THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

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Dear Declan

PRIVATE PENSIONS DEREGULATORY REVIEW: EMPLOYER DEBT (SECTION 75 OF THE PENSIONS ACT 1995)

The Institute of Chartered Accountants in England and Wales (the Institute) welcomes the opportunity to comment on the Discussion paper *Private Pensions Deregulatory Review: Employer Debt (Section 75 of the Pensions Act 1995)* published by the Department for Work and Pensions (DWP) in November 2008.

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We support this DWP initiative to introduce greater flexibility around the triggering of section 75 debts in corporate transactions and reorganisations, as the current regime causes issues in practice and can inhibit corporate activity, with the potential for triggering the debt attracting a disproportionate amount of attention (and fees) in such transactions.

We believe that section 75 should now be considered in light of the current regulatory framework, in particular, tPR's new powers in circumstances where there has been 'material detriment', which were not in existence when s75 was enacted. We believe that, instead of having an automatic funding test (as suggested by DWP in Option 1), which brings with it practical difficulties, there should be:

- a covenant test, under which the trustees review the covenant before and after, and have the discretion to give their approval if appropriate, akin to the review that trustees carry out when considering a clearance application

combined with

- powers for tPR to intervene and issue a CN where there has been 'material detriment'. An advantage of this approach would be that the regulator could exercise judgement, and so could

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distinguish between circumstances where value is transferred outside a group *vs.* value moving within a group.

This is a variation of the Option 1 suggested in the DWP paper, which should address the issue raised by DWP on p5 of the Discussion paper regarding the scheme ranking as a shareholder and thus its claims being subordinated. We also think that it is unhelpful to mention a “strong” covenant – clearance applications do not use this language and we believe the descriptive word “strong” will add uncertainty and should not be included. We also note that, lower down on p5, such discretion placed on trustees is included as a ‘con’ – however, we believe that trustees are already conducting such reviews when considering triennial valuations and clearance applications.

We support the inclusion of a *de minimis* threshold, below which the debt will not be triggered (Option 2). We believe that, in circumstances where the outstanding debt is the lower of (i) 10% of total scheme liabilities or (ii) £5million, the debt should not be triggered. To determine whether the *de minimis* will apply, the trustees should be able to use a reasonable estimate acting on advice from the actuary and based on estimates and available information (rather than requiring new professional work, for example, rather than the trustees needing to request a detailed meticulous review by the actuary) because, in these circumstances, the costs associated with such a full review are disproportionately high. We note that, when setting out the impact on business, the DWP do not appear to have factored in advisers’ fees (the impact of which will be reduced if such a *de minimis* is adopted).

We note that our above suggestions would require a change in the legislation such that s75 is full buy out unless (i) the trustees are satisfied that there is no material weakening of the covenant, or (ii) it is within the *de minimis* exemption.

Another idea, which the DWP may wish to consider (or consult on) as a variation on the *de minimis* exemption, would be to allow a higher threshold (eg 30%) where a scheme is near to fully funded, for example, where the recovery plan has less than three years left to run. This would have the benefit of providing an incentive for companies to reduce the length of recovery plans. However, we acknowledge this may introduce too much complexity.

We also wonder whether the DWP should consider the possibility that, instead of a s75 debt crystallising when the last active member of a pension scheme has departed, an ongoing funding plan could be agreed with the employer's group.

As a general observation, the Discussion paper appears to focus on reorganisations in which a smaller company merges with a larger company, whereas in practice the circumstances are much broader, for example, the debt could be triggered by outsourcing to a service company the employment of the workforce or sections thereof.

For completeness, we believe that triggering of any debt under s75 should be the whole employer debt, and we therefore do not support Option 3, and (as explained above) we believe that this is an important initiative and we therefore do not support option 4 (the “do nothing” option).

Please contact me should you wish to discuss any of the points raised in the attached response. We would also be very happy to meet with you to explore these or any other options, drawing on experiences of the profession.

Yours sincerely

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