

*Draft Regulations laid before Parliament under section 316(2) of the Pensions Act 2004, for
approval by resolution of each House of Parliament.*

DRAFT STATUTORY INSTRUMENTS

2021 No. 0000

PENSIONS

**The Pensions Regulator (Employer
Resources Test) Regulations 2021**

Made - - - - *****
Coming into force - - *1st October 2021*

The Secretary of State for Work and Pensions makes the following Regulations⁽¹⁾ in exercise of the powers conferred by sections 38E(2) and 315(2), (4) and (5) of the Pensions Act 2004⁽²⁾.

In accordance with section 317(1) of the Pensions Act 2004, the Secretary of State has consulted such persons as she considers appropriate.

A draft of these Regulations has been laid before and approved by a resolution of each House of Parliament in accordance with section 316(2) of the Pensions Act 2004⁽³⁾.

Citation and commencement

1. These Regulations may be cited as the Pensions Regulator (Employer Resources Test) Regulations 2021 and come into force on 1st October 2021.

Interpretation

2.—(1) In these Regulations—

“the Act” means the Pensions Act 2004;

“the 2006 Act” means the Companies Act 2006⁽⁴⁾;

“accounting reference date” is determined in accordance with paragraph (2);

“annual accounts” has the meaning given in section 471 of the 2006 Act⁽⁵⁾;

(1) See section 318 of the Act for the definitions of “prescribed” and “regulations”.

(2) 2004 c. 35. Section 38E was inserted by section 103(4) of the Pension Schemes Act 2021 c. 1.

(3) Section 316(2) of the Pensions Act 2004 was amended by paragraph 12 of Schedule 7 to the Pension Schemes Act 2021. There are other amendment instruments but none are relevant.

(4) 2006 c. 46.

(5) Section 471 of the Companies Act 2006 was amended by S.I. 2012/2301, S.I. 2013/1970, S.I. 2013/3008, S.I. 2016/1245 and S.I. 2019/970.

“charity” has the meaning given in section 1(1) of the Charities Act 2011⁽⁶⁾ or the meaning given in section 106 of the Charities and Trustee Investment (Scotland) Act 2005⁽⁷⁾ (as applicable);

“assessment period” means—

- (a) subject to (b), the period of 12 months ending on the relevant accounting reference date;
- (b) where the employer’s annual accounts cover a period ending not more than seven days either before or after the relevant accounting reference date, a period of no less than 51 weeks and no more than 53 weeks beginning on the day immediately after the previous accounting reference date;

“relevant accounting reference date” means the employer’s most recent accounting reference date immediately prior to the relevant time⁽⁸⁾.

(2) Subject to regulation 4(7), the accounting reference date is to be determined in accordance with sections 391 and 392 of the 2006 Act.

3.—(1) For the purposes of these Regulations—

(a) in the case of an employer which is—

- (i) not trading for profit; or
- (ii) a charity,

any reference to “profits” in these Regulations shall be read as if it referred to “net income”;

(b) the value of the resources of the employer may be a negative number.

(2) In this regulation, “net income” means income after the deduction of expenditure.

Constitution and value of employer resources

4.—(1) For the purposes of section 38E(2)(a) of the Act (Section 38 contribution notice: meaning of “employer resources test”), what constitutes the resources of the employer are the profits of the employer before tax.

(2) For the purposes of section 38E(2)(b) of the Act and subject to paragraph (5), the value of the resources of the employer is to be determined, calculated and verified as follows—

- (a) the value of the resources of the employer excluding the effect of the act or failure to act is the profits before tax as stated in the annual accounts of the employer for the assessment period, adjusted to exclude the effects of non-recurring or exceptional items;
- (b) the value of the resources of the employer including the effect of the act or failure to act is the profits before tax as stated in the annual accounts of the employer for the assessment period, adjusted to—
 - (i) exclude the effects of non-recurring or exceptional items; and
 - (ii) account for any effect of the act or failure to act on the value of the resources of the employer as if the act had occurred or the failure first occurred immediately before the beginning of the assessment period.

(3) For the purposes of paragraph (2), the Regulator may determine—

- (a) whether an item is to be treated as non-recurring or exceptional;
- (b) the value of any non-recurring or exceptional items;

⁽⁶⁾ 2011 c. 25.

⁽⁷⁾ 2005 asp 10. Section 106 of the Charities and Trustee Investment (Scotland) Act 2005 was amended by S.I. 2009/1941, S.S.I. 2018/1, section 114(1) and paragraph 139 of Schedule 18 to the Financial Services Act 2012 c. 21 and section 125(3) of the Public Services Reform (Scotland) Act 2010 asp 8.

⁽⁸⁾ Relevant time has the meaning in section 38E(5) of the Pensions Act 2004.

- (c) the effect of the act or failure to act on the value of the resources of the employer.
- (4) When determining the matters set out in paragraph (3)(a) or (b), the Regulator must have regard to the relevant financial reporting standards relating to accounting practices published by the Financial Reporting Council Limited.
- (5) Where paragraph (6) applies, the Regulator may determine, calculate and verify the value of the resources of an employer for the purposes of paragraph 2(a) and (b) by reference to a period which the Regulator deems appropriate.
- (6) This paragraph applies where—
- (a) the employer’s annual accounts do not cover the assessment period;
 - (b) the employer is not required to prepare annual accounts pursuant to the 2006 Act; or
 - (c) the employer’s accounts are not prepared in compliance with section 395 (Individual accounts: applicable accounting framework)(9) or section 403 (Group accounts: applicable accounting framework)(10) of the 2006 Act.
- (7) The Regulator may disregard any alteration of the accounting reference date where an employer does so—
- (a) in a case where the act or failure to act forms part of a series of acts or failures to act, after the first act or failure to act;
 - (b) in any other case, after the act or failure to act occurred.
- (8) In making a determination under regulation 4(3) or (5), the Regulator must take into account all relevant information in its possession and, having done so, no further verification is required.

Signed by authority of the Secretary of State for Work and Pensions

Date

Name
Parliamentary Under Secretary of State
Department for Work and Pensions

(9) Section 395 of the Companies Act 2006 was amended by [S.I. 2019/685](#), [S.I. 2012/2301](#), [S.I. 2008/393](#), [S.I.2019/145](#) and [S.I. 2012/2301](#).

(10) Section 403 of the Companies Act 2006 was amended by [S.I. 2019/685](#), [S.I. 2012/2301](#), [S.I.2019/145](#) and [S.I. 2012/2301](#).

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make further provision relating to the “moral hazard” provisions in section 38 of the Pensions Act 2004 (c.35) (“the Act”), and in particular, what constitutes the resources of an employer, and how they are valued, for the purposes of the “employer resources test”. This section provides for the Pensions Regulator’s power to issue contribution notices.

Regulation 4 sets out what constitutes the resources of the employer and how the value of the resources is to be determined for the purposes of section 38E(2) of the Act. It also sets out the matters to be determined by the Pensions Regulator and enables the Pensions Regulator to estimate the value of the resources of an employer in certain circumstances. In addition, it sets out the circumstances in which verification of the determination made by the Pensions Regulator is not required.

An impact assessment has been carried out as part of the enactment of the measures in the Pension Schemes Act 2021 and has been published alongside the Pension Schemes Act 2021 at www.legislation.gov.uk. Paper copies can be obtained from the Department for Work and Pensions, First Floor, Caxton House, Tothill Street, London SW1H 9NA.