



Trustees Have Daunting DB Funding Obligations

By Brian Buggy

As recent media coverage has reported, many DB schemes have encountered difficulties as a result of the continued fall in stock markets. Concerns were expressed that the funding standard requirements and the somewhat rigid requirements for funding proposals in legislation imposed significant pressures on DB schemes making it difficult, at least in some cases, for employers and trustees to agree a funding proposal. This position has been relieved somewhat by amendments made to the Pensions Act by the recently enacted Social Welfare Act, 2003.

THE FUNDING STANDARD

Section 42 of the Pensions Act 1990, (as amended by the Pensions (Amendment) Act 2002, provides that trustees of DB schemes must submit actuarial funding certificates to the Pensions Board at regular intervals (not more than three and a half years). The actuarial funding certificate must set out the opinion of the scheme's actuary as to whether the scheme meets the funding standard prescribed by section 44 of the Pensions Act.

A further protection now provided by section 55(3) of the Pensions Act (as inserted by section 37 of the Pensions (Amendment) Act, 2002) is the requirement that annual reports prepared by trustees of DB schemes must contain a

statement by the scheme actuary as to whether he is reasonably satisfied that if he were to prepare a funding certificate at that time he/she would be able to certify that the scheme met the funding standard (an "intervalation report").

If the scheme actuary is unable to make the required statement (or is unable to make a statement to the effect that the scheme does not meet the funding standard currently, but he is reasonably satisfied that it will at the effective date of the next funding certificate) then, under section 43(3), the trustees of the scheme must cause a funding certificate to be prepared within 12 months of the last day of the period to which the annual report related.

In either case, the legislation requires the preparation of a funding certificate, i.e., a funding certificate is required in the normal way under section 42 or as a result of an intervalation report not meeting the requirements under section 43. If the funding certificate discloses a failure by the scheme to meet the funding standard then the trustees of the scheme must submit the funding certificate together with a funding proposal.

A FUNDING PROPOSAL

Section 49 of the Pensions Act requires that if the trustees of a scheme submit a funding certificate certifying that a scheme

does not meet the funding standard, they must also submit a funding proposal meeting the requirements of that section. These include the requirement that the proposal has been certified by the scheme actuary and has been designed to ensure that in the opinion of the actuary the scheme could reasonably be expected to satisfy the funding standard at the effective date of the next funding certificate. The funding proposal must be agreed in writing by the employer and the trustees.

Section 23 of the Social Welfare Act, 2003 amends section 49 of the Pensions Act by the insertion of a new section 49(3). This sub-section provides that the Pensions Board may in individual cases, on application to it by scheme trustees, amend the strict requirements relating to a funding proposal, and in particular the date by which the scheme must meet the funding standard where:

- the scheme actuary certifies that failure to meet the funding standard relates wholly or mainly to the performance of relevant markets in relation to investments made with the resources of the scheme; and
- with regard to the performance generally of relevant markets for investment, the Pensions Board considers that specifying a later date is necessary or appropriate and not

contrary to the interests of members of the scheme.

The effect of the amendment may be to allow trustees of DB schemes to submit a funding proposal enabling the scheme to meet the funding standard over a longer period than the three and a half years envisaged by section 49(2).

TRUSTEE OBLIGATION

Does this mean that the obligation of trustees to ensure adequate funding has been altered?

I suggest not. Pension scheme trustees must at all times act in the best interests of the beneficiaries of a scheme. They have a statutory obligation under section 59 of the Pensions Act to ensure that in so far as is reasonable, the contributions payable by the employer and the members of a scheme are received.

A funding proposal requires the agreement of scheme trustees with an employer as to

the amount and timing of employer contributions to a scheme. Clearly, trustees must carefully consider the interests of beneficiaries in agreeing to any modification of an employer's obligation to make contributions to a scheme. Importantly, the trustees must consider the contribution obligations of an employer under the rules of a scheme. Contribution rules are not standard and may vary considerably from scheme to scheme.

The trustees of a DB Scheme must carefully consider the contribution rule of the scheme and determine whether it is in the best interest of beneficiaries to agree a funding proposal which may in effect dilute the obligations that the employer would otherwise have under the relevant contribution rule. In considering any funding proposal, trustees should not only obtain appropriate expert advice in relation to the funding proposal, they should also obtain adequate information in relation to the employer and its financial position.

The new provisions in relation to funding proposals contained in the Social Welfare Act do go some way to relieving the immediate concerns otherwise caused by poor performance of investment markets and the underfunding in many DB schemes. These provisions do not, however, dilute the obligations of trustees of DB Schemes to act in the best interests of beneficiaries and to ensure that DB schemes are appropriately funded.



Brian Buggy
Partner Matheson
Ormsby Prentice



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