The Pensions Regulator

Code of practice No. 12
Circumstances in relation to the material detriment test

May 2009
The Pensions Regulator's codes of practice

www.thepensionsregulator.gov.uk

Introduction

i. This code of practice is issued by the Pensions Regulator (the regulator), the body that regulates **work-based pension schemes**.

ii. The regulator's statutory objectives are to protect the benefits of pension scheme members, to reduce the risk of calls on the Pension Protection Fund, and to promote the good administration of work-based pension schemes[1].

iii. The regulator has a number of regulatory tools, including issuing codes of practice, to enable it to meet its statutory objectives. The regulator will target its resources on those areas where members' benefits are at greatest risk.

iv. Codes of practice provide practical guidelines in relation to the exercise of functions under pensions legislation and set out the standards of conduct and practice expected of those who exercise such functions[2].

This code of practice

v. The regulator is required to issue this code of practice (the code). It sets out the circumstances in which the regulator expects to issue a contribution notice[3] as a result of being of the opinion that the material detriment test is met[4].

Status of the code

vi. When considering issuing a contribution notice under the material detriment test the regulator will take the relevant part of this code into account.

vii. 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[5].

Using this code

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

ix. Certain emboldened terms have the meaning as stated in Appendix A.

---

[1] See section 5(1)
[2] See section 90(1)
[3] See sections 38 and 38A
[4] See section 90(2)(a)
[5] See section 90(5)

The regulator's other functions

    x. The circumstances in this code do not relate to the other functions of the regulator.

Northern Ireland

    xi. 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.

Material detriment test and the circumstances

1. In order to issue a contribution notice by reference to the material detriment test, the regulator must be of the opinion that:

   - the act, or failure to 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)[6]:

     - there are factors which must be considered, when they are relevant, in determining whether there has been material detriment in relation to the act, or failure to act[7];

   - the statutory defence[8] is not met in relation to the act, or failure to act; **and**

   - it is reasonable to impose liability on the person to pay the sum specified in the contribution 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[9];

     - such other matters as the regulator considers relevant[10].

---

[6] See section 38A(1)
[7] Including (where relevant) the factors falling within section 38A(4)
[8] See section 38B
[9] See section 38(3)(d)
[10] Including (where relevant) the matters falling within section 38(7)

2. The circumstances in which the regulator expects to issue a contribution notice as a result of being of the opinion that the material detriment test is met are:

- The transfer of the **scheme** out of the **jurisdiction.**

- The transfer of the sponsoring employer out of the **jurisdiction** or the replacement of the sponsoring employer with an entity that does not fall within the **jurisdiction.**

- **Sponsor support** is removed, substantially reduced or becomes nominal.

- The transfer of liabilities of the **scheme** to another pension scheme or arrangement which leads to a significant reduction of the:

  o **sponsor support** in respect of these liabilities; or
  o funding to cover these liabilities.

- A business model or the operation of the **scheme** which creates from the **scheme,** or which is designed to do so, a financial benefit for:

  o the employer; or
  o some other person,

  where proper account has not been taken of the interests of the members of the **scheme**, including where risks to members are increased.

Appendix A: Defined terms

Jurisdiction means the jurisdictions of the United Kingdom. This includes England, Wales, Scotland and Northern Ireland.

Scheme means an occupational pension scheme[11].

Sponsor support consists of:

- the scheme obligations of the employer or any other person; and

- the likelihood of recovery in full for the **scheme** under the scheme obligations,

and scheme obligation[12] means a liability or other obligation (including one that is contingent or otherwise might fall due) to make payment, or transfer an asset, to:

- the **scheme**; or

- any **work-based pension scheme**, to which accrued **scheme** benefits have been transferred, in respect of any persons who were members of the **scheme** before the act or failure to act.

Work-based pension scheme[13] means an occupational pension scheme and certain aspects of stakeholder and personal pension scheme.

---

[11] See section 1 of the Occupational Pension Schemes Act 1993 (as amended)
[12] See section 38A(5)
[13] See section 5(3)

Appendix B: Corresponding Northern Ireland legislation

GB legislation	Corresponding Northern Ireland legislation
The Occupational Pension Schemes Act 1993 (c48)	**The Occupational Pension Schemes (Northern Ireland) Act 1993 (c49)**
Section 1	Section 1
The Pensions Act 2004 (c35)	**The Pensions (Northern Ireland) Order 2005 (SI 2005/255 (NI 1))**
Section 5	Article 4
Section 38	Article 34
Section 38A	Article 34A
Section 38B	Article 34B
Section 90	Article 85