DUBLIN CORK BOSTON NEW YORK TOKYO

THE 2005 PENSIONS REGULATIONS – NEW RULES FOR OCCUPATIONAL PENSION SCHEMES

Introduction

The provisions of the Pensions Act, 1990 (the "Pensions Act") were amended by the provisions of the Social Welfare and Pensions Act, 2005 (the "2005 Act") which was passed into law in March 2005.

New Pension Regulations (the "Regulations") were introduced by the Minister for Social and Family Affairs Mr. Seamus Brennan who signed the Regulations into law with effect from the 23rd September, 2005. The purpose of the Regulations is to give effect to Council Directive 2003/41/EEC of 3 June 2003, the first EU Pensions Directive (the "Directive"). Complementary tax changes were also introduced in the Finance Act, 2005.

The Directive aims to introduce a common minimum level of supervision across the EU. Clearly this will only occur between those countries which have taken the necessary steps to transpose the Directive into law in their own countries. So far, only 9 countries have done so one of which is Ireland. This will indicate Ireland's willingness to provide a favourable pensions environment which it is hoped will in turn encourage foreign pension schemes to seek the necessary authorisation to locate their pension schemes in Ireland and/or be permitted to accept contributions from Irish persons into their foreign pension scheme. The Regulations were transposed to give effect to the obligations contained in the Directive affecting not only the regulation of cross border pensions but also the national regulation of domestic pension arrangements.

Scope and the Regulations

The scope of the new Regulations is far reaching. Regulations dealing with a number of diverse aspects of pension regulation from issues such as cross border regulations, trustee regulations, professional guidance and preservation of benefits regulations as well as investment and borrowing regulations have now been introduced.

For the purposes of this Article, I propose focussing on the areas of the qualification of pension trustees to act in that capacity, their authorisation to operate cross border schemes as well as the investment and borrowing regulations which have now been introduced.

Trustee Eligibility Criteria

Section 34 of the 2005 Act amends Section 59 of the Pensions Act by the insertion of a new Section 59A therein.

Section 59 as also amended by Section 42 of the Pensions (Amendment) Act, 2002 outlines the general duties of a pension trustee which broadly speaking include an obligation to ensure that contributions made are received, properly invested and paid out in accordance with the regulations and the provisions of the relevant scheme. “Scheme” is defined in the Pensions Act as an occupational pension scheme. The Section also includes an obligation to ensure that proper membership and financial records of the scheme are kept.

The new Section 59A(1) sets out in detail the qualifications to act as a pension trustee. The Section lists a number of disqualifications which preclude certain persons or categories of persons from acting as a pension trustee which are as follows; an undischarged bankrupt, a person convicted of an offence involving fraud or dishonesty, a person in respect of whom a declaration under Section 150 of the Companies Act, 1990 has been made or a company any director of which is prohibited under the provisions of Section 59A itself from being a trustee of a pension scheme.

Section 59A(2) states that: “(2) Regulations shall:-

(a) provide that trustees of a scheme shall possess, or employ or enter into arrangements with advisers who possess, the qualifications and experience specified in those regulations, and…. “

Pursuant to this requirement Section 4 of the Occupational Pension Schemes (Trustee) Regulations, 2005, the (“Trustee Regulations”) provides that the qualifications and experience specified for the purposes of Section 59A(2) of the Pensions Act are qualifications and experience appropriate and relevant to investment of the resources of the scheme. The Section further provides that a trustee will be regarded as possessing such qualifications and experience if they:

(a) enter into an investment management contract with one or more investment managers to provide investment services in respect of the assets of the scheme or,

(b) satisfy the Pensions Board that they have such qualifications and experience themselves.

Other parts of Section 59 provide that any decisions regarding the eligibility of trustees are to be decided by the Pensions Board and provide a right of appeal to the High Court within 21 days from the notification of the determination on a point of law.

So far Section 4 of the Trustee Regulations are the only Regulations made under Section 59A(2) but there may be others in due course depending on the areas of expertise required for the role.

Whilst it is unlikely that these new provisions will require any person(s) currently acting as pension trustees to retire from this role it will provide very useful guidance for any new schemes in the future particularly in light of the new pan-european aspect to pension schemes and proposed new providers of trustee services.

Investment Regulations

Borrowing Powers

Section 5 of The Occupational Pension Schemes (Investment) Regulations, 2005 (the “Investment Regulations”) gives effect to the provisions of Section 61B of the 2005 Act which provides that subject to the Directive, regulations may make provision for borrowing by a scheme.

The new borrowing provisions are very restrictive and may impose limitations in the operation of relevant schemes. Section 5(a) provides that the trustees of a scheme may borrow money but only for liquidity purposes and only on a temporary basis.

Whilst some restrictions were anticipated given the provisions of the Directive, it was hoped that small schemes, i.e. those with less than 100 members would be permitted to borrow without such restrictions. Section 5(b) of the Investment Regulations however only permits the trustees of a one member arrangement to borrow money in this manner.

The definition of a "one member arrangement" is also set out in the Regulations as follows: it means "a scheme which is established for one person only and that one person will always be the only member and that member has discretion as to how the resources of the scheme are invested, unless the scheme is made the subject of a Pension Adjustment Order, in which case it may also include the person or persons referred to in the Pension Adjustment Order".

It is worth nothing in this context that one person pension schemes still have the capacity and flexibility to enter into contractual relationships with the trustees of unit trust schemes where the trustees of those unit trusts engage in borrowing activities on behalf of the single member in one or more one person pension schemes within the same umbrella unit trust.

Perhaps one of the most important changes in the current pension regime for trustees is the new requirement contained in Section 6 of the Investment Regulations to provide a "Statement of Investment Policy Principles" to the members of a scheme other than a small scheme, i.e. one with less than 100 members. Arguably this may not require significant change on the part of many pension trustees who may have already been providing statements containing some or all of the prescribed information to their members.

