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The Pensions Regulator
Napier House
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Dear Sirs

Consultation on revised clearance guidance

I am writing on behalf of the Association of Consulting Actuaries, in response to the Pension Regulator's consultation on revised clearance guidance.

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 are subject to the code of professional conduct of the Faculty and the Institute of Actuaries. Advice given to clients is independent and impartial. ACA members include the scheme actuaries to schemes covering the majority of members of defined benefit pension schemes.

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

Our detailed comments can be found in the Appendix to this letter. However, there are a few general points we would like to draw out here.

We welcome the adoption of a less prescriptive principles based approach. However we note that the guidance is very wide ranging. We would suggest that the clearance guidance should be limited to issues relating directly to type A events.

Generally, we think it would be helpful to clearly separate the actions trustees and employers should consider taking in advance of an event taking place, to ensure both parties are adequately prepared, from those that can only be considered once a specific event is imminent. Some of the guidance provided – for example on the ongoing assessment of employer covenant – would be more appropriate in a separate regulatory guidance document.

Consultation on revised clearance guidance

It would be very helpful to include further detail of the Pension Regulator’s thought process when assessing clearance applications. Terms such as “tramline clearance” and “squash court clearance” have been referred to informally in discussions with individual employers and this document would be an ideal place to outline the various forms of clearance which might be of assistance to employers. Case studies of actual clearance application would also be a great help. Generally, advisers would appreciate as much assistance as possible in communicating this complex guidance to trustees. Providing this additional information will also help the Pensions Regulator to educate trustees directly.

The guidance should also be consistent with the revised regulations on employer debt which are expected to be finalised in the near future. We provide a specific example in the Appendix.

Finally, one of the principles outlined in paragraph 16 is the preferred outcome of an appropriately funded scheme with a solvent employer - it would be helpful to have further information on the principles the Pensions Regulator will adopt where the two components of this objective are in conflict with one another.

We hope that you find our comments of assistance.

Yours sincerely

Charles Young
Chairman
Pension Scheme Committee of the Association of Consulting Actuaries

Appendix

Interpreting findings on employer covenant

A significant amount of information is provided on assessing the employer covenant, both when an event is imminent and for more general ongoing monitoring. One aspect that is far from clear is how this information can be translated into an appropriate level of mitigation.

The guidance suggests that trustees may need independent professional advice on the change to the employer covenant (paragraph 79). While we accept this will be required in some cases, obtaining such advice might not be appropriate where the trustees are effectively negotiating the best possible level of mitigation from the employer. We do not think the Pensions Regulator should necessarily require professional advice on employer covenant, before agreeing to clearance, particularly where such advice is unlikely to affect the level of mitigation that can be negotiated. This point could be addressed within the guidance by adding "if this is likely to have a material impact on the mitigation which can be negotiated" at the end of paragraph 79. However, the Pensions Regulator's application of the guidance in practice is most important.

Applying the "no worse off" test

The no worse off test outlined on the key differences summary on page 3 and at paragraph 110 is potentially very onerous. Further clarification is required to minimise subjectivity. We suggest that both paragraphs conclude with the requirement for trustees to "consider that security when determining the appropriate level of mitigation", with the remaining text, including the no-worse off reference, being removed.

If the relevant text is not removed, we note that there is a potentially significant difference between these two otherwise similar descriptions, with the paragraph 110 version indicating that account can be taken of the Pension Regulator's powers in relation to financial support directions and contribution notices. This test will be significantly easier to pass if trustees can take into account these powers. However, these powers will presumably only be relevant considerations, if at all, if clearance is not obtained - because the Pensions Regulator's ability to issue an FSD or CN will otherwise be restricted.

Relevant deficit

Whether there is a relevant deficit is an "all or nothing" element of the test for assessing whether a type A event has occurred. This might be considered inappropriate as the level of surplus or deficit is likely to change from day to day.

On the definition of relevant deficit at paragraph 81, we presume that the higher basis used to value liabilities, where an event will have a significant effect on the scheme's ability to meet its pension obligations, is broadly equivalent to the technical provisions which the trustees might agree to, based on the post event employer covenant. If so, it would help to say this in the guidance.

We also note that, in defining the relevant deficit, reference is made to an event being "significantly detrimental to the scheme's ability to meet its liabilities" (e.g. paragraph 85). However, when considering type A events in general, the test is whether the event is "materially detrimental to the ability of the scheme to meet its liabilities" (e.g. paragraph 78). It would help to have more information on the difference between significant and material detriment, or to conform the two pieces of text.

Employer-related events

Paragraph 89 suggests that business and asset sales from the employer or the wider employer group could be a type A event. Such sales were not previously generally considered to be type A events if they were commercial transactions undertaken at arms length. We would suggest that a similar distinction be maintained – the type A event, if any, should be inappropriate use of the sale proceeds, rather than the sale itself.

Clarification of type A events

Further clarity in the definition of type A events would help trustees and employers assess whether certain events should be classified at type A or not. Alternatively, where there is doubt, the parties do have the option of applying for clearance and we would hope that the Pensions Regulator would confirm that the event in question does not represent a type A event at an early stage, where this is the case. If this process works efficiently the lack of a prescriptive definition should not be overly problematic.

Consistency with employer debt regulations

The guidance should also be consistent with the revised regulations on employer debt which are expected to be finalised in the near future. For example, the guidance on apportionment suggests that a relevant event could be the use, amendment or insertion of an apportionment rule (paragraph 102). This suggests that the apportionment could satisfy the relevant test when it is inserted in the rules but fail the test when it is used. A similar issue arises for apportionment rules which are already in place. Employers may therefore need to consider applying for clearance, even where trustees are simply proposing to follow existing scheme rules, in addition to complying with the requirements of the final employer debt regulations. If it is the DWP's policy that new alternatives to a buy-out debt are to be made available to ease the legislative position of companies and trustees, it is inappropriate for the Pension Regulator to frustrate this through the new clearance regime. Please can you ensure that there is joined up regulation on this issue.

Trustee valuation powers

The guidance suggests that trustees already have the power to call a valuation at any time, once they have completed their first s224 valuation (see paragraph 111). This is not consistent with our understanding of the legislation, although individual scheme Rules may provide this power. Paragraph 111 should be amended to reflect the correct legal position.

Provision on information

On paragraph 169, it would help to provide more information on the circumstances in which certain listed items would not be considered relevant and hence not need to be disclosed. This would help to ensure that the necessary disclosure of information was proportionate.