

corporate briefing



The Pensions Regulator proposes to use anti-avoidance powers on Sea Containers Ltd

Summary

On Monday 18 June 2007, The Pensions Regulator published Determination Notices indicating the intention to issue a Financial Support Direction (FSD) on Sea Containers Ltd.

Under the FSD, Sea Containers Ltd will be required to put in place arrangements to meet the c£90m of Section 75 (buy out) debt in relation to the two pension schemes of its subsidiary Sea Containers Services Ltd, should the debt fall due.

Sea Containers Ltd is seeking protection from its creditors under Chapter 11 of the US bankruptcy code. While the US courts may not accept a claim or payments under an FSD, the FSD, if issued, will focus the attention of the directors and the court on the potential extent of the pension liabilities.

The message for trustees and companies alike is clear – pension issues must be addressed as part of any corporate activity.

In its first action of this kind, The Pensions Regulator (TPR) has used one of its anti-avoidance powers arising from the Pensions Act 2004 (see box on reverse).

On Monday 18 June 2007, the Regulator published Determination Notices indicating the intention to issue a Financial Support Direction (FSD) on Sea Containers Ltd. This was followed by publication of the reasons behind the Determination on 27 June 2007.

Under the FSD, the Bermuda-based parent company, Sea Containers Ltd, will be required to provide financial support for the two pension schemes of its London-based UK subsidiary Sea Containers Services Ltd, a service company. In particular, Sea Containers Ltd will be required to put in place arrangements to meet the c£90m of Section 75 (buyout) debt in relation to the two schemes should this become due.

The action by TPR was triggered when they were contacted by the trustees of the two pension schemes. This followed Sea Containers Ltd's decision to terminate their participation in and liability to contribute to one of the schemes, raising concerns about their willingness to support the schemes going forward.

TPR decided it was reasonable to issue an FSD to Sea Containers Ltd on the grounds of the benefits it received from Sea Containers Services Ltd. These benefits included:

- The services received from Sea Containers Services Ltd but not actually paid for. Instead of cash payments, inter-company balances were created to record the debt which was not required to be repaid within a specific time.
- Sea Containers Services Ltd's function within the Group was to allow it to benefit from the Bermudan tax regime while maintaining a European trading base.

“ **The action by the Regulator was triggered when they were contacted by the trustees of the two pension schemes.** ”

Sea Containers Ltd is seeking protection from its creditors under Chapter 11 of the US bankruptcy code in a Delaware court action. While the Regulator acknowledged that the US Bankruptcy Court may not accept a claim or payments under an FSD, the FSD, if issued, will focus the attention of the directors and the court on the potential extent of the pension liabilities (for example the insurance buyout cost). This may at least have the effect of making the schemes' interest a larger proportion of the total unsecured creditors' claims on any assets which, along with any priority claims, will be taken into account as part of the attempt to restructure the Group's finances. If the FSD is not satisfied, TPR can go on to issue a Contribution Notice creating a legally enforceable debt, albeit still ranking as an unsecured creditor.

The reasons behind the Determination provide a unique insight into TPR's considerations in issuing the FSD. In particular, the literal interpretation the Regulator has given to the 'benefits received' when assessing whether or not it is reasonable to issue the FSD (including the importance of the structure of inter-company payments in this

decision) and its willingness to issue an FSD support pension schemes within a bankruptcy situation, potentially to the detriment of other creditors.

However, most importantly, TPR has now shown it is willing to use its powers. While it remains to be seen under what other circumstances it may take similar actions, the message for trustees and companies alike is clear – pension issues must be addressed as part of any corporate activity.

Further information

For further details, see the Regulator's website at: <http://www.thepensionsregulator.gov.uk/mediaCentre/pressReleases/pn07/pn07-10.aspx>

Andrew Reid

+44 (0) 20 7222 8033
andrew.reid@watsonwyatt.com

Steven Dicker

+44 (0) 7808 176397
steven.dicker@watsonwyatt.com

The Pensions Regulator's anti-avoidance powers and clearance

The Regulator has two key powers available to it arising from the Pensions Act 2004: the issuance of Contribution Notices and Financial Support Directions.

- A **Contribution Notice** is applied where one of the main purposes of act or failure to act is preventing recovery of or reducing a Section 75 debt payable either now or in the future.
- **Financial Support Directions** can be applied without regard to intent, whenever a company is inadequately resourced to meet its pension obligations (taken to mean the company's net assets are less than 50 per cent of the scheme's buyout deficit) or is a service company and other group companies could help support the scheme.

Companies are able to apply to The Pensions Regulator for **clearance** that it will not use its anti-avoidance powers in relation to a specific corporate transaction. We understand that new clearance guidance will soon be issued in consultative form and expect an effort to clarify the differences between notifiable and Type A events and provide further guidance on the relevant deficit in leveraged buyouts (in line with their May statement on this subject).

“ The reasons behind the Determination provide a unique insight into the Regulator's considerations in issuing the FSD. ”

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