

# PENSIONS ACT 2008

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Schedule 9 – contribution notices and financial support directions under Pensions Act 2004*

366. *Paragraph 1* introduces the amendments made by Schedule 9.
367. *Paragraph 2(1)* inserts reference to the material detriment test into section 38(5)(a) of the PA 2004 (main purpose or one of the main purposes of act or failure to prevent recovery of employer debt under section 75 of the PA 1995etc.)
368. *Sub-paragraph (2)* inserts section 38A into the PA 2004.

#### **38A Section 38 contribution notice: meaning of “material detriment test”**

369. *Subsection (1)* of new section 38A enables the Pensions Regulator to issue a contribution notice where it is of the opinion that an act or failure to act has detrimentally affected in a material way the likelihood of the accrued scheme benefits being received (the “material detriment test”).
370. *Subsection (2)* sets out for the purposes of section 38A what are accrued scheme benefits.
371. *Subsection (3)* defines “the relevant time” in the case of an act or a failure to act and specifies that in the case of acts or failures to act forming part of a series, any reference to the act or failure is a reference to the last of those acts or failures.
372. *Subsection (4)* provides that the Regulator must have regard to such matters as it considers relevant in considering whether the material detriment test is met; this includes certain specified matters where relevant.
373. *Subsection (5)* defines “scheme obligation”, which includes actual or contingent obligations towards the scheme or relevant transferee scheme.
374. *Subsection (6)(a)* defines “relevant transferee scheme”, and *subsection 6(b)* provides that references to the assets or liabilities of any relevant transferee scheme relate to those assets or liabilities only in relation to persons who were members of the scheme before the relevant time.
375. *Subsection (7)* provides that for the purposes of subsection 6(a) a transfer of accrued rights of members of a scheme to another pension scheme includes a reference to the extinguishing of those accrued rights as a result of an obligation to make a payment or asset transfer to the other scheme.
376. *Subsection (8)* defines “work-based pension scheme” and provides that any reference to rights which have accrued be read in accordance with section 67(A)(6) and (7) of the PA 1995.

377. *Subsection (9)* provides that certain provisions of the PA 2004 (relating to the Pension Protection Fund and the Financial Assistance Scheme) are to be disregarded for the purposes of deciding whether an act or failure has had a detrimental effect under this section.
378. *Subsection (10)* provides the Secretary of State with a regulation-making power to amend any provision of subsections (4) to (8).

**38B Section 38 contribution notice issued by reference to material detriment test: defence**

379. This section sets out how a person may make out a statutory defence to a contribution notice issued under the material detriment test.
380. *Subsection (1)* sets out where this section applies, namely where the Regulator has issued a warning notice under section 38 of this Act, wholly or partly because in its opinion the material detriment test is met.
381. *Subsection (2)* provides that a contribution notice must not be issued on grounds of material detriment if the Regulator is satisfied that certain conditions under this section are met.
382. *Subsections (3) to (7)* set out the conditions for the defence: this provides that the person who wishes to raise the defence must satisfy the Regulator that he or she satisfied conditions A and C, and where relevant condition B. Those conditions provide for a three step process.
383. Condition A is that before becoming a party to the act or failure, the person gave due consideration to the extent to which the act or failure to act might detrimentally affect in a material way the likelihood of accrued scheme benefits being received.
384. Condition B is that where as a result of that consideration there was considered to be a potential detriment, the person took all reasonable action to eliminate or minimise the extent to which it would have a detrimental effect on the likelihood of accrued scheme benefits being received.
385. Condition C is that, having regard to all the circumstances prevailing at the time in question, it was reasonable for the person to conclude that the act or failure to act would not detrimentally affect in a material way the likelihood of accrued scheme benefits being received.
386. *Subsection (6)* gives further detail about what will be required in order for a person to be regarded as having given the consideration referred to in Condition A, and that is that the person must have made the enquiries and done the other acts that a reasonably diligent person would have made or done in the circumstances.
387. *Subsection (7)* defines “the relevant time”, and makes clear that the person’s assessment of whether or not an act or failure might detrimentally affect the likelihood of scheme benefits being received is to be judged by reference to the circumstances prevailing at that time and of which that person was aware or ought reasonably to have been aware.
388. *Subsections (8) to (11)* set out how the defence applies in relation to a series of acts or failures.
389. *Subsection (8)* provides that the person must show either that the three conditions are met in relation to each of the acts or failures in the series, or that in relation to each of those acts or failures, it formed part of a group of acts or failures (as selected by the person raising the defence) in relation to which the matters set out in subsection (9) are shown.
390. *Subsection (9)* sets out the matters to be shown to meet conditions A, B and C in relation to a group of acts. They are that before becoming party to the first act or failure in the

group, the person must show that condition A is met in relation to the overall effect of the group; condition B must be met in relation to that overall effect, and condition C must be met in relation to each of the acts or failures in the group.

