



# Pension Schemes Act 2021

## 2021 CHAPTER 1

### PART 3

#### THE PENSIONS REGULATOR

##### *Contribution notices where avoidance of employer debt etc*

#### **103 Grounds for issuing a section 38 contribution notice**

- (1) The Pensions Act 2004 is amended as follows.
- (2) In section 38 (contribution notices where avoidance of employer debt)—
  - (a) in subsection (5)(a)—
    - (i) after “test” insert “, the employer insolvency test or the employer resources test”;
    - (ii) for “section 38A)” substitute “ sections 38A, 38C and 38E) ”;
  - (b) in subsection (12)(c), after “test” insert “, the employer insolvency test or the employer resources test”.
- (3) After section 38B insert—

#### **“38C Section 38 contribution notice: meaning of “employer insolvency test”**

- (1) For the purposes of section 38 the employer insolvency test is met in relation to an act or failure to act if the Regulator is of the opinion that—
  - (a) immediately after the relevant time, the value of the assets of the scheme was less than the amount of the liabilities of the scheme, and
  - (b) if a debt under section 75(4) of the Pensions Act 1995 (deficiencies in scheme assets: employer insolvency etc) had fallen due from the employer to the scheme immediately after the relevant time, the act or failure would have materially reduced the amount of the debt likely to be recovered by the scheme.

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- (2) For the purposes of subsection (1)—
- (a) the value of the assets of the scheme immediately after the relevant time is the value which the Regulator estimates to be their value,
  - (b) the amount of the liabilities of the scheme immediately after the relevant time is the amount which the Regulator estimates to be the amount of those liabilities, and
  - (c) the amount of the debt is the amount which the Regulator estimates to be the amount of the debt under section 75(4) of the Pensions Act 1995 that would have fallen due immediately after the relevant time.
- (3) When estimating the value and the amounts referred to in subsection (2), the Regulator must take into account how assets and liabilities, and their value or amount, are determined and calculated for the purposes of section 75(4) of the Pensions Act 1995.
- (4) When estimating—
- (a) the value of the assets of the scheme immediately after the relevant time, and
  - (b) the amount of the debt under section 75(4) of the Pensions Act 1995 falling due immediately after the relevant time,
- the Regulator must disregard the amount of any debt due immediately after the relevant time from the employer under section 75 of the Pensions Act 1995.
- (5) In this section “the relevant time” means—
- (a) in the case of an act, the time of the act, or
  - (b) in the case of a failure to act—
    - (i) the time when the failure occurred, or
    - (ii) where the failure continued for a period of time, the time which the Regulator determines and which falls within that period;
- and, in the case of acts or failures to act forming part of a series, any reference in this subsection to an act or failure to act is a reference to the last of the acts or failures in that series.

### **38D Section 38 contribution notice issued by reference to employer insolvency test: defence**

- (1) This section applies where—
- (a) a warning notice is given to any person (“P”) in respect of a contribution notice under section 38, and
  - (b) the contribution notice under consideration would be issued wholly or partly by reference to the Regulator's opinion that the employer insolvency test is met in relation to an act or deliberate failure to act to which P was a party.
- (2) If the Regulator is satisfied that P has shown that—
- (a) conditions A and C are met, and
  - (b) where applicable, condition B is met,
- the Regulator must not issue the contribution notice by reference to its being of the opinion mentioned in subsection (1)(b).

