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Pensions Client Directorate
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Dear Sir

Response to the Consultation on the Powers of the Pensions Regulator

I am writing on behalf of the Hundred Group of Finance Directors with regard to the Department for Work and Pensions' consultation named above. The Hundred Group represents the Finance Directors of the UK's largest companies.

The Hundred Group has serious concerns about a number of the proposals contained in this consultation paper, and urges the DWP to reconsider their proposals. We accept that the DWP has legitimate concerns about a small number of vehicles on the market that seek to separate pension schemes from their employers, but believe that the proposals as currently framed would impose severe constraints on any transaction where a pension scheme is involved.

Our concerns are set out in more detail below:

1. Nature of the Consultation

We are concerned that the consultation paper does not contain the details of the proposed legislation, and therefore we are being asked to take the fine print 'on trust'.

We are also concerned that the effect of the changes will be to move the legislation on contribution notices and financial support directions from primary to secondary legislation, where there will be less parliamentary scrutiny of the legislation and where it will be easier to make further amendments (again with limited parliamentary scrutiny).

We believe that these powers, especially the power to impose contribution notices, (which are, in effect, the nuclear option in the Pensions Regulator's armoury) should be reserved only for the most extreme cases, and should therefore remain set out in primary legislation, rather than be subject to possible "knee-jerk" changes through secondary legislation.

2. Removal of 'In Good Faith' Test

We believe that the 'in good faith' test is an important safeguard for employers involved in legitimate corporate activity in which pension schemes are involved, and its removal is likely to lead to a considerable increase in the number of employers applying for clearance, as it is only through clearance that an employer acting in good faith will have the reassurance that the Pensions Regulator will not impose a financial support direction or contribution notice.

When contribution notices were first introduced in the 2004 Pensions Bill, the 'in good faith' test was inserted as an important amendment in the House of Lords (Baroness Hollis described it as 'pivotal') to provide reassurance that the new powers of the Pensions Regulator would not be applied to parties who had had no intention of avoiding their liabilities. The removal of the 'in good faith' test will mark a significant departure from the agreement that ensured the passage of the Pensions Bill through Parliament in 2004.

We also do not believe that a statutory defence, which would shift the burden of proof from the Pensions Regulator to the person at risk of a contribution notice, is an acceptable alternative. A statutory defence is a very shaky foundation for a company to build a corporate decision, and inevitably many companies will look for clearance, or abandon their corporate activity altogether, rather than risk being required to prove their statutory defence.

3. Test for Contribution Notice

Aside from the issue of 'in good faith' (see 2 above), we believe that the test for a contribution notice should remain an act or failure to act that aims at avoiding the s75 debt. The proposed change to an act that leads to 'material detriment' to the likelihood of a member receiving benefits would considerably weaken the test for what should be (as we have suggested above) the 'nuclear option'.

We also regard the intention to make bulk transfers that are materially detrimental to the interests of the members liable to a contribution notice inappropriate. We agree that bulk transfers should not be used as a way of evading a contribution notice (see 5 below), but we do not agree that any bulk transfer should automatically be used as grounds for a contribution notice, unless there was a deliberate intention to avoid the s75 debt by the bulk transfer.

4. Non-Exhaustive List of Circumstances

The consultation lists the circumstances in which the Pensions Regulator will use its new powers retrospectively. This list is helpful, as far as it goes. However, there are two problems with the list.

The first is that the list is not exhaustive, and so employers cannot be entirely certain that the Pensions Regulator might not use its new powers against them. The only option for certainty will therefore be to apply for clearance. We find the consultation paper's assertion that the proposals will not lead to a material increase in the number of clearance applications at the least optimistic.

The second is that these assurances are only given until the legislation is in force. To give any reassurance to employers who may be engaged in future transactions or other corporate activity involving pension schemes, the DWP must set this list out as an exhaustive list on the face of the primary legislation.

5. Other Changes

We do however welcome the other less radical changes proposed in the consultation to tidy up the rules for contribution notices and financial support directions to ensure that they operate in line with the original intention of the legislation, namely:

- Being able to spread the requirement for financial support to a number of parties rather than just a single entity;
- Extending the requirements for imposing a contribution notice to a course of conduct rather than necessarily a single act;
- Extending the factors to be considered in assessing whether it is reasonable for the Pensions Regulator to issue a contribution notice;
- Ensuring that a bulk transfer cannot be used as a way of frustrating a contribution notice.

These are sensible amendments that stay true to the original conception of the Pensions Regulator's powers to issue contribution notices and financial support directions. We would urge the DWP to restrict its changes to these practical measures and not seek to extend the Pensions Regulator's powers in the ways it sets out in the rest of the paper.

Please contact me if you would like any further information on any of the matters discussed in this letter.

Yours sincerely

Edward Weiss

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Chairman,
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