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Mrs Alison Humberstone OBE
Pensions Protection and Stewardship Division
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DearMrs Humberstone

The Pensions Act 2011 (Transitional and Consequential Provisions) Regulations 2014

I am writing on behalf of the Association of Consulting Actuaries (ACA) in response to the consultation on the above-named draft regulations. I am sorry that we are a little late with our submission.

We have chosen not to respond to the 51 questions set out in the consultation document, but have instead restricted our comments to the areas we have identified in the short time available in which we envisage difficulties or where we believe the drafting of the regulations needs changing.We thought it most helpful to structure our response around the regulations, but we are not lawyers and have not given the whole document the level of scrutiny it requires before it is implemented.

We note that the impact assessment identifies *"minimising the burden on industry and providing clarity and certainty in the law"* as a key objective. We do not feel this has been fully achieved. This is particularly the case with regard to the winding up and employer debt provisions, since the proposals further complicate already over complicated regulations, to the extent that it is difficult to assess whether they will be effective (in the sense of possible to be carried out in practice) or not.

During the latter part of 2012 and in early 2013, the Department for Work and Pensions worked closely with the Industry Working Group (IWG), chaired on behalf of the ACA by Bob Scott. This work established a good deal of common ground and Department officials listened and responded constructively to many of the IWG's concerns. The IWG's report did highlight a number of residual concerns – in particular about the potential impact of retrospective application of Section 29 – and, although some of these have been addressed in the draft regulations, a number of them have not.

Our comments, which are arranged in the same order as the Parts of the regulations, are set out in the appendix to this letter.

We hope that you find our comments of assistance and would be happy to discuss them further if that is helpful. Please contact either me on 020 7432 6635 (david.everett@lcp.uk.com) or my colleagues,Mark Seed on 0161 957 8066 (Mark_Seed@JLTGROUP.COM) or Deborah Cooper on 020 7178 7184 (Deborah.R.Cooper@mercer.com) who prepared the response.

We would be happy to provide whatever further assistance you require, in our area of expertise, before the regulations are finalised.

Yourssincerely

David Everett
Chairman
ACA Pension Schemes Committee

Sent by e-mail to moneypurchase.2014regsresponses@dwp.gsi.gov.uk

ACA'S comments onThe Pensions Act 2011 (Transitional and Consequential Provisions) Regulations 2014

Part 2 – Winding up

Overall, re-opening schemes that have completed wind up by the appointed day will be incredibly difficult, so we would prefer to simply exempt any such schemes from the effect of section 29, including those wound up between 28 July 2011 and the appointed date. Where the assets are not sufficient to meet members' benefits in full, the likely impact of re-opening a case will be to re-allocate the assets (possibly reduced by the costs incurred) such that some members receive higher benefits and others receive lower benefits. This presents material communication issues. Given that the wind-up had been completed in accordance with the law as it stood, it is difficult to see the justification for re-opening it.

The regulations provide for potentially different treatment according to when winding up commenced. But, from the point of view of 'fairness', often the date that winding up is formally triggered is little more than an administrative convenience, to reduce problems caused by changes in member status over the period 'winding up' is being implemented.

Regulation 2

The provision of Condition 2 that there is no promise about the rate of pension to be provided is too restrictive and may prevent some cash balance benefits from being covered by the transitional provisions. In particular, there may be a minimum guaranteed annuity rate attached to the benefit – it would not be desirable for this to lead to such benefits being excluded.

We suggest that, for the purpose of being covered by the transitional provisions, the definition of "cash balance benefit" is extended so that it covers all such benefits that don't have a specified accumulation rate and annuity rate (such excluded benefits being clearly defined benefit).

In order to achieve this, Condition 2 could be redefined as follows:

> *"Condition 2 is that under the scheme-*
>
> *(a) There is a promise about the amount of the available sum, and*
> *(b) The accumulation rate of the sum of money and the conversion rate of the accumulated sum into pension are not both fixed."*

Regulations 6 and 8

These regulations seem to us to be drafted in such a way that a scheme that has both self-annuitised money purchase benefits and cash balance benefits would not be included in the transitional exemptions.However, in the time we have had available to produce our consultation response, we have not been able to form a consensus about the actual effect, which is an indication of the difficulty in the proposed regulations and the uncertainty that they could create if they are implemented in this form.

Regulation 7

This schemes to which this regulation appears to apply are characterised differently to the schemes regulation 6 seems to apply.We are not confident that the effect is the same in both cases (which we expect is the intention) so suggest that the application is expressed similarly in both cases.