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- (3) If the Regulator is satisfied that P or another person has shown that condition D is met, the Regulator must not issue the contribution notice by reference to its being of the opinion mentioned in subsection (1)(b).
- (4) Condition A is that, before becoming a party to the act or failure, P gave due consideration to the extent to which, if a debt under section 75(4) of the Pensions Act 1995 were to fall due from the employer to the scheme—
  - (a) immediately after the act or failure, or
  - (b) where the failure might continue for a period of time, at any time within that period,the act or failure might materially reduce the amount of the debt likely to be recovered by the scheme.
- (5) Condition B is that, in any case where as a result of that consideration P considered that the act or failure might have such an effect, P took all reasonable steps to eliminate or minimise the potential for the act or failure to have such an effect.
- (6) Condition C is that, having regard to all relevant circumstances prevailing at the time of the act or at the time when the failure to act first occurred, it was reasonable for P to conclude that, if a debt under section 75(4) of the Pensions Act 1995 were to fall due from the employer to the scheme—
  - (a) immediately after the act or failure, or
  - (b) where the failure might continue for a period of time, at any time within that period,the act or failure would not materially reduce the amount of the debt likely to be recovered by the scheme.
- (7) Condition D is that, immediately after the relevant time, the value of the assets of the scheme equalled or was more than the amount at that time of the liabilities of the scheme.
- (8) P is to be regarded as giving the consideration mentioned in condition A only if P has made the enquiries, and done the other acts, that a reasonably diligent person would have made or done in the circumstances.
- (9) For the purposes of condition C the reference to the circumstances mentioned in that condition is a reference to those circumstances of which P was aware, or ought reasonably to have been aware, at the time of the act or the time when the failure to act first occurred (including acts or failures to act which have occurred before that time and P's expectation at that time of other acts or failures to act occurring).
- (10) For the purposes of conditions A, C and D the amount of any debt due at the time in question from the employer under section 75 of the Pensions Act 1995 is to be disregarded.
- (11) In the case of acts or failures to act forming part of a series, P is to be regarded as having shown the matters mentioned in subsection (2) if P shows in the case of each of the acts or failures in the series that—
  - (a) conditions A and C are met, and (where applicable) condition B is met, in relation to the act or failure, or

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- (b) the act or failure was one of a number of acts or failures (a “group” of acts or failures) selected by P in relation to which the following matters are shown.

(12) The matters to be shown are that—

- (a) before becoming a party to the first of the acts or failures in the group, condition A is met in relation to the effect of the acts or failures in the group taken together,
- (b) condition B is (where applicable) met in relation to that effect, and
- (c) condition C is then met in relation to each of the acts or failures in the group (determined at the time at which each act or failure concerned occurred or first occurred).

(13) If at any time P considers that condition C will not be met in relation to any particular act or failure in the group—

- (a) the previous acts or failures in the group are to be regarded as a separate group for the purposes of subsection (11), and
- (b) P may then select another group consisting of the particular act or failure concerned, and any subsequent act or failure, in relation to which P shows the matters mentioned in subsection (12).

Nothing in paragraph (b) is to be read as preventing P from showing the matters mentioned in subsection (11)(a).

(14) If—

- (a) P is unable to show in the case of each of the acts or failures in the series that the matters set out in subsection (11)(a) or (b) are met, but
  - (b) does show in the case of some of them that those matters are met,
- the acts or failures within paragraph (b) are not to count for the purposes of section 38C as acts or failures to act in the series.

(15) In this section—

- (a) “the relevant time” has the meaning given by section 38C;
- (b) “a warning notice” means a notice given as mentioned in section 96(2)(a);
- (c) a reference to a party to an act or failure to act includes a reference to a person who knowingly assists in the act or failure.”

(4) After section 38D (inserted by subsection (3)) insert—

**“38E Section 38 contribution notice: meaning of “employer resources test”**

(1) For the purposes of section 38 the employer resources test is met in relation to an act or failure to act if the Regulator is of the opinion that—

- (a) the act or failure reduced the value of the resources of the employer, and
- (b) that reduction was a material reduction relative to the estimated section 75 debt in relation to the scheme.

(2) For the purposes of this section—

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- (a) what constitutes the resources of the employer is to be determined in accordance with regulations;
  - (b) the value of the resources of the employer is to be determined, calculated and verified in a prescribed manner.
- (3) In this section the “estimated section 75 debt” means the amount which the Regulator estimates to be the amount of the debt which would become due from the employer to the trustees or managers of the scheme under section 75 of the Pensions Act 1995 (deficiencies in the scheme assets) if—
  - (a) section 75(2) applied, and
  - (b) the time designated by the trustees or managers of the scheme for the purposes of section 75(2) were the relevant time.
- (4) When calculating the estimated section 75 debt under subsection (3), the amount of any debt due at the relevant time from the employer under section 75 of the Pensions Act 1995 is to be disregarded.
- (5) In this section “the relevant time” means—
  - (a) in a case where the act or failure to act forms part of a series of acts or failures to act, the time immediately before the first of the acts occurred or the first of the failures to act first occurred;
  - (b) in any other case, the time immediately before the act occurred or the failure to act first occurred.

