In Touch technical update

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New Pensions Regulator powers outlined

- New criminal penalties for wilfully reckless behaviour and non-compliance with 'anti-avoidance' powers
- Expanded list of notifiable events, with employer 'Declaration of Intent' required if selling a material portion of a major sponsoring employer or granting prior ranking charges on debt
- Amendments to existing anti-avoidance powers

The DWP has published its response to last year's consultation on 'Protecting Defined Benefit Pension Schemes - a stronger Pensions Regulator'. This consultation was one of the actions under the earlier White Paper. Most of the additional powers proposed for the Regulator will be taken forward. Legislation will follow as soon as Parliamentary time allows.

Background

The proposals aim to improve the Pensions Regulator's powers so that it can:

- Be more proactive and get involved earlier when employers make changes which could impact the pension scheme;
- Obtain the right information about a scheme and its sponsoring employer;
- Gain redress when things go wrong; and
- Deter reckless behaviour.

Notifiable events

The notifiable events framework requires trustees and employers to notify the Regulator if certain events occur, giving an early warning of potential problems. Following responses received on the consultation, the range of events requiring notification will be expanded, adding the following:

- Sale of a material proportion of a business or assets of a scheme employer which has funding responsibility for at least 20% of the scheme's liabilities;
- Granting of security on a debt to give it priority over debt to the scheme.

The definition of the terms relating to each of these new events will need to be considered.

The existing notifiable event concerning wrongful trading of the sponsoring employer will be removed.

In addition, further consideration will be given to changing the existing timing requirements for notification of events, and to the impact on business of changes to the notifiable events framework. The Government will also consult on the detail underpinning the notifiable events being taken forward, and on any changes in relation to scheme-related notifiable events and those arising from the recent consultation on consolidation of Defined Benefit pension schemes. The Regulator will update its guidance on the notifiable events framework and consult on a revised Code of Practice.

Declaration of Intent

The Government will legislate so that corporate planners will need to prepare a 'Declaration of Intent', that will be shared with the trustee board and the Regulator, for the following events:

- Sale of controlling interest in a scheme employer;
- Sale of the business or assets of a scheme employer; and
- Granting of security in priority to scheme debt.

The consultation had explained that this would set out the implications of the transaction for the scheme. The Government will work with the Regulator on the content and timing of the declaration. The aim is to ensure that the impact of the event can be estimated, and mitigations put in place.

Penalties

A more comprehensive regime will allow the Regulator/Courts to impose the most appropriate penalty from a suite of options:

- Existing civil penalties for low-level non-compliance;
- Power to issue civil penalties of up to £1 million for more serious breaches; and
- Criminal sanctions that would allow the courts to impose appropriate penalties for wilful or reckless behaviour (unlimited fines and/or custodial sentences) - or non-compliance with a Contribution Notice (unlimited fines).

The range of potential targets includes all those who have responsibility to the pension scheme – directors, sponsoring employers and any associated or connected persons, and in some circumstances trustees.

Anti-avoidance powers

The Regulator already has powers to issue Contribution Notices (CNs) and Financial Support Directions (FSDs). It is proposed to strengthen and improve this framework, including by:

- Amending the "reasonableness test" for CNs so there is a stronger focus on the loss or risk caused to the scheme by the event. (Currently there is a focus on the benefit the target, eg a parent, has extracted from the sponsor.)
- Expanding the 'material detriment test' for CNs, so that it is met if, as a result of the action, either the amount the scheme would have recovered on a hypothetical employer insolvency is materially reduced or the "value" of the employer provides materially less coverage of the scheme's section 75 deficit. Given its inherent subjectivity, further clarity will be needed on exactly how such an assessment would be conducted.
- Making the FSD process a single-stage process, in which the Determination Panel imposes a particular form and amount of enforceable financial support on a target (this power would be renamed as a Financial Support Notice).

Clearance

An employer can apply to the Regulator on a voluntary basis for 'Clearance' that it will not issue a CN or FSD in relation to a particular event. The Regulator will review its guidance on Clearance to clarify expectations, but there are no plans to replace this process with the Declaration of Intent.

Information gathering powers

Following separate discussion with industry on measures in the White Paper, the Government will also proceed with proposals to give the Regulator a stand-alone Interview Power and to expand its power to inspect premises.

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