

SCHEDULES

SCHEDULE 8

CONTRIBUTION NOTICES AND FINANCIAL SUPPORT DIRECTIONS UNDER 2005 ORDER

Contributions notices: material detriment test

2.—(1) In Article 34(5)(a) (main purpose or one of main purposes of act or failure to prevent recovery of employer debt under Article 75 of the 1995 Order etc.), after “is of the opinion that” insert “the material detriment test is met in relation to the act or failure (see Article 34A) or that”.

(2) After Article 34 insert—

“Article 34 contribution notice: meaning of “material detriment test”

34A.—(1) For the purposes of Article 34 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 Article 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 Article “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 paragraph 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 Article 34 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,
- (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 sub-paragraph (e), and
- (g) such other matters as may be prescribed.

(5) In paragraph (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 Article—

- (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 paragraph (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 Article—

- (a) “work-based pension scheme” has the meaning given by Article 4(3);
- (b) any reference to rights which have accrued is to be read in accordance with Article 67A(6) and (7) of the 1995 Order (reading any reference in those paragraphs to a subsisting right as a reference to a right which has accrued).

(9) In deciding for the purposes of this Article whether an act or failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received, the following statutory provisions are to be disregarded—

- (a) Chapter 3 of Part 3 (the Board of the Pension Protection Fund: pension protection), and
- (b) section 286 of the Pensions Act 2004 (the financial assistance scheme for members of certain pension schemes).

(10) Regulations may amend any provision of paragraphs (4) to (8).

Article 34 contribution notice issued by reference to material detriment test: defence

34B.—(1) This Article applies where—

- (a) a warning notice is given to any person (“P”) in respect of a contribution notice under Article 34, 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 paragraph (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 paragraph (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.

(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 paragraph (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 paragraph (9).

Nothing in sub-paragraph (b) is to be read as preventing P from showing the matters mentioned in paragraph (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 paragraph (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 sub-paragraph (b) are not to count for the purposes of Article 34A as acts or failures to act in the series.

(12) In this Article—

- (a) “a warning notice” means a notice given as mentioned in Article 91(2)(a);
- (b) any reference to an act or failure to which a person is a party has the same meaning as in Article 34(6)(a);
- (c) any reference to the accrued scheme benefits being received has the same meaning as in Article 34A;

and paragraph (9) of Article 34A applies for the purposes of conditions A to C as it applies for the purposes of that Article.

(13) Regulations may amend this Article.”.

3. In Article 85(2) (the matters in relation to which the Pensions Regulator must issue codes of practice), after sub-paragraph (a) insert—

“(aa) the circumstances in which the Regulator expects to issue contribution notices under Article 34 as a result of being of the opinion that the material detriment test is met in relation to an act or failure;”.

4. In Article 91 (standard procedure), after paragraph (1) insert—

“(1A) In any case where—

- (a) a warning notice is given to any person in respect of a contribution notice under Article 34, 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 Article 34B, and
- (b) a requirement for the person to be given an opportunity before the contribution notice is issued to show the matters mentioned in paragraph (2) of that Article.”.

5. In Article 288(3) (orders and regulations under Order that are subject to confirmatory procedure), after sub-paragraph (a) insert—

“(aa) regulations under Article 34A(10) or 34B(13) (Article 34 contribution notices: “the material detriment test”);”.