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Department for Work and Pensions
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Dear Mike

Employer Debt (Section 75 of the Pensions Act 1995) – consultation on the draft regulations

Please find a response to the above consultation on behalf of the Association of Consulting Actuaries (ACA). The Association is the representative body for UK consulting actuaries and has close to 1750 members working in around 75 firms. Our response has been drafted and reviewed by a committee of members from the ACA with representation from actuarial consultancies.

Thank you for giving us the opportunity to respond to this consultation. We have set out below our comments on the draft regulations and the impact assessment.

General Questions

1 We would welcome your views on the Flexible Apportionment Arrangement proposal

In isolation, we expect that the proposed Flexible Apportionment Arrangement (FAA) will help in some cases. However, the FAA is being added to regulations that provide a range of options to employers and trustees following events that could trigger employer debts. **The need is less for a new option, but more for the existing options to be amended so that they are made fit for purpose and, in the case of a scheme apportionment arrangement, able to address the issues the DWP has identified**.

The consultation document identifies that scheme apportionment arrangements (SAAs) are currently available to trustees and employers, but ignores the difficulties with SAAs that have been pointed out to it in the past and which will remain, if the proposals in the consultation document go ahead. The difficulties arise because the

SAA is defined as an arrangement that provides for the difference between the employer's liability share and its 'scheme apportionment share' to be apportioned to one or more of the remaining employers, without being clear what this means with respect to the liabilities. In particular, although regulation 6(4)(a) clearly recognises the possibility that liabilities can be apportioned as a result of a SAA, because the definition of a SAA apportions an amount to one or more of the remaining employers, there is a risk that those employers could have to pay twice for the same liabilities.

There are other, less fundamental, problems with the SAA aspects of the Employer Debt regulations, including uncertainty about what, if anything needs to be certified. As these have been identified in previous consultation exercises, we will not revisit them here. However, so long as these problems with the regulations remain, it seems perverse to add more complexity to an already confused situation. **Consequently, our preference would be for the effect of the regulations that determine how a SAA operates to be clarified to include explicitly the possibility that a SAA could result in liabilities as well as debt being apportioned, and to ensure that employers to whom liabilities are apportioned under a SAA are not at risk of paying more than once in respect of those liabilities**.

If the DWP is not minded to amend the SAA regime so that it becomes effective, we agree that the FAA will be a useful alternative, particularly for employers where there will be no debt trigger. With regard to the FAA, we have the following suggestions:

- The effect of the definition of a 'leaving employer' seems to exclude the possibility that an employer in relation to a frozen scheme could take advantage of a FAA to remove itself from the definition of 'former employer' in relation to the scheme. If our interpretation is correct, then we cannot see what is served by it and suggest that this restriction is removed.

- We do not believe that FAAs need to be restricted to employment cessation events that occur on or after 1 October 2011. We expect that FAAs could be applied retrospectively to employment cessation events that have occurred before that date, provided no debt has been certified (or paid) as at 1 October 2011, without any material detriment to scheme members.

- A consequence of the amendments to introduce the FAA seems to be to preclude the possibility of using a SAA to apportion liabilities (due to the proposed amendment to regulation 6(4)(a) in regulation 6 of the draft regulations). We do not understand the purpose of this, consider that it could have possibly unintended effects on existing SAAs and suggest that the proposed amendment is not made.

2 Do the proposals include sufficient protection for members

In our view, an FAA will operate more or less identically to some SAAs that are already permitted under the regulation, except that a debt is not formally triggered. Since trustees will have to go through similar processes (for example, agreeing the funding test is met) when deciding whether to agree to an FAA as they would do when deciding whether to agree to a SAA, the protection provided to members is the same under both.

However, SAAs give trustees the opportunity to get immediate extra funding into the scheme, which FAAs will not. If the SAA regime is left un-amended, its weaknesses will mean that FAAs are likely to be the preferred solution and, as a result, less cash may find its way into pension schemes.

3 Are the proposals easier for people to use than the restructuring easements?

The process for agreeing to a FAA seems more straightforward than the process for restructuring arrangements, so we expect people will find the proposals easier to use.

Period of grace provisions

4 We would welcome your views on the proposal to extend the period of grace to up to 36 months

The extension of the period of grace to up to 36 months is helpful since it gives employers more flexibility over how they manage their employment arrangements.

Our understanding is that draft Regulation 9 allows for the period of grace to be extended to 36 months for employers who are already within a period of grace as at 1 October 2011 (i.e. where the one month's notice was given and the 12 months hasn't already expired), provided the trustees nominate the new end date in writing before the original 12 month expiry date, presumably at the leaving employer's request. Please could you confirm that this is the Government's intention.

5 We would welcome your views on the proposal to extend the period within which employers must write to trustees to two months

Extending the period within which employers can write to the trustee adds greater flexibility and so should make the process easier to manage.

It appears to us that the effect of the amendment proposed in regulation 9 of the draft regulations is that the new two month notice period (which starts from 1 October 2011) could be used for an employment cessation event from 1 August onwards (provided the notification is made within two months of the employment cessation event). Could you please confirm that this is the intention?

Impact assessment

6 We would welcome your views on the Government's estimates

We believe there would have been value in considering the option of improving the regulation that applies to SAAs. The Employer Debt regulations in their current form are over complex and confused in many areas. This adds to the cost of each employment cessation event, and will continue to do so until the regulations are appropriately amended.

7 We would welcome any additional data that you could supply to improve the robustness of the Government's estimates

No comment.

8 Previous employer debt Impact Assessments have estimated the benefits of the policy as being the foregone interest payments on funds borrowed to meet the inappropriately-triggered debt. However, there is a benefit to the debt being paid off at the point it is crystallised, because liabilities no longer increase over time (as discounting unwinds). This needs to be netted off against the benefits of the foregone interest payments. Does this represent a reasonable methodology for estimating the benefits of the policy?

Given the degree of approximation ion the assessment, we do not consider it is sensible to enter into this degree of detail, particularly since tax and other considerations affect the degree to which discounting adds to (or deducts from) the associated cost.

We hope you find these comments helpful.

Kind regards

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