

## SCHEDULES

### SCHEDULE 9

Section 126

#### CONTRIBUTION NOTICES AND FINANCIAL SUPPORT DIRECTIONS UNDER PENSIONS ACT 2004

##### *Introduction*

1 The Pensions Act 2004 (c. 35) is amended as follows.

##### *Contribution notices: material detriment test*

2 (1) In section 38(5)(a) (main purpose or one of main purposes of act or failure to prevent recovery of employer debt under section 75 of the Pensions Act 1995 (c. 26) etc.), after “is of the opinion that” insert “the material detriment test is met in relation to the act or failure (see section 38A) or that”.

(2) After section 38 insert—

##### **“38A Section 38 contribution notice: meaning of “material detriment test”**

(1) For the purposes of section 38 the material detriment test is met in relation to an act or failure if the Regulator is of the opinion that the act or failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received (whether the benefits are to be received as benefits under the scheme or otherwise).

(2) In this section any reference to accrued scheme benefits being received is a reference to benefits the rights to which have accrued by the relevant time being received by, or in respect of, the persons who were members of the scheme before that time.

(3) 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—

(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 is a reference to the last of the acts or failures in that series.

(4) In deciding for the purposes of section 38 whether the material detriment test is met in relation to an act or failure, the Regulator must have regard to such matters as it considers relevant, including (where relevant)—

(a) the value of the assets or liabilities of the scheme or of any relevant transferee scheme,

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- (b) the effect of the act or failure on the value of those assets or liabilities,
  - (c) the scheme obligations of any person,
  - (d) the effect of the act or failure on any of those obligations (including whether the act or failure causes the country or territory in which any of those obligations would fall to be enforced to be different),
  - (e) the extent to which any person is likely to be able to discharge any scheme obligation in any circumstances (including in the event of insolvency or bankruptcy),
  - (f) the extent to which the act or failure has affected, or might affect, the extent to which any person is likely to be able to do as mentioned in paragraph (e), and
  - (g) such other matters as may be prescribed.
- (5) In subsection (4) “scheme obligation” means a liability or other obligation (including one that is contingent or otherwise might fall due) to make a payment, or transfer an asset, to—
- (a) the scheme, or
  - (b) any relevant transferee scheme in respect of any persons who were members of the scheme before the relevant time.
- (6) In this section—
- (a) “relevant transferee scheme” means any work-based pension scheme to which any accrued rights to benefits under the scheme are transferred;
  - (b) any reference to the assets or liabilities of any relevant transferee scheme is a reference to those assets or liabilities so far as relating to persons who were members of the scheme before the relevant time.
- (7) For the purposes of subsection (6)(a) the reference to the transfer of accrued rights of members of a pension scheme to another pension scheme includes a reference to the extinguishing of those accrued rights in consequence of the obligation to make a payment, or transfer an asset, to that other scheme.
- (8) In this section—
- (a) “work-based pension scheme” has the meaning given by section 5(3);
  - (b) any reference to rights which have accrued is to be read in accordance with section 67A(6) and (7) of the Pensions Act 1995 (reading any reference in those subsections to a subsisting right as a reference to a right which has accrued).
- (9) In deciding for the purposes of this section whether an act or failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received, the following provisions of this Act are to be disregarded—
- (a) Chapter 3 of Part 2 (the Board of the Pension Protection Fund: pension protection), and
  - (b) section 286 (the financial assistance scheme for members of certain pension schemes).
- (10) Regulations may amend any provision of subsections (4) to (8).

**38B Section 38 contribution notice issued by reference to material detriment 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 material detriment 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 detrimentally affect in a material way the likelihood of accrued scheme benefits being received.
- (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 detrimental effects that the act or failure might have on the likelihood of accrued scheme benefits being received.
- (5) Condition C is that, having regard to all relevant circumstances prevailing at the relevant time, it was reasonable for P to conclude that the act or failure would not detrimentally affect in a material way the likelihood of accrued scheme benefits being received.
- (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—
  - (a) “the relevant time” means the time at which the act occurred or the failure to act first occurred;
  - (b) 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 that time (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) 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.

(9) 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).

(10) 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 (8), 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 (9).

