



# Pensions Act 2004

## 2004 CHAPTER 35

### PART 1

#### THE PENSIONS REGULATOR

##### *Contribution notices where avoidance of employer debt*

### **38 Contribution notices where avoidance of employer debt**

- (1) This section applies in relation to an occupational pension scheme other than—
  - (a) a money purchase scheme, or
  - (b) a prescribed scheme or a scheme of a prescribed description.
- (2) The Regulator may issue a notice to a person stating that the person is under a liability to pay the sum specified in the notice (a “contribution notice”)—
  - (a) to the trustees or managers of the scheme, or
  - (b) where the Board of the Pension Protection Fund has assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 (pension protection), to the Board.
- (3) The Regulator may issue a contribution notice to a person only if—
  - (a) the Regulator is of the opinion that the person was a party to an act or a deliberate failure to act which falls within subsection (5),
  - (b) the person was at any time in the relevant period—
    - (i) the employer in relation to the scheme, or
    - (ii) a person connected with, or an associate of, the employer,
  - (c) the Regulator is of the opinion that the person, in being a party to the act or failure, was not acting in accordance with his functions as an insolvency practitioner in relation to another person, and
  - [<sup>F1</sup>(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—

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- (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).]
- (4) But the Regulator may not issue a contribution notice, in such circumstances as may be prescribed, to a person of a prescribed description.
- (5) An act or a failure to act falls within this subsection if—
  - (a) the Regulator is of the opinion that [<sup>F2</sup>the material detriment test is met in relation to the act or failure (see section 38A) or that] the main purpose or one of the main purposes of the act or failure was—
    - (i) to prevent the recovery of the whole or any part of a debt which was, or might become, due from the employer in relation to the scheme under section 75 of the Pensions Act 1995 (c. 26) (deficiencies in the scheme assets), or
    - (ii) <sup>F3</sup>... to prevent such a debt becoming due, to compromise or otherwise settle such a debt, or to reduce the amount of such a debt which would otherwise become due,
  - (b) it is an act which occurred, or a failure to act which first occurred—
    - (i) on or after 27th April 2004, and
    - (ii) before any assumption of responsibility for the scheme by the Board in accordance with Chapter 3 of Part 2, and
  - (c) it is either—
    - (i) an act which occurred during the period of six years ending with the [<sup>F4</sup>giving of a warning notice in respect of] the contribution notice in question, or
    - (ii) a failure which first occurred during, or continued for the whole or part of, that period.
- (6) For the purposes of subsection (3)—
  - (a) the parties to an act or a deliberate failure include those persons who knowingly assist in the act or failure, and
  - (b) “the relevant period” means the period which—
    - (i) begins with the time when the act falling within subsection (5) occurs or the failure to act falling within that subsection first occurs, and
    - (ii) ends with the [<sup>F5</sup>giving of a warning notice in respect of] the contribution notice in question.
- (7) [<sup>F6</sup>The matters within this subsection are—]
  - (a) the degree of involvement of the person in the act or failure to act which falls within subsection (5),
  - (b) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of subsection (11) of section 435 of the Insolvency Act 1986 (c. 45), whether the person has or has had control of the employer within the meaning of subsection (10) of that section),
  - (c) any connection or involvement which the person has or has had with the scheme,

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- (d) if the act or failure to act was a notifiable event for the purposes of section 69 (duty to notify the Regulator of certain events), any failure by the person to comply with any obligation imposed on the person by subsection (1) of that section to give the Regulator notice of the event,
  - (e) all the purposes of the act or failure to act (including whether a purpose of the act or failure was to prevent or limit loss of employment),
  - [<sup>F7</sup>(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;]
  - (f) the financial circumstances of the person, and
  - (g) such other matters as may be prescribed.
- [<sup>F8</sup>(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.]
- (8) For the purposes of this section references to a debt due under section 75 of the Pensions Act 1995 (c. 26) include a contingent debt under that section.
- (9) Accordingly, in the case of such a contingent debt, the reference in subsection (5)(a)(ii) to preventing a debt becoming due is to be read as including a reference to preventing the occurrence of any of the events specified in section 75(4C)(a) or (b) of that Act upon which the debt is contingent.
- (10) For the purposes of this section—
- (a) section 249 of the Insolvency Act 1986 (connected persons) applies as it applies for the purposes of any provision of the first Group of Parts of that Act,
  - (b) section 435 of that Act (associated persons) applies as it applies for the purposes of that Act, and
  - (c) section [<sup>F9</sup>229 of the Bankruptcy (Scotland) Act 2016] (associated persons) applies as it applies for the purposes of that Act.
- (11) For the purposes of this section “insolvency practitioner”, in relation to a person, means—
- (a) a person acting as an insolvency practitioner, in relation to that person, in accordance with section 388 of the Insolvency Act 1986, or
  - (b) an insolvency practitioner within the meaning of section 121(9)(b) (persons of a prescribed description).
- [<sup>F10</sup>(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

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or failure to act falling with subsection (5) is to the first of the acts or failures to act in the series).]

