NORTON ROSE FULBRIGHT

UK Pensions Briefing

TPR Guidance on suspending Deficit Repair Contributions

March 2020

The current Covid-19 pandemic is a fluid and fast-moving situation with the Government's guidance and advice being updated daily. Given the negative impact of the crisis on the world's financial markets and the subsequent strain currently being placed on many employers this briefing touches on the potential for you to discuss a suspension of deficit repair contributions with the trustees of your defined benefit pension scheme as well as on the potential discussions which employers that have an upcoming scheme valuation due in March or April 2020 should be having with the trustees of their scheme.

Suspension of Deficit Repair Contributions

In light of the ongoing impact of the COVID-19 pandemic on the financial markets in these turbulent times, The Pensions Regulator (the Regulator) has received a number of enquiries in recent days regarding the ability of employers to suspend deficit repair contributions to their defined benefit pension scheme.

In response to these enquiries, the Regulator has released guidance setting out a number of steps which it recommends employers and trustees work through in a collaborative manner before a suspension in deficit contributions is agreed. The Regulator recognises that, depending on the circumstances, pausing deficit contributions may be appropriate. In addition, you should take legal advice on the scheme's governing documents to ascertain whether there are any provisions which deal with deferring or suspending deficit repair contributions.

In a recent interview, David Fairs, the executive director at the Regulator, emphasised that the most important thing for employers to demonstrate when requesting a suspension in their deficit repair contributions will be that the pension scheme is being treated fairly and equitably with other stakeholders who have an interest in the profits and cash-flow of the company.

Demonstrating this equitability between stakeholders is likely to include measures such as:

- Stopping the payment of any dividends to your shareholders;
- Stopping payments to any other group entities including the provision of intra-group loans; and
- When granting new security, considering whether the pension scheme should also receive new security.

The Regulator is also expecting employers to be open with trustees to allow trustees to understand the impact of the current pandemic on your financial position, and suggests sharing the following documents and information to help focus discussions:

- How the virus and the measures which have been put in place to contain it may impact the demand for your products/services;
- How the virus may impact your Business Continuity Plan, especially the availability of staff and materials; and
- Where there is a significant impact on cash flow as a result of the virus, a 13 week cash-flow plan.

Employers should also consider and be prepared to discuss with the trustees questions around any upcoming key payment dates which you may have, such as rent payment dates as well as the positions of any lenders and borrowing facilities which you are currently utilising, including whether you are considering accessing further borrowing facilities. The trustees are also likely to question whether lenders are supportive of you or whether any borrowing facilities have been withdrawn.

A particularly key aspect of this discussion is likely to be whether lenders are seeking any further or new security from you – if so, the trustees may also seek to strengthen their security position, as recommended by the Regulator's guidance.

Trustees may also ask you about the package of support measures which was announced by the Chancellor on March 17, 2020, including the extent to which you expect to benefit from this and any conditions which may be attached to this support package.

In answering all of these questions, you should be seeking to focus on how this is likely to impact your ability to meet your commitments to the pension scheme, which will include consideration of whether any contingent assets could be used to support the scheme.

Although information sharing is encouraged, the Regulator's guidance also acknowledges that the information which you will be in a position to provide may not be as robust as usual due to the number of competing demands placed on your resources during this difficult time. The information which you provide should help the trustees understand the driving factors behind your request to suspend deficit repair contributions.

If you require an urgent suspension of deficit repair contributions, the Regulator's guidance is urging trustees to agree short-term deferrals of contributions with longer-term deferrals available only once the further information discussed above has been provided to the trustees. Given the volatility of the current situation, it is also likely that the trustees will seek to include triggers for the re-start of deficit repair contributions if the current situation improves.

The Regulator will continue to update this guidance in the coming weeks as the situation evolves. The Regulator will also be issuing guidance on other issues relating to defined benefit schemes, such as investments and liquidity that we will address in the coming weeks.

We are happy to provide assistance with the process of requesting a suspension of deficit repair contributions from the trustees of your defined benefit pension scheme.

To view the guidance in full please click here.

Scheme Valuations

The Regulator's current guidance does not yet address the approach which you and the trustees should take for 2019 valuations which have not yet been completed or imminent 2020 valuations. However, the Regulator is due to issue further guidance by mid-April for schemes which have an imminent valuation date – the Regulator will set out its position on March and April 2020 valuations in its Annual Funding Statement, which is due to be issued after Easter.

Actuarial valuations must take place within three years of the previous valuation, so there does not appear to be any scope for deferring valuations. However, you should sit down with the trustees as soon as possible to discuss the potential for longer repair plans or lower contributions at the beginning of any deficit repair plan followed by a step-up in future contribution levels in order to deal with the increased deficit which would likely result from a valuation taking place in the current volatile and atypical climate. Additionally, you and the trustees could discuss considering making use of the flexibility of the 15-month valuation timeline to formally or informally take post-valuation experience into account.

In the midst of this current uncertainty, your Norton Rose Fulbright adviser is working remotely and contactable through the usual channels. We are here to help and can be contacted for advice and support and updates will also appear daily on all aspects of the legal implications of the crisis on our Norton Rose Fulbright website.

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