tel: +44 (0)20 3102 6761 · Email: acahelp@aca.org.uk · Web: www.aca.org.uk

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pensions.consultations@dwp.gov.uk

Defined Benefit: The Pensions Regulator Powers team
DWP Consultation Coordinator
4th Floor
Caxton House
Tothill Street
London SW1H 9NA

Dear Sirs

Strengthening the Pensions Regulator's Powers: Contribution Notice and Information Gathering Powers Regulations 2021

I am writing on behalf of the Association of Consulting Actuaries in response to the above consultation. Our thoughts are set out in two separate Appendices to this letter.

We hope that you find the contents of this letter of assistance. We would be happy to discuss them further if that is helpful. In that event, please contact me on 01372 733763 or at peter.williams@aon.com.

Yours faithfully

Peter Williams
Chairman, Pension Schemes Committee
On behalf of the Association of Consulting Actuaries Limited

APPENDIX 1

The Employer Resources Test

1. Do the draft regulations achieve the stated policy aim?

Our understanding is that you wish to introduce a test that is focused on acts or failures to act which affect the employer, as opposed to something which affects the scheme directly and for such a test to be determined on a 'snapshot basis'. As such the draft regulations would appear to achieve the policy aim.

We are supportive of a test that seeks to ascertain whether an act or failure to act has damaged the normal profitability of a company and hence its ability to stand behind the section 75 debt as a going concern – which is our understanding of how the employer resources test is intended to operate (as opposed to the employer insolvency test, which presumably when you consult on it will be looking at an asset measure).

However, the consultation does not discuss what non-recurring or exceptional items are to be removed by the Regulator when working out 'normalised annual profit before tax' (NAPBT), nor does it give any illustration of how the impact on NAPBT is to be determined following the act or failure to act. There is no reference to following any industry-accepted practice in taking statutory accounts and adjusting the profit line in order to obtain the NAPBT measure, either pre or post the act / failure to act. There therefore remains a lot of uncertainty as to how these measurements will take place. And assuming that there is a negative impact on NAPBT we are no further forward in our understanding of how such a reduction will be regarded as being 'material' in relation to the estimated section 75 debt. For example, we would hope that a reduction in NAPBT would be deemed largely irrelevant if a scheme is funded close to buyout, but simplistically, such a reduction could be considered more 'material' when expressed as a percentage of a small section 75 debt, than in a case where a scheme is less well funded.

It would have been much more helpful if the consultation on the regulation mechanics could have been married up with some Regulator draft guidance because there is a fear that many normal corporate activities will potentially result in exposure to an employer resources contribution notice. These fears include the following corporate activities:

- **Payment of dividends** – but presumably the NAPBT measure is struck before considering dividend payments so any level of dividends will not invoke the test?
- **Taking on more debt** – this would presumably depress NAPBT and so potentially activate the test?
- **Business sales** – would presumably depress NAPBT if the sold business had been profitable?
- **Internal restructurings** – could impact NAPBT in either direction.

We think it important that there is clarity as to the intended impact of the employer resources test. Corporates need to know whether actions they are likely to take could depress NAPBT and whether such a reduction could be assessed as being material relative to the estimated section 75 debt. They need to know this through sufficiently comprehensive guidance and not have to discover whether they are caught through applying for clearance, which may be impractical in a number of situations. Corporates will not want to find they are in situations where the employer

resources test is very frequently met, with power passing entirely to the Regulator to decide whether or not it is reasonable to impose a Contribution Notice in specific situations.

The consultation document is silent on not-for-profit organisations that sponsor DB schemes. We see that the draft regulations empower the Regulator to estimate employer resources in this and similar situations. It would have been useful if the consultation document could have said what was intended here.

2. Can you see anything that means that these draft regulations will not work?

Not particularly from a narrow viewpoint as the detail has been left to any Regulator guidance. The consultation says that the regulations *"will work alongside The Pensions Regulator's code of practice and any other related guidance so that industry are informed on how the "employer resources test" will be applied"*. Currently there is a small Code of Practice 12 in this area, which deals with the material detriment test. We assume that this will be extended to cover both the employer resources test and the employer insolvency test, as envisaged by the changes set out in paragraph 8(a) of schedule 7 to the Pension Schemes Act 2021, before this legislation is implemented.