[<sup>F11</sup>(14) In this section “a warning notice” means a notice given as mentioned in section 96(2)(a).]

#### Textual Amendments

- F1** S. 38(3)(d) substituted (with effect in accordance with Sch. 9 para. 15(1) of the amending Act) by [Pensions Act 2008 \(c. 30\), s. 149\(2\)\(3\)](#), **Sch. 9 para. 7(2)**
- F2** Words in s. 38(5)(a) inserted (for specified purposes and with effect in accordance with Sch. 9 para. 15(1) of the amending Act and 29.6.2009 so far as not already in force) by [Pensions Act 2008 \(c. 30\), s. 149\(1\)](#), **Sch. 9 para. 2(1)**; S.I. 2009/1566, art. 2(1)(b)(ii)
- F3** Words in s. 38(5)(a)(ii) repealed (with effect in accordance with Sch. 9 para. 15(1) of the amending Act and 6.4.2011 so far as not already in force) by [Pensions Act 2008 \(c. 30\), s. 149\(2\)\(3\)](#), **Sch. 9 para. 6**, **Sch. 11 Pt. 6**; S.I. 2011/664, art. 2(3), **Sch. Pt. 2**
- F4** Words in s. 38(5)(c)(i) substituted (3.1.2012) by [Pensions Act 2011 \(c. 19\), ss. 26\(2\)](#), 38(4); S.I. 2011/3034, art. 3(f)
- F5** Words in s. 38(6)(b)(ii) substituted (3.1.2012) by [Pensions Act 2011 \(c. 19\), ss. 26\(2\)](#), 38(4); S.I. 2011/3034, art. 3(f)
- F6** Words in s. 38(7) substituted (with effect in accordance with Sch. 9 para. 15(1) of the amending Act) by [Pensions Act 2008 \(c. 30\), s. 149\(2\)\(3\)](#), **Sch. 9 para. 7(3)(a)**
- F7** S. 38(7)(ea)(eb) inserted (with effect in accordance with Sch. 9 para. 15(1) of the amending Act) by [Pensions Act 2008 \(c. 30\), s. 149\(2\)\(3\)](#), **Sch. 9 para. 7(3)(b)**
- F8** S. 38(7A) inserted (with effect in accordance with Sch. 9 para. 15(1) of the amending Act) by [Pensions Act 2008 \(c. 30\), s. 149\(2\)\(3\)](#), **Sch. 9 para. 7(4)**
- F9** Words in s. 38(10)(c) substituted (30.11.2016) by [The Bankruptcy \(Scotland\) Act 2016 \(Consequential Provisions and Modifications\) Order 2016 \(S.I. 2016/1034\), art. 1](#), **Sch. 1 para. 26(2)**
- F10** S. 38(12)(13) inserted (for specified purposes and with effect in accordance with Sch. 9 para. 15(2) of the amending Act and 29.6.2009 so far as not already in force) by [Pensions Act 2008 \(c. 30\), s. 149\(2\)\(3\)](#), **Sch. 9 para. 8(1)**; S.I. 2009/1566, art. 2(1)(b)(ii)
- F11** S. 38(14) inserted (3.1.2012) by [Pensions Act 2011 \(c. 19\), ss. 26\(3\)](#), 38(4); S.I. 2011/3034, art. 3(f)