Nothing in paragraph (b) is to be read as preventing P from showing the matters mentioned in subsection (8)(a).

(11) 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 (8)(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 38A as acts or failures to act in the series.

(12) In this section—

- (a) “a warning notice” means a notice given as mentioned in section 96(2)(a);
- (b) any reference to an act or failure to which a person is a party has the same meaning as in section 38(6)(a);
- (c) any reference to the accrued scheme benefits being received has the same meaning as in section 38A;

and subsection (9) of section 38A applies for the purposes of conditions A to C as it applies for the purposes of that section.

(13) Regulations may amend this section.”

3 In section 90(2) (the matters in relation to which the Pensions Regulator must issue codes of practice), after paragraph (a) insert—

- “(aa) the circumstances in which the Regulator expects to issue contribution notices under section 38 as a result of being of the opinion that the material detriment test is met in relation to an act or failure;”.

4 In section 96 (standard procedure), after subsection (1) insert—

- “(1A) In any case where—

- (a) a warning notice is given to any person 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 material detriment test is met in relation to an act or failure,

the standard procedure must provide for the following matters.

(1B) The matters are—

- (a) a requirement for the warning notice to explain the general effect of section 38B, and
- (b) a requirement for the person to be given an opportunity before the contribution notice is issued to show the matters mentioned in subsection (2) of that section.”

5 In section 316(2) (subordinate legislation that is subject to affirmative resolution procedure), before paragraph (a) insert—

“(za) regulations under section 38A(10) or 38B(13) (section 38 contribution notices: “the material detriment test”);”.

*Contribution notices: acting or failing to act otherwise than in good faith*

6 In section 38(5) (acts or failures to act in relation to which Pensions Regulator may issue contribution notices), in paragraph (a)(ii), omit “otherwise than in good faith”.

*Whether reasonable for Pensions Regulator to issue contribution notice*

7 (1) Section 38 (contribution notices where avoidance of employer debt) is amended as follows.

(2) In subsection (3) (conditions which must be met before Pensions Regulator can issue contribution notice), for paragraph (d) substitute—

“(d) the Regulator is of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice, having regard to—

- (i) 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, and
- (ii) such other matters as the Regulator considers relevant, including (where relevant) the matters falling within subsection (7).”

(3) In subsection (7) (list of relevant matters for purposes of subsection (3)(d))—

(a) for the words from the beginning to “the following matters—” substitute “The matters within this subsection are—”; and

(b) after paragraph (e) insert—

“(ea) the value of any benefits which directly or indirectly the person receives, or is entitled to receive, from the employer or under the scheme;

(eb) the likelihood of relevant creditors being paid and the extent to which they are likely to be paid;”.

(4) After that subsection insert—

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“(7A) In subsection (7)(eb) “relevant creditors” means—

- (a) creditors of the employer, and
- (b) creditors of any other person who has incurred a liability or other obligation (including one that is contingent or otherwise might fall due) to make a payment, or transfer an asset, to the scheme.”

*Contribution notices: series of acts or failures to act*

8 (1) In section 38 (contribution notices where avoidance of employer debt), at the end insert—

“(12) Subsection (13) applies if the Regulator is of the opinion that—

- (a) a person was a party to a series of acts or failures to act,
- (b) each of the acts or failures in the series falls within subsection (5) (b) and (c), and
- (c) the material detriment test is met in relation to the series, or the main purpose or one of the main purposes of the series was as mentioned in subsection (5)(a)(i) or (ii).

(13) The series of acts or failures to act is to be regarded as an act or failure to act falling within subsection (5) (and, accordingly, the reference in subsection (6)(b)(i) to the act or failure to act falling with subsection (5) is to the first of the acts or failures to act in the series).”

(2) In section 39 (the sum specified in a section 38 contribution notice)—

- (a) in subsection (4), after “means” insert “(subject to subsection (4A))”; and
- (b) after subsection (4) insert—

“(4A) In the case of a series of acts or failures to act, “the relevant time” is determined by reference to whichever of the acts or failures in the series is, in the Regulator’s opinion, most appropriate.”