Regulation 9

We can envisage practical difficulties of requiring schemes that have completed winding up having to be unpicked. Once winding up has been completed, the scheme will no longer have trustees and it may be difficult or impossible to "bring back" the previous trustees. Also, there will be no remaining funds in the scheme to cover the costs of re-opening the situation. We suggest therefore that this requirement to unpick in certain situations is removed by deleting (3) c and (4). In addition, since the scheme is wound up and no longer has trustees, there is no person or body even to determine whether the position has to be re-opened.

Part 3 – Deficiencies in assets

Our overarching comments on this part of the regulations are:

- If a scheme has been operated as a money purchase scheme, it is possible that the dates of 'relevant events' have not been recorded, or that the information required to assess a debt is not available. It seems likely that, where they both apply, the interaction of the part relating to debt calculations and the part relating to winding up could result in possibly unintended consequences and certainly a good deal of complexity.
- Indeed, where more than one debt has been triggered, this part on its own could be complex to administer.
- The regulations appear to take for granted that all employers affected by one debt calculation continue to exist.
- The employer debt regulations have been through several iterations over the period covered in the draft regulations. Some of the terms used in the draft might not have existed in earlier versions (e.g. relevant event) or could have had different interpretations (e.g. cessation event, funding test). If the draft regulations go ahead with the same effect as those currently being consulted on, they should make clear that the legislative regime that applies to a reconsideration of a debt (or other solution) is the one in force at the time, rather than the one in force now.
- We do not understand the benefit of limiting the exemption from section 29 to pre-28 July 2011 events. Our view is that the complexity and administrative cost of revisiting calculations does not justify any perceived 'fairness' achieved.
- We also note that schemes could only have calculated a Section 75 debt in the way now envisaged by breaking the law as it stood.
- Finally, if the regulations are introduced as drafted, all impacted schemes will incur costs if only to satisfy the trustees that recalculating would make members less likely to receive their full entitlement; or that recovery of the debt could not be made without disproportionate cost.

Regulation 13

We expect that regulation 13(1)(f) should read *"were able to be met in full"*.

Regulation 14

The practical difficulties for schemes that have already wound up are the same as those described above for Regulation 9.

Also, *"former trustees"* is not defined (in Regulation 12) (and they, and the scheme, might no longer exist).

Regulation 16

"Employer cessation event" (in Regulation 16(1)(a)(iii)) should be *"employment cessation event".*

The effect of sub paragraph 3 when taken together with that of subparagraph 1 seems to require debt calculations to be revisited only when the exiting employer's share of the debt is increased due to section 29. However, it is possible that the exiting employer's share could be reduced. Whilst we can understand why the government might take a policy decision that the calculation should be revisited if it is in the members' interests, why shouldn't it also be revisited if it is in the departing employers' interest?If the intention is to only revisit in the former case, our view is that condition (3)(b) should be sufficient on its own.

Regulation 18

18(5) appears to result in an automatic re-allocation of debt if trustees do not opt to take voluntary action. However, under 18(11) it appears trustees have some power over 18(5), even where they have not opted for 18(4). Although we are not lawyers, we expect that employers would challenge an automatic adjustment to the contract they have agreed with trustees, which is perhaps why 18(11) is necessary. However, it would be preferable if the steps were set out more transparently.

The effect of 18(11) is, in any case, unclear. For example, rather than reallocating the exiting employer's share of the additional debt, the entire amount seems to be allocated across the remaining employers.

Part 4 – Revaluation and Indexation

We agree that there should be no new requirements to revisit past decisions.

Regarding the revaluation of cash balance benefits in deferment, our view is that schemes should be permitted to continue to use the practice that applied previously.In relation to service post the appointed date, the proposals mandate the fixed rate as a minimum approach for schemes that do not have a final salary link. Our expectation is that this will be in line with most common practice, but that, if there are cases where this does not happen, additional cost could be imposed on the employer that is in excess of what is expected by scheme members. (The impact assessment says that the proposals give trustees a method to revalue, ignoring the fact that they will already have adopted a method.)

Regarding indexation, we agree that cash balance benefits should be excluded from the requirement to be indexed in payment (which we think is the purpose).

Regulation 22

The effect of 22(2)(d) and 22(3)(c)is that only those schemes with no requirement under their rules to provide increases to pensions in payment are exempted from section 51. Our view is that all cash balance and money purchase schemes should be exempted from the statutory requirement – ie including those who choose to index under their own rules.

Part 5 – Transfers, Cash transfer sums and contribution refunds

Regarding transfers from cash balance schemes, our view is that schemes should be permitted to continue to use the practice that applied previously.

Regulation 27

In relation to service after the appointed date, the proposals mandate different approaches dependent on whether the cash balance benefits are or are not calculated by reference to final salary, which seems inconsistent. Our expectation is that most cash balance schemes will have calculated transfer values using a 'defined benefit' method (since they are defined benefit schemes).If there are cases where this does not happen, additional cost could be imposed on the employer in excess of that expected by scheme members.