The statement must include details of:

(i) The investment objectives of the trustees;
(ii) The investment risk measurements methods;
(iii) The risk management process to be used, and
(iv) The strategic asset allocation implemented with respect to the nature and duration of pension liabilities.

The trustees must review the statement at least every 3 years and the statement must also be revised at any time following any change in investment policy which is inconsistent with the current statement.

Investment Restrictions

The new investment rules contained in the Investment Regulations set out broad investment principles rather than specific percentage amounts. This is a significant advantage for Ireland and increases its attractiveness as a location in which a pension scheme from another EU Member State may choose to be located.

By providing flexibility in the investment regime this leaves the way open for a variety of investment styles and fosters Ireland's reputation as a centre for facilitating inward investment and growth.

Section 7(3) provides that the assets of the scheme must be invested in a manner designed to ensure the security, quality, liquidity and profitability of the portfolio as a whole having regard to the nature and duration of the expected liabilities of the scheme.

The requirement that the assets of the scheme must be invested predominantly on regulated markets and investments not so invested must be kept to a prudent level is contained in Section 7(4).

Another important feature and a requirement of Section 7(5) is the requirement that assets of the scheme must be properly diversified so as to avoid over reliance on any particular asset, issuer or group of undertakings so as to avoid accumulations of risk in the portfolio as a whole. Investments in assets issued by issuer(s) belonging to the same group must not expose the scheme to excessive risk concentration.

Notwithstanding the provisions of Section 4 of the Trustee Regulations therefore, which permit pension trustees to delegate the investment management of the scheme to an investment manager it would be important for them to put adequate monitoring procedures in place to enable them to monitor the investments of the scheme against the requirements of the Investment Regulations on an ongoing basis.

Authorisation to Operate Cross Border Schemes

A full review of the provisions governing the operation of cross border schemes is outside the scope of this Article however, in the context of the review of trustee obligations it is necessary to be aware of the provisions of the new Part XII of the Pensions Act inserted by Section 37 of the 2005 Act.

In particular Section 149 (1) provides that the trustees of a scheme shall not accept any contribution to a scheme from an undertaking unless:-

(a) the trustees are authorised by the Board under this Section, and
(b) approval has been granted under Section 151 in relation to the undertaking concerned.

Section 149 also sets out the requirements for an application, which must be made in writing and must contain the prescribed information. The trustees of a small scheme as defined above must also comply with the relevant provisions.

If the Pensions Board is satisfied with the application authorisation will be granted but if not, authorisation will not be forthcoming. The Pensions Act also makes provision in Section 150(1) (6) that the trustees may within 21 days after the date of notification of revocation of any authorisation under this section appeal to the High Court against the decision of the board to revoke the authorisation in question.

Conclusion

It is clear that Ireland's wish to portray itself as an investment friendly location and its willingness to create a suitable environment to make this happen is demonstrated once again in the new Pension Regulations giving effect to the Directive.

Although the new Regulations set out eligibility criteria for trustees and the obligation to provide a statement of investment policy procedure this transparency will provide certainty in this area. Similarly the flexibility contained in the Investment Regulations will provide guidance without being prescriptive which is undoubtedly a positive step in the new pensions environment.

Securing the flow of financial contributions from either (i) EU based multi-nationals or (ii) one man EU pension schemes under the cross border iorps framework into Ireland will present significant challenges requiring consideration of a number of different measures including the taxation regime of pensions generally in Ireland.

In any event, the double taxation agreements governing investment activities into other jurisdictions such as the US need to be reviewed to ensure that Ireland at a minimum receives treatment equivalent to other EU Member States such as the UK.

Additionally, measures including the continued publication abroad of the taxation and regulatory frameworks in operation in Ireland, the range of pension investment vehicles available in Ireland such as iorps, and taking advantage generally of the "pooling vehicle" technology such as virtual pooling and CCFs, will all contribute significantly to this end.

As ever, there is considerable scope for creative planning on the part of government, for example by the introduction of investment projects through which cross border iorps could invest in public private partnership projects in Ireland.

Notwithstanding these considerations one thing is certain, in light of the recently published Report of the Pensions Board (following the National Pensions Review) the whole pensions area will be the subject of much closer government scrutiny and attention, given the changing demographics in Ireland and the ever increasing need to make adequate pension provisions for the Irish population.

Date: **September, 2006**
Author: **Paula Kelleher**

CONTACT US

Our Offices

Dublin
33 Sir John Rogerson's Quay,
Dublin 2,
Ireland.
Tel: +353 1 667 0022
Fax.: +353 1 667 0042

Cork
8 Webworks Cork,
Eglinton Street,
Cork, Ireland.
Tel: +353 21 425 0630
Fax: +353 21 425 0632

Boston
26th Floor,
225 Franklin Street,
Boston, MA 02110,
United States of America.
Tel: +1 617 217 2866
Fax: +1 617 217 2566

New York
245 Park Avenue
39th Floor
New York, NY 10167
United States
Tel: +1 212 792 4166
Fax: +1 212 792 4167

Tokyo
12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501

e-mail: enquiries@dilloneustace.ie
website: www.dilloneustace.ie

Contact Points

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.

Paula Kelleher
e-mail: paula.kelleher@dilloneustace.ie
Tel : +353 1 667 0022
Fax: + 353 1 667 0042

DISCLAIMER:
This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:
© 2009 Dillon Eustace. All rights reserved.
This article was first published in Finance Magazine in 2006.

DUBLIN CORK BOSTON NEW YORK TOKYO

33 Sir John Rogerson's Quay, Dublin 2, Ireland.
www.dilloneustace.ie

In alliance with Arendt & Medernach