3. Do you foresee any unintended consequences in this approach, if so please provide details?

We are not disagreeing with the proposed approach; it is simply that the consultation is too narrow to be able to assess the consequences, intended or otherwise. There is a clear danger that corporates will take fright because of the uncertainties that this new test delivers when the policy intention all along is (say) to enable the Regulator to pursue successfully a handful of cases which under the current legislation it is held back from doing.

It would have been useful if this consultation could have been married up with hopefully one to come on the employer insolvency test on which there is also a lot of uncertainty as to how it will operate.

We are disappointed that the consultation has not taken the opportunity to state that this new contribution notice test will not be backdated – ie it will only apply to acts or failures to act occurring after say 1 October 2021. There is a fear that when the relevant Commencement Order is laid it will catch acts and failures to act from any time after say 1 October 2015.

4. If the approach is not workable, please provide your views on what would be an appropriate alternative approach?

We are not in a position to opine as to whether the approach is not workable as we have not seen the full detail.

APPENDIX 2

The Pensions Regulator (Information Gathering Powers and Miscellaneous Amendments) Regulations 2021

5. Do you agree that the requirements in draft regulation 3(1) cover all the essential information that the interviewee should be made aware of? If not, please indicate which additional items of information you consider should be included.

We are supportive of the interview concept as a potentially efficient means by which the Regulator can gather information and views, test these and through this be able to make more rapid progress with an investigation than if the process is largely correspondence based. However, a formal interview is presumably most definitely not an informal 'fireside chat' and those being called for interview will need to recognise this.

The draft regulation appears to us to cover the essential requirements for a notice, but a better view may be obtained from those with familiarity with similar interview requests by other regulatory bodies.

As the interview concept is new to pensions (leaving aside that in relation to automatic enrolment and master trusts), it would be helpful if the Regulator could provide some guidance or leaflet on how it will in practice operate this power and how it expects those called for interview to conduct themselves and what rights they can avail themselves of when being interviewed. For example, it is not clear from either the Act or the draft regulation whether the interviews will always be recorded, whether interview notes will be created and shared and/or agreed with the interviewee. It is not clear whether the interviewee is to be questioned as a witness or as a potential target for regulatory action. Where the interviewee is an adviser, it is not clear how their duty of confidentiality to their client is to operate.

6. Do you think that the draft regulations ensure that The Pensions Regulator has the same inspection powers under section 73(6)(d) to (f) regarding any employer of a multi-employer scheme as it has where there is only a single employer?

This is a question requiring a legal opinion which we are not qualified to give, but we can see how the logic of draft regulation 4 and 5 operates, so hopefully it will deliver the inspection power that you seek in relation to such multi-employer schemes.

7. Do you agree that £400 is an appropriate level for a fixed rate penalty under new section 77A of the Pensions Act 2004?

When considered in isolation, we do not have a view on what is an appropriate level for the fixed rate penalty.

8. Do you agree it is appropriate that the fixed penalty under section 77A is aligned with the fixed penalty under section 40(1)(d) of the Pensions Act 2008 for failure to

comply with similar information gathering requirements in connection with Automatic Enrolment?

Yes – we see no reason why this new fixed penalty should be set at a level different to the fixed penalty that currently operates for failing to comply with auto-enrolment information requests.

9. If not, please state the level you think would be appropriate and why.

Not applicable

10. Do you agree that £200 is an appropriate level for an escalating penalty to be imposed on an individual under section 77B?

When considered in isolation, we do not have a view on what is an appropriate level for the escalating penalty.

11. Do you agree it is appropriate that the escalating penalty for an individual under section 77B is aligned with the escalating penalty under section 41(1)(d) of the Pensions Act 2008 for failure to comply with similar information gathering requirements in connection with Automatic Enrolment?

Yes – we see no reason why this new escalating penalty should be set at a level different to the escalating penalty that currently operates for failing to comply with auto-enrolment information requests.

12. If not, please state the level you think would be appropriate and why.

Not applicable.

13. Do you agree that the escalating penalty regime proposed is appropriate for persons who are not individuals who continue to fail to comply with The Pensions Regulator's requests for information? If not, please indicate the level of penalty you think is appropriate and why. If you think a different approach for non-individuals is more appropriate, please give details along with your reasons.

We are content with the proposal to use, for non-individuals, the same escalating scale of penalties that currently operates for master trusts – ie £500 for the first day on which the escalating penalty applies, £1,000 for the second day, £1,500 for the third day etc until the 20th day when the daily rate is capped at £10,000.

Disclaimer

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