

Code of Practice 12: Contribution Notices

# Circumstances in relation to the material detriment test, the employer insolvency test and the employer resources test

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# **Circumstances in relation to the material detriment test, the employer insolvency test and the employer resources test**

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28 September 2021

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## Introduction

1. This code of practice sets out the circumstances in which we expect to issue a contribution notice (CN) where we believe that the material detriment test, the employer insolvency test or the employer resources test has been met<sup>1</sup>.
2. The publication of this code is a statutory requirement and has been produced under section 90 of the Pensions Act 2004.
3. You can find definitions of **bolded** terms in the glossary in Appendix A of this code.

## Status of the code

4. When considering issuing a CN under the material detriment, employer insolvency or employer resources tests, we will take the relevant part of this code into account.
5. This code is admissible in evidence in any legal proceedings and must be taken into account by a court or tribunal where it is relevant to any question arising in those proceedings. It is not, however, a statement of the law.

## Using this code

6. This code should be read in conjunction with Part 1 of the Pensions Act 2004 (as amended). In this code, unless stated otherwise, all statutory references are to the Pensions Act 2004 (as amended).

## TPR's other functions

7. The circumstances in this code do not relate to our other functions.

## Northern Ireland

8. In this code, references to the law that applies in Great Britain should be taken to include corresponding legislation in Northern Ireland. Appendix B to this code lists the corresponding references.

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<sup>1</sup> Subject to the other statutory tests within section 38 of the Pensions Act 2004 being met

## Material detriment test

9. In order to issue a CN by reference to the material detriment test, we must be of the opinion that:
- **the act** has been materially detrimental to the likelihood of the accrued **scheme** benefits being received (whether the benefits are to be received as benefits under the scheme or otherwise)<sup>2</sup>, considering all relevant factors<sup>3</sup>, and
  - the statutory defence<sup>4</sup> is not met.

## Employer insolvency test

10. In order to issue a CN by reference to the employer insolvency test, we must be 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<sup>5</sup>, and
  - b. if a debt under section 75(4) of the Pensions Act 1995 had fallen due from the employer to the scheme immediately after the relevant time, the act would have materially reduced the amount of the debt likely to be recovered by the scheme<sup>6</sup>, and
  - c. the statutory defence<sup>7</sup> is not met in relation to the act.
11. For the purposes of this test:
- a. The value of the assets of the scheme immediately after the relevant time is the value estimated by us.
  - b. The value of the liabilities of the scheme immediately after the relevant time is the value estimated by us.
  - c. The amount of the debt that would have fallen due immediately after the relevant time is the amount estimated by us.
  - d. The value of scheme assets and liabilities, and the value of any debt due under section 75(4) of the Pensions Act 1995, 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.
  - e. When estimating these values, we must disregard the amount of any debt due immediately after the relevant time from the employer under section 75 of the Pensions Act 1995.

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2 See section 38A(1)

3 See section 38A(4)

4 See section 38B

5 See section 38C(1)(a)

6 See section 38C(1)(b)

7 See section 38D

## Employer resources test

12. In order to issue a CN by reference to the employer resources test, we must be of the opinion that:
  - a. the act reduced the value of the resources of the employer<sup>8</sup>, and
  - b. that reduction was a material reduction relative to the estimated section 75 debt in relation to the scheme<sup>9</sup>, and
  - c. the statutory defence<sup>10</sup> is not met in relation to the act.
13. What constitutes the ‘resources of the employer’ must be determined, and their value must be determined, calculated and verified, according to the method prescribed in legislation<sup>11</sup>.
14. The ‘estimated section 75 debt’ is the amount we estimate would become due from the employer to the scheme trustees under section 75(2) of the Pensions Act 1995 at the relevant time, disregarding any actual debt due at that time.