#### Modifications etc. (not altering text)

- C1** Pt. 1 applied in part (with modifications) (20.7.2005 for specified purposes, 1.9.2005 for specified purposes, 5.12.2005 for specified purposes) by [The Financial Assistance Scheme Regulations 2005 \(S.I. 2005/1986\), regs. 1\(1\), 4](#), **Sch. 1**
- C2** Ss. 38-56 modified (1.9.2005) by [The Pensions Regulator \(Financial Support Directions etc.\) Regulations 2005 \(S.I. 2005/2188\), regs. 1, 15, 16](#)
- C3** S. 38 excluded (29.9.2008) by [The Bradford & Bingley plc Transfer of Securities and Property etc. Order 2008 \(S.I. 2008/2546\)](#), **Sch. 3 para. 11(b)(ii)**
- C4** S. 38 excluded (29.9.2008 at 8.00 a.m.) by [The Bradford & Bingley plc Transfer of Securities and Property etc. Order 2008 \(S.I. 2008/2546\)](#), **Sch. 3 para. 11(b)(ii)**
- C5** S. 38 modified (30.3.2009) by [The Amendments to Law \(Resolution of Dunfermline Building Society\) Order 2009 \(S.I. 2009/814\), art. 5](#)
- C6** S. 38 modified (30.3.2009 at 8.00 a.m.) by [The Amendments to Law \(Resolution of Dunfermline Building Society\) Order 2009 \(S.I. 2009/814\), art. 5](#)

#### Commencement Information

- I1** S. 38(1)(a)(2)(3)(5)(6)(7)(a)-(f)(8)-(11) in force in so far as not already in force except subsections (4) and (7)(g) at 6.4.2005 by [S.I. 2005/275, art. 2\(7\)](#), **Sch. Pt. 7**

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- I2** S. 38(1)(b) in force for the purpose only of conferring power to make regulations, orders or rules, as the case may be, 10.2.2005; and for all other purposes at 6.4.2005 in so far as not already in force by S.I. 2005/275, art. 2(3), **Sch. Pt. 3**

### **[<sup>F12</sup>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,
  - (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—

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- (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).

#### Textual Amendments

**F12** Ss. 38A, 38B inserted (for specified purposes and with effect in accordance with Sch. 9 para. 15(1) of the amending Act and 29.6.2009 so far as not already in force) by [Pensions Act 2008 \(c. 30\)](#), s. 149(2)(3), [Sch. 9 para. 2\(2\)](#); S.I. 2009/1566, art. 2(1)(b)(ii)

### **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).

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- (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
  - (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).

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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.]

#### Textual Amendments

**F12** Ss. 38A, 38B inserted (for specified purposes and with effect in accordance with Sch. 9 para. 15(1) of the amending Act and 29.6.2009 so far as not already in force) by [Pensions Act 2008 \(c. 30\)](#), s. 149(2)(3), [Sch. 9 para. 2\(2\)](#); S.I. 2009/1566, art. 2(1)(b)(ii)

### 39 The sum specified in a section 38 contribution notice

- (1) The sum specified by the Regulator in a contribution notice under section 38 may be either the whole or a specified part of the shortfall sum in relation to the scheme.
- (2) Subject to subsection (3), the shortfall sum in relation to a scheme is—
  - (a) in a case where, at the relevant time, a debt was due from the employer to the trustees or managers of the scheme under section 75 of the Pensions Act 1995 (c. 26) (“the 1995 Act”) (deficiencies in the scheme assets), the amount which the Regulator estimates to be the amount of that debt at that time, and
  - (b) in a case where, at the relevant time, no such debt was due, the amount which the Regulator estimates to be the amount of the debt under section 75 of the 1995 Act which would become due if—
    - (i) subsection (2) of that section applied, and
    - (ii) the time designated by the trustees or managers of the scheme for the purposes of that subsection were the relevant time.
- (3) Where the Regulator is satisfied that the act or failure to act falling within section 38(5) resulted—
  - (a) in a case falling within paragraph (a) of subsection (2), in the amount of the debt which became due under section 75 of the 1995 Act being less than it would otherwise have been, or



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- (b) in a case falling within paragraph (b) of subsection (2), in the amount of any such debt calculated for the purposes of that paragraph being less than it would otherwise have been,

the Regulator may increase the amounts calculated under subsection (2)(a) or (b) by such amount as the Regulator considers appropriate.

- (4) For the purposes of this section “the relevant time” means <sup>F13</sup>(subject to subsection (4A)) —

- (a) in the case of an act falling within subsection (5) of section 38, the time of the act, or
- (b) in the case of a failure to act falling within that subsection—
  - (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.

<sup>F14</sup>(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.]

- (5) For the purposes of this section—
  - (a) references to a debt due under section 75 of the 1995 Act include a contingent debt under that section, and
  - (b) references to the amount of such a debt include the amount of such a contingent debt.

