

Lord Browne-Wilkinson
Financial Markets Law Committee
c/o Bank of England
Threadneedle Street
London
EC2R 8AH

19 May 2005

Dear Lord Browne-Wilkinson

Thank you for your letter of 20 April.

It may be helpful to give you some background to sections 38 – 51 of the Pensions Act 2004. The so-called “moral hazard” powers were introduced to the pensions bill in April 2004. The powers were considered by some to be quite draconian and there was concern that they may affect corporate transactions. As a result, the government undertook a consultation exercise which involved, amongst others, HMT, the Association of Pension Lawyers and the Insolvency Service. As a result of those consultations amendments were made to the clauses.

The purpose of the powers is to ensure that pension liabilities cannot be avoided, either deliberately or as a result of legitimate corporate structures.

If I can deal firstly with your concern in relation to Contribution Notices. In order to be issued with a Contribution Notice a person must be a party to an act or deliberate failure to act (s 38(3)(a)) which has as one of its main purposes avoiding pension liabilities (s38(3)(b)) and the Pensions Regulator must consider it reasonable to impose liability (s38(3)(d)).

In both the circumstances you describe, where either control has not vested or has vested but not been exercised, we do not believe the party holding the security would be party to an act as required before a Contribution Notice could be issued.

In relation to Financial Support Directions (FSD's), the Pensions Regulator can issue an FSD if the employer company is a service company or is insufficiently resourced and there is a connected or associated party who has sufficient resources (s(44)(3)). Again, the Pensions Regulator must consider it reasonable to impose the requirement of an FSD (s43(7)).

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In both the circumstances you describe, we believe taking into account the factors listed at section 43(7), it would not be reasonable to issue an FSD to a person who has an entitlement to control which has either not vested or not been exercised.

We are hoping to add to the guidance towards the end of July. In the meantime however, I am happy for you to circulate this letter and hope that it clarifies matters for you.

Yours sincerely


PP

David Norgrove
Chair

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