*Contribution notices and financial support directions: bulk transfers*

9 After section 39 (the sum specified in a section 38 contribution notice) insert—

**“39A Section 38 contribution notice: transfer of members of the scheme**

(1) This section applies where—

- (a) the Regulator is of the opinion that in relation to a scheme (“the initial scheme”) in relation to which section 38 applies—
  - (i) an act or failure to act falling within subsection (5) of that section has occurred (or first occurred) at any time, and
  - (ii) the other conditions in that section for issuing a contribution notice are met in relation to the initial scheme (or, but for any transfer falling within paragraph (b), would be met), and
- (b) the accrued rights of at least two persons who were members of the initial scheme are transferred at that or any subsequent time to one or more work-based pension schemes (whether by virtue of the act or otherwise).

- (2) The Regulator may issue a contribution notice under section 38 in relation to any transferee scheme (and, accordingly, any reference in section 40 or 41 to the scheme is to the transferee scheme).
- (3) In the case of any contribution notice issued by virtue of subsection (2) to any transferee scheme which is not within subsection (5)(a) or (b), section 39 has effect as if any reference in that section to the scheme were a reference to whichever of—
  - (a) the initial scheme, and
  - (b) the transferee scheme,the Regulator determines to be more appropriate in the circumstances.
- (4) In any case where section 39 has effect in relation to the transferee scheme by virtue of subsection (3), any reference in that section to a debt under section 75 of the 1995 Act is a reference to so much of that debt as, in the Regulator’s opinion, is attributable to those members of the transferee scheme who were members of the initial scheme.
- (5) In the case of any contribution notice issued by virtue of subsection (2) to any transferee scheme which is—
  - (a) a scheme to which section 75 of the 1995 Act does not apply, or
  - (b) a scheme to which that section does apply in a case where the liabilities of the scheme that would be taken into account for the purposes of that section do not relate to the members of the initial scheme,the sum specified by the Regulator in the notice is determined in accordance with regulations (and not in accordance with section 39).
- (6) The Regulator may also issue a direction to the trustees or managers of any transferee scheme requiring them to take specified steps to secure that the sum payable under the notice is applied for the benefit of the members of the transferee scheme who were members of the initial scheme.
- (7) If the trustees or managers fail to comply with a direction issued to them under subsection (6), section 10 of the 1995 Act (civil penalties) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance.

### **39B Section 39A: supplemental**

- (1) In section 39A a “transferee scheme”, in relation to any time, means any work-based pension scheme—
  - (a) to which the accrued rights of at least two persons who were members of the initial scheme have been transferred, and
  - (b) of which any of those persons are members at that time.
- (2) For the purposes of section 39A(1) and subsection (1) above it does not matter whether any rights are transferred to a work-based pension scheme directly from the initial scheme or following one or more other transfers to other work-based pension schemes.
- (3) For the purposes of section 39A and this section references to the transfer of accrued rights of members of a pension scheme to another pension

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scheme include references to the extinguishing of those accrued rights in consequence of the obligation to make a payment, or transfer an asset, to that other scheme.

- (4) In section 39A and this section—
  - (a) “the 1995 Act” means the Pensions Act 1995;
  - (b) “work-based pension scheme” has the meaning given by section 5(3);
  - (c) any reference to rights which have accrued is to be read in accordance with section 67A(6) and (7) of the 1995 Act (reading any reference in those subsections to a subsisting right as a reference to a right which has accrued).
- (5) Section 39A applies even if the initial scheme—
  - (a) is wound up as a result of any transfer falling within subsection (1) (b) of that section, or
  - (b) otherwise ceases to exist at the time of the transfer or at any subsequent time.
- (6) Accordingly, in any such case, in subsection (1) of that section—
  - (a) the reference to a scheme to which section 38 applies is a reference to a scheme which was such a scheme before the transfer;
  - (b) the reference to any conditions in section 38 being met is a reference to any conditions in that section that, but for the transfer, would have been met in relation to the scheme.
- (7) Nothing in section 39A or this section is to be read as preventing the Regulator from issuing a contribution notice in relation to the initial scheme.
- (8) Regulations may make provision applying, with or without modifications, any provision made by or under section 39A or this section in relation to any scheme or other arrangement in any case where the accrued rights of persons who were members of the initial scheme are transferred or extinguished directly or indirectly in consequence of or otherwise in connection with—
  - (a) the making of any payment at any time to or for the benefit of the scheme or other arrangement,
  - (b) the transfer of any asset at any time to or for the benefit of the scheme or other arrangement,
  - (c) the discharge (wholly or partly) at any time of any liability incurred by or on behalf of the scheme or other arrangement, or
  - (d) the incurring at any time of any obligation to do any act falling within paragraph (a) to (c).
- (9) Any reference in subsection (8)(a) to (d) to the doing of an act of any description at any time in relation to the scheme or other arrangement includes a reference to the doing of an act of that description at any previous time in relation to any other scheme or other arrangement.
- (10) Regulations under subsection (8) may—
  - (a) make provision having effect in relation to any case where rights are transferred or extinguished on or after the date on which the Secretary of State publishes a statement of the intention to make the regulations; and



