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Turning Transparent: What a ban on corporate directors means for pension schemes

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Introduction

Planned corporate transparency reforms will limit the circumstances in which companies can act as directors of other companies. Professional trustees and the pension schemes they look after should check whether they will be affected by this and look out for the detailed rules.

What is the Government's concern?

The Government has been discussing a ban on the use of corporate directors on UK company boards for some time, as one component of a wider push to increase corporate transparency and fight economic crime. It consulted about this issue in 2013 and 2014, included a provision to prohibit the use of corporate directors in the Small Business, Enterprise and Employment Act 2015 which has never been enacted and consulted again, more recently, in December 2020.

The Government is concerned that the use of corporate directors weakens corporate governance. Chains of corporate control make it more difficult to know who is ultimately controlling companies, can weaken the personal accountability of directors and can even be used as a cover for illegal activity.

At present, UK company law only requires one director on a company's board to be a "natural person" as opposed to a corporate body. Certain jurisdictions, for example Germany and the USA, do not allow corporate directors.

Where have we got to now?

In late February the Government published a White Paper setting out a corporate reform package designed to stop the "*abuse*" of "*the UK's open, flexible corporate registration framework*". The White Paper includes a response to the December 2020 consultation and confirms that a ban on corporate directors will go ahead.

We now await regulations to set out the detailed rules.

Why is this relevant to pension schemes?

It has become increasingly common for pension schemes to be governed by trustee companies rather than by individual trustees. In turn, those trustee companies tend to include one or more professional trustee directors on their trustee board, many of whom provide their services via a company.

This structure can benefit both the professional trustee and the pension scheme. For the individual performing the professional trustee director role, use of a company structure helps to limit their personal liability. It also provides flexibility by allowing for another member of the professional trustee firm to attend meetings if the usual named individual cannot attend. For the pension scheme, using this structure can help to reduce its administrative burden by, for instance, reducing the volume of paperwork associated with appointing and removing trustee directors.

Will the Government ban corporate directors altogether?

No. The Government recognises that there are some legitimate uses for corporate directors and has specifically named their use by pension schemes as an example.

It intends to introduce an exception to the ban so that a company can have a corporate director if:

- the corporate director is registered in the UK and has "legal personality" (i.e. it is able to function in business like a natural person);
- the directors of the corporate director are natural persons (i.e. there is only one "layer" of corporate directors); and
- those natural person directors have had their identities verified by Companies House before the corporate director is appointed.

How will this affect professional trustees and their pension schemes?

Professional trustees should consider what the new laws will mean for the way they are currently set up. Is their current structure in line with what is planned?

This issue is unlikely to be limited to professional trustees. Whilst we await the underlying detail, the December 2020 consultation envisaged that a breach by the professional trustee would also amount to a breach by the trustee company of which it is a director. Schemes will therefore also need to be confident that their professional trustee's structure, governance, compliance processes and appointment terms work under the new laws (once finalised).

Helpfully the Government has promised a transition period for existing companies to comply with the new requirements.

What steps should schemes be taking?

First, keep a watching brief for the detailed regulations.

In the meantime consider with your professional trustees whether there is any structural issue that needs to be addressed.

Any scheme currently going through the process of appointing, or renewing terms with, professional trustees may want to explore including contractual provisions to ensure the professional trustee complies with the new requirements and the trustee company is protected from breaches where possible. If the appointment terms are with the scheme's sponsor (which is common), schemes should raise this issue with the employer and liaise with it to ensure they are adequately protected.

Once the detailed regulations are available, schemes should review their governance processes. For example, the Government's December 2020 proposals would require the trustee company to take all reasonable steps to assure itself that its professional trustee corporate director has, and continues to have, no corporate directors of its own, and for the trustee company to confirm this in an annual statement to Companies House. This may again require some liaising with the employer if some of those functions would be performed on the scheme's behalf by the employer group.

Schemes may also need to review their trustee company articles and relevant provisions in scheme governing documents to ensure these align with the new regulations.

Schemes which have individual trustees or which do not use corporate directors will not be affected by these changes.

Finally it is also worth being aware that the person or company acting as company secretary to the trustee company and making filings on its behalf at Companies House will be caught by the identity verification requirements.

For more information on this issue, or advice on steps to take, please contact the Norton Rose Fulbright LLP pensions team.

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