391. Subsection (10) provides that where condition C cannot be met in relation to any act in the group, the defence for the preceding act(s) would stand where the three conditions A - C had been met, and those preceding acts or failures would be regarded as a separate group. Subsection (10)(b) provides that the person could then select another group for the defence, which could include the particular act or failure concerned, and any subsequent one, and the person would then need to show the matters set out in subsection (9) in relation to the new group.
392. Subsection (11) provides that in a case where the person cannot show those matters set out in subsection (8) in relation to each of the acts or failures in the group, but can in relation to some of them, those which he can would not be taken into account for the purposes of a series of acts (under new sections 38A and 38(12) of the Act).
393. *Subsection (12)* defines terms used in this section and also applies the disapplication of provisions relating to the Pension Protection Fund and the Financial Assistance Scheme for the purposes of this section.
394. *Subsection (13)* provides the Secretary of State with a regulation-making power to amend this section.
395. *Paragraph 3* of the Schedule provides that the Pensions Regulator must issue a code of practice setting out the circumstances in which it expects to issue contribution notices under the material detriment test.
396. *Paragraph 4* stipulates that where a warning notice is issued by virtue of the material detriment test, the Pensions Regulator's standard procedure must provide for the warning notice to explain the general effect of section 38B, and give the person the opportunity to make out the statutory defence that section.
397. *Paragraph 5* provides that regulations under section 38A(10) or section 38B (13) are subject to affirmative resolution.

#### ***Contribution notices: acting or failing to act otherwise in good faith***

398. *Paragraph 6* removes the words "otherwise in good faith" from section 38(5)(a)(ii) of the PA 2004.

#### ***Whether reasonable for the Pensions Regulator to issue contribution notice***

399. *Paragraph 7* further amends section 38 of the PA 2004.
400. *Sub-paragraph (2)* amends *subsection (3)* by setting out an additional condition that must be met before the Regulator can consider it reasonable to impose a liability on the person to pay the sum in the contribution notice; that is, the Regulator must have regard to all the circumstances of the case as well as such other matters the Regulator considers relevant (including matters set out in *subsection (7)*).
401. *Sub-paragraph (3)* adds to the relevant matters set out in *subsection (7)*; that is, the Regulator must also have regard, where relevant, to the value of any benefits the person (to whom the Regulator is considering imposing a liability to pay a sum specified) receives, or is entitled to receive, directly or indirectly from the employer or under the scheme, and also to the likelihood of any relevant creditors being paid and the extent to which they are likely to be paid.
402. *Sub-paragraph (4)* defines "relevant creditors".

***Contribution notices: series of acts or failures***

403. *Paragraph 8* makes a clarificatory amendment section 38 to enable the Pensions Regulator to issue a contribution notice in relation to a series of acts or failures to act. For the purposes of section 39 of the Act the relevant time in relation to such a series is determined by reference to whichever of the acts or failures in the series that the Regulator considers most appropriate.

***39A Section 38 contribution notice: transfer of members of the scheme***

404. *Paragraph 9* inserts a new section 39A into the PA 2004.
405. *Subsection (1)* provides that the new section applies where the Regulator is of the opinion that in relation to a scheme (known as “the initial scheme”), one of the tests for issuing a contribution notice under section 38 are met, and the other conditions in that section for issuing such a notice are also met, and further that the accrued rights of at least two persons have been transferred out of the scheme to one or more other work-based pension schemes (that is, a “transferee scheme”).
406. *Subsection (2)* of the new section provides that where the section applies, the Regulator may issue a contribution notice in relation to any transferee scheme. It further provides that references in sections 40 and 41 to the scheme are to the transferee scheme.
407. *Subsection (3)* provides that, except where subsection (5) applies, references to the scheme in section 39 are references to either the initial scheme or the transferee scheme whichever the Regulator considers most appropriate.
408. *Subsection (4)* provides that where section 39 has effect in relation to the transferee scheme, references in that section to the debt under section 75 of the PA 1995 is to be taken as a reference to so much of that debt as is to be attributable to those members of the transferee scheme who were members of the initial scheme.
409. *Subsection (5)* makes provision for the Secretary of State to introduce regulations to permit the Regulator to calculate the sum specified in the contribution notice in a different way from that specified under 39 where appropriate, to take account of transfers into schemes to which section 75 of the 1995 Act does not apply (section 75 of the 1995 Act establishes the debts from employers to pension schemes).
410. *Subsection (6)* enables the Pensions Regulator to issue a direction to the trustees of managers of a transferee scheme requiring them to take certain steps to ensure that the sum payable under the contribution notice is applied for the benefit of the affected members (that is, those who have transferred in from the affected initial scheme).
411. *Subsection (7)* provides that failure by the trustees or managers to take all reasonable steps to comply with a direction under subsection (6) may attract a civil penalty under section 10 of the 1995 Act.

