

Response to:

Consultation on the Pensions Regulator's Guidance on defined benefit multi-employer schemes and employer departures - published July 2010

General Observations

ITS welcomes the opportunity to comment on the revised guidance and has the following general observations:

The overall structure of the guidance is somewhat confusing. In our view it would be more logical to deal with definitions of a multi-employer scheme, employment - cessation events and the mechanisms available to avoid triggering a s75 debt before dealing with the various considerations for employers and trustees. We note that it is the intention to develop the guidance primarily as a web-based product, in which case the order in which the guidance is laid out may be less significant, although we suspect many users will prefer to print off a copy of the guidance rather than read it on line, particularly as it relates to a technically complex area of law.

The guidance makes repeated reference to the need for trustees to take legal or other professional advice before proceeding, and cross refers to other trustee guidance, most notably the guidance on monitoring employer support with which there is a fair amount of overlap. As professional trustees we wholeheartedly concur with the view that trustees should take legal and other professional advice, and find it difficult to envisage a situation where any board of trustees would proceed without appropriate advice, therefore the guidance should be targeted more towards those advising trustees. If there are trustees who attempt to tackle these issues without professional advice it is unlikely they will seek to apply complex guidance of this nature. We must therefore question who the target audience should be.

Our comments on the Sections and your specific questions are as follows:

Section 1: What is a multi-employer DB scheme?

Are there any other particular characteristics or complexities that it would be appropriate to include in this section?

This section could be re-named as it goes beyond merely defining multi-employer schemes and deals with 'employment-cessation events' 'frozen schemes' and duties of employers and others to fund the scheme.

Although the guidance summarises the difference between segregated and non-segregated schemes, it does not explain what this means in practical terms when an employer wishes to depart, i.e. if the tests are met each section is treated as a separate scheme.

Paragraph 24 could be expanded by way of examples to assist trustees.

Section 2: Considerations for employers

Are there any other specific considerations for employers that we should include here?

The inclusion of considerations for employer is a useful addition; we would suggest that there is more emphasis on sharing information with trustees and less on periods of grace, which could possibly be included with the explanation of the various mechanisms.

Section 3: What do we expect from trustees?

Does the section clearly explain the regulator's expectations of trustees and are these expectations reasonable?

There is a strong expectation that trustees will seek both legal and financial advice, and where they chose not to, will document their reasons. We concur with this approach.

There appears to be a contradiction on the face of it between the last sentence in paragraph 69 and paragraph 71. Paragraph 71 suggests that where the departing employer is willing to pay the liability share in full the regulator would normally expect the trustees to accept without considering other alternatives, whereas paragraph 69 suggests that where the liability share is not sufficient to mitigate against the risk of losing the strength of covenant of the departing employer the trustees should seek additional mitigation in the form of further financial support, cross guarantees, etc.

Paragraph 65 suggests that the trustees should seek to go beyond the statutory requirement in circumstances where the departing employer is paying the liability share in full but is still leaving the scheme with a weaker covenant overall. It is not clear what locus the trustees would have to make such demands, and whilst it is possible that the trustees may have a bargaining position where the transaction is part of a larger corporate re-structuring, we believe it is dangerous to set an expectation that trustees are required to ask departing employers for more than they are required to provide by statute.

Section 4: Important aspects of each mechanism

Does this section give an adequate overview of each mechanism for employer departure?

This is a technically complex area and we feel the explanation of the various mechanisms could be supplemented by the addition of a table or chart summarising the differences so that trustees could see at a glance whether a particular mechanism was applicable to their circumstances. Flowcharts such as the ones used for notifiable events would also be useful.

Paragraph 110 suggests that trustees should negotiate for an appropriate level of mitigation where they consider that the use of the de minimis mechanism will have an adverse effect on the scheme overall. However, if the test has been met the trustees have no discretion under the Regulations to make consent conditional on any additional support measures.

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