

BBS briefing note

Identifying your Statutory Employer

The Pensions Regulator has issued a statement to help trustees of defined benefit schemes understand the importance of identifying their scheme's statutory employer(s).

This *BBS Briefing Note* summarises the statement and the actions that trustees should be taking to identify which employers fall within the statutory definition in relation to their scheme.

BACKGROUND

Over recent years, it has become increasingly apparent that some schemes have lost their statutory employer, perhaps as a result of historic corporate restructuring or of schemes ceasing future accrual of benefit.

This has potentially serious consequences for the members of the scheme as the security offered to the scheme by a non-statutory employer can be significantly reduced. In one recent case, a scheme was refused entry to the PPF as a result of its insolvent employer not qualifying as a statutory employer, no doubt to the significant distress of the members and the trustees.

The Regulator's statement is intended to remind trustees of the importance of identifying their statutory employer(s). The employer's legal obligation underpins the pensions framework in the UK, and is fundamental to the assessment of the employer's covenant, which in turn directly influences the trustees' funding and investment strategies.

Unfortunately, the statutory definition of an "employer" is not entirely straightforward under pensions legislation. In general, a statutory employer is an entity which employs, or formerly employed, persons in a category of employment to which the scheme relates.

In a practical sense, a statutory employer is one that is legally responsible for:

- meeting the scheme funding objective;
- paying the Section 75 debt when an employment cessation event occurs; and
- triggering potential entry to the PPF on insolvency.

It is, therefore, critical to identify the statutory employer(s) to a scheme.

IDENTIFYING THE STATUTORY EMPLOYER

Identifying the statutory employer(s) may be relatively straightforward for the majority of schemes. However, this will not be the case for all schemes, particularly those schemes that closed to future accrual some time in the past, have a complex history, and/or involve multiple former employers.

The Regulator suggests that, for schemes where benefits are continuing to accrue for active members, the starting point should be to speak to the existing contributing employer(s). It should be relatively straightforward to confirm whether they meet the statutory employer definition.

It may be more difficult, however, to establish the position in relation to former employers who no longer employ any active scheme members. Legal advice may be required to establish whether former employers fall into the statutory employer category, and trustees may need to investigate whether such former employers fully discharged their obligation at the relevant time.

Schemes that are closed to future accrual may also be problematic and again legal advice may be required.

Once the statutory employers have been identified, trustees may need to revisit their employer covenant assessment, and consequently the assumptions adopted in setting technical provisions and their investment strategy, to satisfy themselves that they remain appropriate.



BBS briefing note (continued)

From November 2011, the statutory employer(s) will need to be recorded on the scheme return submitted to the Regulator each year.

WHAT INFORMATION IS REQUIRED?

The information required by trustees to determine their statutory employer(s) will depend upon the complexity of each situation, but may include:

- Employment records;
- Historic documents regarding employer participations and departures;
- HMRC data, including ECON numbers;
- Information from Companies House;
- Past scheme accounts to assist in establishing funding positions at the time of employer departures and whether Section 75 debts were discharged.

If trustees have difficulty in obtaining the information from the employers, they are advised to contact the Regulator.

WHAT IF A STATUTORY EMPLOYER CAN'T BE IDENTIFIED?

If neither the employer that contributes to the scheme, nor any other employer, is identified as a statutory employer, the trustees should discuss the situation with the contributing employer and notify the Regulator of the position.

The trustees will be expected to investigate how and why the scheme came to be without a statutory employer, considering in detail any advice received at the time. The Regulator will also consider whether the use of its anti-avoidance powers is appropriate.

WHAT SHOULD TRUSTEES LOOK OUT FOR IN THE FUTURE?

Having established the current position, trustees should be vigilant going forward, so that a future event does not lead to their scheme being separated from its statutory employer. The potential for a scheme becoming ineligible for the PPF or being left without an employer that is responsible for Section 75 liabilities should be

constantly borne in mind, and trustees should contact the Regulator if they have concerns over any proposed changes.

The Regulator's statement identifies some scenarios which trustees should look out for:

- An employer substitution takes place and the new employer does not meet the definition of statutory employer;
- There is a bulk transfer of liabilities to a scheme in which no defined benefits have accrued or will accrue;
- An employer departs from the scheme under the employer debt regulations leaving an employer who may not be a statutory employer;
- There is a "phoenix event" where the employer's business is sold to a new entity following insolvency and the new entity has never employed any active defined benefit members.

BBS VIEW

The role of a statutory employer to a scheme is not new, but a number of recent cases have highlighted the importance of trustees identifying their statutory and non-statutory employers.

The Regulator's statement is, therefore, very welcome in highlighting the issue and reminding trustees of the need to continually monitor those entities with a legal obligation to support the scheme and to ensure that this vital support is not inadvertently lost.

The need to advise the Regulator of the scheme's statutory employer(s) on the annual return from November 2011 will increase the focus on this and BBS will be working with its clients to identify their statutory employers, seeking legal advice where required.

This BBS briefing note is based on BBS's understanding of the law and is provided for information only. It should not be relied upon as a definitive statement of the law and detailed legal and financial advice should be obtained on the specific circumstances before proceeding.