- (b) without prejudice to section 315(5), make consequential provision applying with modifications any provision of this Act which relates to contribution notices under section 38.”

10 After section 43 (financial support directions) insert—

**“43A Financial support directions: transfer of members of the scheme**

- (1) This section applies where—
  - (a) the Regulator is of the opinion by reference to any time that the conditions in section 43 for issuing a financial support direction are met in relation to a scheme (“the initial scheme”) in relation to which that section applies (or, but for any transfer falling within paragraph (b), would be met), and
  - (b) the accrued rights of at least two persons who were members of the initial scheme are transferred at any subsequent time to one or more work-based pension schemes.
- (2) The Regulator may issue a financial support direction under that section in relation to any transferee scheme (and, accordingly, any reference in section 45 or any of sections 47 to 50 to the scheme is to the transferee scheme).
- (3) The Regulator may also issue a direction to the trustees or managers of any transferee scheme requiring them to take specified steps to secure that the financial support is put in place for the benefit of the members of the transferee scheme who were members of the initial scheme.
- (4) If the trustees or managers fail to comply with a direction issued to them under subsection (3), section 10 of the 1995 Act (civil penalties) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance.

**43B Section 43A: supplemental**

- (1) In section 43A a “transferee scheme”, in relation to any time, means any work-based pension scheme—
  - (a) to which the accrued rights of at least two persons who were members of the initial scheme have been transferred, and
  - (b) of which any of those persons are members at that time.
- (2) For the purposes of section 43A(1) and subsection (1) above it does not matter whether any rights are transferred to a work-based pension scheme directly from the initial scheme or following one or more other transfers to other work-based pension schemes.
- (3) For the purposes of section 43A and this section references to the transfer of accrued rights of members of a pension scheme to another pension scheme include references to the extinguishing of those accrued rights in consequence of the obligation to make a payment, or transfer an asset, to that other scheme.
- (4) In section 43A and this section—
  - (a) “the 1995 Act” means the Pensions Act 1995;

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- (b) “work-based pension scheme” has the meaning given by section 5(3);
  - (c) any reference to rights which have accrued is to be read in accordance with section 67A(6) and (7) of the 1995 Act (reading any reference in those subsections to a subsisting right as a reference to a right which has accrued).
- (5) Section 43A applies even if the initial scheme—
- (a) is wound up as a result of any transfer falling within subsection (1) (b) of that section, or
  - (b) otherwise ceases to exist at the time of the transfer or at any subsequent time.
- (6) Accordingly, in any such case, in subsection (1) of that section—
- (a) the reference to a scheme to which section 43 applies is a reference to a scheme which was such a scheme before the transfer;
  - (b) the reference to any conditions in section 43 being met is a reference to any conditions in that section that, but for the transfer, would have been met in relation to the scheme.
- (7) Nothing in section 43A or this section is to be read as preventing the Regulator from issuing a financial support direction in relation to the initial scheme.
- (8) Regulations may make provision applying, with or without modifications, any provision made by section 43A or this section in relation to any scheme or other arrangement in any case where the accrued rights of persons who were members of the initial scheme are transferred or extinguished directly or indirectly in consequence of or otherwise in connection with—
- (a) the making of any payment at any time to or for the benefit of the scheme or other arrangement,
  - (b) the transfer of any asset at any time to or for the benefit of the scheme or other arrangement,
  - (c) the discharge (wholly or partly) at any time of any liability incurred by or on behalf of the scheme or other arrangement, or
  - (d) the incurring at any time of any obligation to do any act falling within paragraph (a) to (c).
- (9) Any reference in subsection (8)(a) to (d) to the doing of an act of any description at any time in relation to the scheme or other arrangement includes a reference to the doing of an act of that description at any previous time in relation to any other scheme or other arrangement.
- (10) Regulations under subsection (8) may—
- (a) make provision having effect in relation to any case where rights are transferred or extinguished on or after the date on which the Secretary of State publishes a statement of the intention to make the regulations; and
  - (b) without prejudice to section 315(5), make consequential provision applying with modifications any provision of this Act which relates to financial support directions under section 43.”

