

PENSIONS ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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

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.

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

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.