## The circumstances

15. Below is a list of circumstances in which we expect to issue a CN if we are of the opinion that one or more of the tests discussed in this code could be met<sup>12</sup>:
  - a. **Employer covenant** is removed, substantially reduced or becomes nominal (any of the tests).
  - b. Significant weakening of the scheme’s creditor position (material detriment and/or employer insolvency tests).
  - c. Some instances of paying a cash dividend or a return of capital by the sponsoring employer (material detriment and/or employer insolvency tests).
  - d. Early redemption or repayments of other significant creditor balances, before they are contractually due, that favour other creditors to the employer over the scheme (material detriment and/or employer insolvency tests).

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8 See section 38E(1)(a)

9 See section 38E(1)(b)

10 See section 38F

11 See The Pensions Regulator (Employer Resources Test) Regulations 2021

12 These circumstances are not mutually exclusive, eg there is some overlap between the weakening of sponsor support in circumstance 1, and paying a dividend in circumstance 3

The circumstances continued...

16. However, a CN may only be issued if it is reasonable to impose liability on the person to pay the sum specified in the notice, having regard to:
  - the extent to which, in all the circumstances of the case, it was reasonable for the person to act, or fail to act, in the way that the person did<sup>13</sup>, and
  - any other matters we consider to be relevant<sup>14</sup>.
17. It is possible for the 'act' test (eg the material detriment test, the employer insolvency test or the employer resources test) to be met, but for us to conclude that it is not reasonable to issue a CN in the circumstances. Neither the circumstances in this code, nor the examples provided in the code-related guidance, include an assessment of reasonableness.

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<sup>13</sup> See section 38(3)(d)

<sup>14</sup> Including (where relevant) the matters falling within section 38(7)

# Appendix A: Glossary

## Act

In the context of this code, an act also refers to a failure to act, or a series of acts and/or failures to act.

## Employer covenant

Employer covenant is the extent of the employer's legal obligation and financial ability to support a defined benefit scheme now and in the future – taking account, as applicable, of any guarantors or other contingent arrangements. The support of parties other than the employer can be taken into account as long as it:

- i. provides sufficient support for the risk(s) being run,
- ii. is appropriately valued, and
- iii. is legally enforceable and realisable at its necessary value when required.

## Relevant time

For the purposes of the employer insolvency test, relevant time means the time when the act of failure to act occurred or, if the failure continued for a period of time, at a time within that period as determined by us. In the case of acts or failures that form part of a series, the relevant time means the time of the last act or failure in that series.

For the purposes of the employer resources test, relevant time means the time immediately before the act occurred or the failure to act first occurred, and in the 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.

## Scheme

Scheme means an occupational pension scheme<sup>15</sup> other than a money purchase scheme<sup>16</sup>, a prescribed scheme, or a scheme of a prescribed description, for the purposes of section 38(1) of the Pensions Act 2004.

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<sup>15</sup> See section 1 of the Pension Schemes Act 1993 (as amended)

<sup>16</sup> See section 181(1) of the Pension Schemes Act 1993 (as amended)

## Appendix B: Corresponding Northern Ireland legislation

| GB legislation  | Corresponding Northern Ireland legislation  |
|---|---|
| The Pension Schemes Act 1993 (c48)                                | The Pension Schemes (Northern Ireland) Act 1993 (c49)                                 |
| Section 1   | Section 1   |
| Section 181   | Section 176   |
| The Pensions Act 1995 (c26)                                       | The Pensions (Northern Ireland) Order 1995 (SI 1995/3213(NI22))                       |
| Section 75  | Article 75  |
| The Pensions Act 2004 (c35)                                       | The Pensions (Northern Ireland) Order 2005 (SI 2005/255 (NI1))                        |
| Part 1  | Part 2  |
| Section 5   | Article 4   |
| Section 38  | Article 34  |
| Section 38A   | Article 34A   |
| Section 38B   | Article 34B   |
| Section 38C   | Article 34C   |
| Section 38D   | Article 34D   |
| Section 38E   | Article 34E   |
| Section 38F   | Article 34F   |
| Section 90  | Article 85  |
| The Pensions Regulator (Employer Resources Test) Regulations 2021 | The Pensions Regulator (Employer Resources Test) Regulations (Northern Ireland) 2021* |

\*Made and laid in September 2021

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