11 In section 306(2) (overriding requirements)—

- (a) after paragraph (d) insert—  
“(da) any direction issued by the Regulator under section 39A(6);”; and
- (b) after paragraph (e) insert—  
“(ea) any direction issued by the Regulator under section 43A(3);”.
- 12 In section 316(2) (subordinate legislation that is subject to affirmative resolution procedure), after paragraph (za) (as inserted by paragraph 5 of this Schedule) insert—  
“(zb) regulations under section 39A(5), 39B(8) or 43B(8) (contribution notices and financial support directions: bulk transfers);”.
- 13 In Part 4 of Schedule 2 (the reserved regulatory functions of Pensions Regulator: functions under 2004 Act)—
- (a) after paragraph 30 insert—  
“30A The power to issue a direction under section 39A(6) to any person.”; and
- (b) after paragraph 33 insert—  
“33A The power to issue a direction under section 43A(3) to any person.”

*Financial support directions: meaning of “insufficiently resourced”*

- 14 (1) In section 44(3) (meaning of “insufficiently resourced”), for paragraph (b) substitute—  
“(b) condition A or B is met.”
- (2) After subsection (3) insert—  
“(3A) Condition A is met if—
- (a) there is at that time a person who falls within section 43(6)(b) or (c), and
- (b) the value at that time of that person’s resources is not less than the relevant deficit, that is to say the amount which is the difference between—
- (i) the value of the resources of the employer, and
- (ii) the amount which is the prescribed percentage of the estimated section 75 debt.
- (3B) Condition B is met if—
- (a) there are at that time two or more persons who—
- (i) fall within section 43(6)(b) or (c), and
- (ii) are connected with, or associates of, each other, and
- (b) the aggregate value at that time of the resources of the persons who fall within paragraph (a) (or any of them) is not less than the relevant deficit.”
- (3) In subsection (4), for “subsection (3)” substitute “subsections (3) to (3B)”.

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*Effect of amendments made by this Schedule*

- 15 (1) The amendments made by paragraphs 2, 6 and 7 have effect in relation to any act occurring, or any failure to act first occurring, on or after 14 April 2008.
- (2) The amendments made by paragraph 8 have effect—
- (a) for the purposes of the material detriment test, where at least one of the acts or failures to act occurs or first occurs on or after 14 April 2008, and
  - (b) for all other purposes, where at least one of the acts or failures to act occurs or first occurs on or after the day on which this Act is passed.
- (3) The amendments made by paragraphs 9 and 10 have effect in relation to any case where rights are transferred or extinguished on or after 14 April 2008.
- (4) The amendment made by paragraph 14 has effect so as to enable the Pensions Regulator to issue a financial support direction under section 43 of the Pensions Act 2004 by reference to any time falling on or after 14 April 2008.

*Transitional provision*

- 16 (1) In the case of the first set of regulations made under subsection (8) of section 39B of that Act, subsection (10)(a) of that section has effect as if for the words from “the date” to “the regulations” there were substituted “20 October 2008”.
- (2) In the case of the first set of regulations made under subsection (8) of section 43B of that Act, subsection (10)(a) of that section has effect as if for the words from “the date” to “the regulations” there were substituted “20 October 2008”.