This could lead to transfer values being unreasonably low where there is a high guaranteed rate of return and / or a high guaranteed annuity rate attaching to the cash balance benefit. We suggest this is addressed by requiring the transfer value to be no lower than a best estimate of the anticipated benefits allowing for any guaranteed rates of return or guaranteed annuity rates.

Regulation 30

The same comment as for Regulation 27 applies.

Part 8 – Scheme administration

Regulation 36 does not appear to envisage situations where schemes that were affected by the section 29 amendment before 6 July 2014 no longer have such benefits (or are exempt from having a scheme actuary for some other reason) on 6 July 2014.

Part 9 – Pension Protection Fund

Regulation 38

We do not believe that eligibility should be deferred until 1 April 2015 even if the scheme has not paid any levies. Instead, such schemes should be eligible with effect from the appointed date. This is consistent with our view that, in effect, the force of most aspects of the new definition should not be felt before the appointed date. Given the small number of such schemes coupled with the fact that most will be fully funded, we believe that any financial implications on the PPF of doing this would be negligible.

Regulation 40

The range of the effective date of the first valuation (i.e. between 31 December 2014 and 31 March 2015) is too narrow. First, it is typically several months after the effective date until a valuation can be completed due to the work involved and the need to obtain audited accounts. Secondly, it would be appropriate to give a range of possible effective dates that covers at least a full year in order that schemes can coincide the valuation date with their normal scheme year end, so avoiding the need to obtain special audited accounts and in many cases to make the provision of valuation data simpler. We suggest that (2) is changed to say that the effective date of the first valuation must be on or after 31 March 2013.

We question whether part of 40(3) and 40(4) – 40(6) are needed since, once the schemes are deemed 'eligible' they are covered by the existing legislation.

In case it is retained, the word *"previous"* needs to be deleted in the last line of (5) i.e. so that the requirement is that any subsequent valuation must be provided within 15 months of the effective date of that valuation.

Regulation 41

We think that you should add *"in Section 79 valuations"* to the wording of 41 (1) (b) so that it reads as follows:

> *"during the period beginning immediately after 27th July 2011 and ending immediately before the appointed day, the trustees or managers of the scheme treated those benefits or some of those benefits in Section 179 valuations as if they were money purchase benefits"*

Regulation 42

The wording of 42(1)(b) should be clear that the *"period"* referred to is (we assume) the PPF year.

Regulation 52

We think the word *"may"* in the first line of (1) needs to be changed to *"will"* in order to achieve the objective of providing the transitional protection here. If the word *"may"* is used then there is still uncertainty about what the Board will decide and we are unsure of any grounds the Board could use to exercise discretion.

Part 10 – Scheme Funding

Regulation 63(b) does not seem to cover the case where the first actuarial valuation has an effective date less than a year after the appointed date.

Part 12 – Equality

Although we understand the outcome of the Test Achats case did not apply directly to trustees of occupational pension schemes in the setting of actuarial factors, nonetheless trustees have a pre-existing duty (tracing back to Barber v GRE) not to apply gender discrimination when it comes to delivering benefits.If money purchase or cash balance benefits are to be applied to purchase a scheme pension, we do not understand how this can be done on gender specific terms, without it being discriminatory, so we are uncertain of the Government's ability to provide this exemption. In any case, to the extent that this reflects current practice, trustees must have been advised that such an exemption already exists (in particular 4(2)(b) of the Equality Act 2010 (Sex Equality Rule) (Exceptions) Regulations 2010 (SI 2010/2132)).

Regulation 67

Our concern about the restriction in the definition of *"cash balance benefit"* (see above) is particularly relevant here.

Part 16 – Underpin and top up benefits

Whilst we share the concern that there is some uncertainty about the treatment of underpin and top up benefits that might need to be clarified, we do not feel this document is the place to alter established PPF policy: the purpose of these regulations is just to ensure that section 29 does not inadvertently create unwanted retrospective effects.

Different views can be taken as to the 'fairness' of its current approach: for example, if the resulting compensation is worth less than the money purchase pot, this could be taken to represent the value in providing the guarantee. Our preference would be for there to be a proper debate around the fairness or otherwise of PPF compensation levels, rather than implement this small change in isolation.

Similar considerations apply to the compensation the FAS provides to underpin schemes and, in our view, these should be treated consistently.

About the Association of Consulting Actuaries (ACA)

Members of the ACA provide advice to thousands of pension schemes, including most of the country's largest schemes. Members of the Association are all qualified actuaries and all actuarial advice given is subject to the Actuaries' Code. Advice given to clients is independent and impartial. ACA members include the scheme actuaries to schemes covering the majority of members of private sector defined benefit pension schemes.

The ACA is the representative body for UK consulting actuaries, whilst the Institute and Faculty of Actuaries is the professional body.

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