**38F Section 38 contribution notice issued by reference to employer resources test: defence**

- (1) This section applies where—
  - (a) a warning notice is given to any person (“P”) in respect of a contribution notice under section 38, and
  - (b) the contribution notice under consideration would be issued wholly or partly by reference to the Regulator's opinion that the employer resources test is met in relation to an act or deliberate failure to act to which P was a party.
- (2) If the Regulator is satisfied that P has shown that—
  - (a) conditions A and C are met, and
  - (b) where applicable, condition B is met,the Regulator must not issue the contribution notice by reference to its being of the opinion mentioned in subsection (1)(b).
- (3) Condition A is that, before becoming a party to the act or failure, P gave due consideration to the extent to which the act or failure might reduce the value of the resources of the employer relative to the estimated section 75 debt in relation to the scheme.
- (4) Condition B is that, in any case where as a result of that consideration P considered that the act or failure might have such an effect, P took all reasonable steps to eliminate or minimise the potential for the act or failure to have such an effect.
- (5) Condition C is that, having regard to all relevant circumstances prevailing at the time of the act or at the time when the failure to act first occurred, it was

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reasonable for P to conclude that the act or failure would not bring about a reduction in the value of the resources of the employer that would be a material reduction relative to the estimated section 75 debt in relation to the scheme.

- (6) P is to be regarded as giving the consideration mentioned in condition A only if P has made the enquiries, and done the other acts, that a reasonably diligent person would have made or done in the circumstances.
- (7) For the purposes of condition C the reference to the circumstances mentioned in that condition is a reference to those circumstances of which P was aware, or ought reasonably to have been aware, at the time of the act or the time when the failure to act first occurred (including acts or failures to act which have occurred before that time and P's expectation at that time of other acts or failures to act occurring).
- (8) For the purposes of conditions A and C—
  - (a) the “estimated section 75 debt” means the amount which is a reasonable estimate of the amount of the debt which would become due from the employer to the trustees or managers of the scheme under section 75 of the Pensions Act 1995 (deficiencies in the scheme assets) if—
    - (i) section 75(2) applied, and
    - (ii) the time designated by the trustees or managers of the scheme for the purposes of section 75(2) were the time immediately before the act occurred or the failure to act first occurred;
  - (b) the amount of any debt due at the time in question from the employer under section 75 of the Pensions Act 1995 is to be disregarded.
- (9) In the case of acts or failures to act forming part of a series, P is to be regarded as having shown the matters mentioned in subsection (2) if P shows in the case of each of the acts or failures in the series that—
  - (a) conditions A and C are met, and (where applicable) condition B is met, in relation to the act or failure, or
  - (b) the act or failure was one of a number of acts or failures (a “group” of acts or failures) selected by P in relation to which the following matters are shown.
- (10) The matters to be shown are that—
  - (a) before becoming a party to the first of the acts or failures in the group, condition A is met in relation to the effect of the acts or failures in the group taken together,
  - (b) condition B is (where applicable) met in relation to that effect, and
  - (c) condition C is then met in relation to each of the acts or failures in the group (determined at the time at which each act or failure concerned occurred or first occurred).
- (11) If at any time P considers that condition C will not be met in relation to any particular act or failure in the group—
  - (a) the previous acts or failures in the group are to be regarded as a separate group for the purposes of subsection (9), and
  - (b) P may then select another group consisting of the particular act or failure concerned, and any subsequent act or failure, in relation to which P shows the matters mentioned in subsection (10).

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Nothing in paragraph (b) is to be read as preventing P from showing the matters mentioned in subsection (9)(a).

(12) If—

- (a) P is unable to show in the case of each of the acts or failures in the series that the matters set out in subsection (9)(a) or (b) are met, but
  - (b) does show in the case of some of them that those matters are met,
- the acts or failures within paragraph (b) are not to count for the purposes of section 38E as acts or failures to act in the series.

(13) In this section—

- (a) section 38E(2) (the resources of the employer and their value) has effect for the purpose of this section as it has effect for the purposes of section 38E;
- (b) “a warning notice” means a notice given as mentioned in section 96(2)(a);
- (c) a reference to a party to an act or failure to act includes a reference to a person who knowingly assists in the act or failure.”

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#### Commencement Information

- I1** S. 103(1)-(3)(5)-(13) in force at 1.10.2021 by S.I. 2021/950, **reg. 2(5)(a)** (with **reg. 3(1)(2)**)
- I2** S. 103(4) in force at 31.5.2021 for specified purposes by S.I. 2021/620, **reg. 2(1)(a)**
- I3** S. 103(4) in force at 1.10.2021 in so far as not already in force by S.I. 2021/950, **reg. 2(5)(a)** (with **reg. 3(1)(2)**)

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