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**DWP consultation on
proposed amendments to the
anti-avoidance measures in the
Pensions Act 2004**

Buck Consultants response

June 2008

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In principle, we can appreciate the rationale behind the proposed amendments in the consultation document. The pace of development in the market for buyouts and alternatives has been rapid of late, and shows every sign of continuing. We fully understand the Regulator's concern that its current powers may not be sufficient to address future abuses resulting from transactions that may not even have been thought of yet.

We have always supported the general concept of a Regulator having a flexible, risk-based remit, as opposed to the highly-prescriptive regulatory basis that applied prior to 2005. We accept that this means that there will as a consequence be some reduction in certainty for those being regulated. This therefore calls for a sensitive approach from the Regulator, and appropriate safeguards to ensure that there is a reasonable degree of certainty and that the powers that do exist cannot be abused.

Given the starting position that the corporate veil can already be breached, and the need to ensure that the Regulator has sufficient powers to ensure adequate protection of members' interests, particularly in the environment described above, we accept under the circumstances the proposed extension of the Regulator's powers to:

- Allow an FSD to be issued even where there is no single entity able to bear the burden alone (the logic behind the present restriction is hard to understand),
- Allow the Regulator to look at a series of transactions or events that may result in a need for a Contribution Notice or a Financial Support Direction to be issued (we accept that a problem may not only arise solely from one event in isolation), and
- Apply the new powers from 14 April 2008 (we accept that this is a necessary anti-avoidance device).

However, we consider that the proposals go too far in respect of:

- The removal of the "otherwise than in good faith" test, replacing it with a hindsight- driven assessment of the actual effect of the decision, with the burden of proof on the parties to the decision to show that they acted reasonably
- The backdating to 27 April 2004 of the period in respect of which a series of transactions may be reviewed.

The "otherwise than in good faith" test is a vital safeguard against unfair regulatory intervention against employers or parties connected with them. Removal of this protection, when combined with the ability to look at a series of transactions, gives the Regulator potential to attack any combination of events, judging with hindsight, simply on the basis of how events have turned out, whether or not that was the actual intention and ignoring the impact of outside events. We are at a loss therefore to understand why the government "believes that this approach would offer transparency and objectivity to parties".

Furthermore, we do not believe that the proposed statutory defence is a satisfactory replacement for this present safeguard. We do not doubt that the Regulator will find it easier to proceed against parties where the burden of proof is on them, once detriment to members has occurred; and at first sight the justification given, that as part of their “due diligence” the parties should have already identified all relevant issues and taken them into account and documented them, appears compelling. However, given the range of potential situations in which this provision could be used by the Regulator, it will not necessarily be the case that the parties will have formally gone through this process, particularly in respect of more minor issues and smaller schemes. The imposition of this burden of proof on the involved parties could easily fail the test of “proportionality” that the Regulator has been at pains to emphasise as being a major plank of the new regulatory world. We also do not subscribe to the view that it is acceptable to grant potentially overly strong powers to a body and justify this by saying that they will only use them in extreme cases (because they have not abused powers in the past).

There should be an acceptance that there is a degree of risk which it is reasonable to assume, and that in the event of things going wrong, there is the PPF safety net to protect against the worst losses – as the PPF legislation originally intended.

If the changes are introduced as proposed, this will increase the uncertainty, both in respect of future transactions, and those that have occurred since 27 April 2004. These past transactions were undertaken under a regulatory regime that was different from the one now proposed, and so the approach adopted and the records kept may well not tie in with the new requirements. This situation cannot be justified by saying that it was always the policy intention, but that the law enacted by Parliament did not properly reflect that intention. That may or may not be the case, but if so, morally it is not acceptable to ‘rectify’ the position by applying changes retrospectively.

We believe that continuation along this path will result in a large number of transactions being submitted to the Regulator for clearance – and these will mainly be those undertaken by reputable parties in good faith, who will need to do so in order to have certainty of their position in respect of past actions. On the other hand, those who have acted in the past without good faith are still unlikely to be flushed out & those who have done things in good faith in accordance with their legal obligations at the time, run the risk of being penalised. It will introduce unnecessary worry and uncertainty, and puts past corporate transactions in doubt.

The potential knock-on effects on the economy of potentially reopening past corporate transactions should not be underestimated; whether or not the Regulator actually uses these powers in this extreme way, the mere existence of them will have severe negative impact on overseas organisations’ perceptions of the benefits of doing business in the UK. They will not be reassured by an undertaking not to use the new powers “unreasonably”; nor will it be considered sufficient simply to imply that appeals processes, including the backstop cumbersome process of judicial review, are practical everyday tools to restrict the Regulator’s ability to apply these powers in a way that causes unnecessary additional work in rebutting incorrect interpretations of past actions.

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