#### Textual Amendments

**F13** Words in s. 39(4) inserted (for specified purposes and with effect in accordance with Sch. 9 para. 15(2) of the amending Act and 29.6.2009 so far as not already in force) by [Pensions Act 2008 \(c. 30\)](#), s. 149(2)(3), [Sch. 9 para. 8\(2\)\(a\)](#); S.I. 2009/1566, art. 2(1)(b)(ii)

**F14** S. 39(4A) inserted (for specified purposes and with effect in accordance with Sch. 9 para. 15(2) of the amending Act and 29.6.2009 so far as not already in force) by [Pensions Act 2008 \(c. 30\)](#), s. 149(2)(3), [Sch. 9 para. 8\(2\)\(b\)](#); S.I. 2009/1566, art. 2(1)(b)(ii)

#### Modifications etc. (not altering text)

**C1** Pt. 1 applied in part (with modifications) (20.7.2005 for specified purposes, 1.9.2005 for specified purposes, 5.12.2005 for specified purposes) by [The Financial Assistance Scheme Regulations 2005 \(S.I. 2005/1986\)](#), regs. 1(1), 4, [Sch. 1](#)

**C2** Ss. 38-56 modified (1.9.2005) by [The Pensions Regulator \(Financial Support Directions etc.\) Regulations 2005 \(S.I. 2005/2188\)](#), regs. 1, 15, 16

#### Commencement Information

**I3** S. 39 in force at 6.4.2005 by [S.I. 2005/275](#), art. 2(7), [Sch. Pt. 7](#)

### <sup>F15</sup>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

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- (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.

#### Textual Amendments

**F15** Ss. 39A, 39B inserted (with effect in accordance with Sch. 9 para. 15(3) of the amending Act) by Pensions Act 2008 (c. 30), s. 149(2)(3), **Sch. 9 para. 9** (with Sch. 9 para. 16(1))

### 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

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- (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 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—

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- (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.]

#### Textual Amendments

**F15** Ss. 39A, 39B inserted (with effect in accordance with Sch. 9 para. 15(3) of the amending Act) by Pensions Act 2008 (c. 30), s. 149(2)(3), **Sch. 9 para. 9** (with Sch. 9 para. 16(1))

#### 40 Content and effect of a section 38 contribution notice

- (1) This section applies where a contribution notice is issued to a person under section 38.
- (2) The contribution notice must—
  - (a) contain a statement of the matters which it is asserted constitute the act or failure to act which falls within subsection (5) of section 38,
  - (b) specify the sum which the person is stated to be under a liability to pay, and
  - (c) identify any other persons to whom contribution notices have been or are issued as a result of the act or failure to act in question and the sums specified in each of those notices.
- (3) Where the contribution notice states that the person is under a liability to pay the sum specified in the notice to the trustees or managers of the scheme, the sum is to be treated as a debt due from the person to the trustees or managers of the scheme.
- (4) In such a case, the Regulator may, on behalf of the trustees or managers of the scheme, exercise such powers as the trustees or managers have to recover the debt.
- (5) But during any assessment period (within the meaning of section 132) in relation to the scheme, the rights and powers of the trustees or managers of the scheme in relation to any debt due to them by virtue of a contribution notice are exercisable by the Board of the Pension Protection Fund to the exclusion of the trustees or managers and the Regulator.
- (6) Where, by virtue of subsection (5), any amount is paid to the Board in respect of a debt due by virtue of a contribution notice, the Board must pay the amount to the trustees or managers of the scheme.
- (7) Where the contribution notice states that the person is under a liability to pay the sum specified in the notice to the Board, the sum is to be treated as a debt due from the person to the Board.
- (8) Where the contribution notice so specifies, the person to whom the notice is issued (“P”) is to be treated as jointly and severally liable for the debt with any persons specified in the notice who are persons to whom corresponding contribution notices are issued.
- (9) For the purposes of subsection (8), a corresponding contribution notice is a notice which—

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- (a) is issued as a result of the same act or failure to act falling within subsection (5) of section 38 as the act or failure as a result of which P's contribution notice is issued,
  - (b) specifies the same sum as is specified in P's contribution notice, and
  - (c) specifies that the person to whom the contribution notice is issued is jointly and severally liable with P, or with P and other persons, for the debt in respect of that sum.
- (10) A debt due by virtue of a contribution notice is not to be taken into account for the purposes of section 75(2) and (4) of the Pensions Act 1995 (c. 26) (deficiencies in the scheme assets) when ascertaining the amount or value of the assets or liabilities of a scheme.