***39B Section 39A: supplemental***

412. Section 39B makes provision supplemental to section 39A.
413. *Subsections (1) and (2)* define the “transferee scheme” and provide that for the purposes of section 39A(1) and 39B(1) it does not matter whether the transfer into the transferee scheme was directly from the initial scheme or whether it was as a result of one or more.
414. *Subsection (3)* provides that in sections 39A and 39B, any references to the transfer of accrued rights include references to the extinguishing of those accrued rights as a result of the obligation to make a payment, or transfer an asset, to the transferee scheme.
415. *Subsection (4)* provides definitions that are relevant to this section.

416. *Subsection (5)* provides that this section applies even if the initial scheme has been wound up as a result of the transfer or otherwise ceases to exist. *Subsection (6)* sets out the application of references to a scheme in section 39A(1) in a case to which subsection (5) applies.
417. *Subsection (7)* provides that nothing in this section prevents the Regulator from issuing a contribution notice in relation to the initial scheme, that is, the transferor scheme.
418. *Subsections (8) and (9)* permit the Secretary of State to make regulations in order to apply sections 39A and 39B to a scheme or other arrangement in any case where the accrued rights of pension scheme members are transferred or extinguished in connection with certain specified events.
419. *Subsection (10)* provides that regulations made under subsection (8) may have effect from the date of any announcement by the Secretary of States of the intention to legislate. Paragraph 16 of the Schedule provides that the first set of regulations made section 39B(8) would have effect from 20 October 2008.

#### ***43A Financial support directions: transfer of members of the scheme.***

420. Section 43A and 43B provide that where some or all of the members of a pension scheme to which section 43 of the PA 2004 (financial support directions) applies have been transferred to one or more other work-based schemes the Regulator may issue a financial support direction in relation to any scheme that contains the affected members. These sections set out parallel provisions in respect of financial support directions to those at sections 39A and 39B.
421. *Paragraph 11* of the Schedule amends section 306 of the PA 2004 to provide that any direction issued by the Regulator under either section 39A(6) or 43A(3) overrides the scheme rules to the extent that there would otherwise be a conflict. *Paragraph 13* provides that the powers to issue a direction under those sections are reserved regulatory functions of the Regulator.

#### ***Financial support directions: meaning of “insufficiently resourced”***

422. *Paragraph 14* amends section 44(3) of the PA 2004 to provide that, for the purposes of financial support directions, the “insufficiently resourced” test is satisfied if the additional conditions listed are met.
423. *Sub-paragraph (2)* amends subsection (3) to add a new condition which if met means that the “insufficiently resourced” test would be met. The effect of the new condition is that the Regulator may take into account the aggregate value of the resources or two or more persons who are associated with or connected to the employer, who are furthermore associated with or connected to each other, and determine whether that aggregate value is not less than the relevant deficit.

#### **Effect of amendments made by the Schedule**

424. *Paragraph 15(1)* specifies that the amendments made by the Schedule have effect in relation to acts or failures first occurring on or after 14 April 2008.
425. *Sub-paragraph (2)* provides that the amendments made by paragraph 8 (contribution notices: series of acts or failures to act) have effect for the material detriment test where at least one of the acts or failures occurs or first occurs on or after 14 April 2008, and for all other purposes, where at least one of the acts or failures to act occurs on or after the day on which the Act receives Royal Assent.
426. *Sub-paragraph (3)* provides that the amendments made by paragraphs 9 and 10 (contribution notices and financial support directions: transfer of members of the scheme) have effect in relation to any case where rights are transferred or extinguished on or after 14 April 2008.

*These notes refer to the Pensions Act 2008 (c.30)  
which received Royal Assent on 26 November 2008*

427. *Sub-paragraph (4)* provides that the amendments made by paragraphs 14 (financial support directions: meaning of “insufficiently resourced”) have effect to enable the Pensions Regulator to make a financial support direction by reference to any time falling on or after 14 April 2008.

### **Transitional Provisions**

428. *Paragraph 16 (1)* provides that for the first set of regulations made under this power, the regulation-making power at 39B(8) would have retrospective effect to 20 October 2008.
429. *Paragraph 16 (2)* provides that for the first set of regulations made under this power, the regulation-making power at 43B(10) would have retrospective effect to 20 October 2008.