**Modifications etc. (not altering text)**

- C1** Pt. 1 applied in part (with modifications) (20.7.2005 for specified purposes, 1.9.2005 for specified purposes, 5.12.2005 for specified purposes) by [The Financial Assistance Scheme Regulations 2005 \(S.I. 2005/1986\)](#), regs. 1(1), 4, **Sch. 1**
- C2** Ss. 38-56 modified (1.9.2005) by [The Pensions Regulator \(Financial Support Directions etc.\) Regulations 2005 \(S.I. 2005/2188\)](#), regs. 1, **15**, **16**

**Commencement Information**

- I4** S. 40 in force at 6.4.2005 by [S.I. 2005/275](#), art. 2(7), **Sch. Pt. 7**

**41 Section 38 contribution notice: relationship with employer debt**

- (1) This section applies where a contribution notice is issued to a person ("P") under section 38 and condition A or B is met.
- (2) Condition A is met if, at the time at which the contribution notice is issued, there is a debt due under section 75 of the Pensions Act 1995 ("the 1995 Act") (deficiencies in the scheme assets) from the employer—
  - (a) to the trustees or managers of the scheme, or
  - (b) where the Board of the Pension Protection Fund has assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 (pension protection), to the Board.
- (3) Condition B is met if, after the contribution notice is issued but before the whole of the debt due by virtue of the notice is recovered, a debt becomes due from the employer to the trustees or managers of the scheme under section 75 of the 1995 Act.
- (4) The Regulator may issue a direction to the trustees or managers of the scheme not to take any or any further steps to recover the debt due to them under section 75 of the 1995 Act pending the recovery of all or a specified part of the debt due to them by virtue of the contribution notice.
- (5) If the trustees or managers fail to comply with a direction issued to them under subsection (4), 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.
- (6) Any sums paid—
  - (a) to the trustees or managers of the scheme in respect of any debt due to them by virtue of the contribution notice, or

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- (b) to the Board in respect of any debt due to it by virtue of the contribution notice, are to be treated as reducing the amount of the debt due to the trustees or managers or, as the case may be, to the Board under section 75 of the 1995 Act.
- (7) Where a sum is paid to the trustees or managers of the scheme or, as the case may be, to the Board in respect of the debt due under section 75 of the 1995 Act, P may make an application under this subsection to the Regulator for a reduction in the amount of the sum specified in P's contribution notice.
- (8) An application under subsection (7) must be made as soon as reasonably practicable after the sum is paid to the trustees or managers or, as the case may be, to the Board in respect of the debt due under section 75 of the 1995 Act.
- (9) Where such an application is made to the Regulator, the Regulator may, if it is of the opinion that it is appropriate to do so—
- (a) reduce the amount of the sum specified in P's contribution notice by an amount which it considers reasonable, and
  - (b) issue a revised contribution notice specifying the revised sum.
- (10) For the purposes of subsection (9), the Regulator must have regard to such matters as the Regulator considers relevant including, where relevant, the following matters—
- (a) the amount paid in respect of the debt due under section 75 of the 1995 Act since the contribution notice was issued,
  - (b) any amounts paid in respect of the debt due by virtue of that contribution notice,
  - (c) whether contribution notices have been issued to other persons as a result of the same act or failure to act falling within subsection (5) of section 38 as the act or failure as a result of which P's contribution notice was issued,
  - (d) where such contribution notices have been issued, the sums specified in each of those notices and any amounts paid in respect of the debt due by virtue of those notices,
  - (e) whether P's contribution notice specifies that P is jointly and severally liable for the debt with other persons, and
  - (f) such other matters as may be prescribed.
- (11) Where—
- (a) P's contribution notice specifies that P is jointly and severally liable for the debt with other persons, and
  - (b) a revised contribution notice is issued to P under subsection (9) specifying a revised sum,
- the Regulator must also issue revised contribution notices to those other persons specifying the revised sum and their joint and several liability with P for the debt in respect of that sum.
- (12) For the purposes of this section—
- (a) references to a debt due under section 75 of the 1995 Act include a contingent debt under that section, and
  - (b) references to the amount of such a debt include the amount of such a contingent debt.

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**Modifications etc. (not altering text)**

- C1** Pt. 1 applied in part (with modifications) (20.7.2005 for specified purposes, 1.9.2005 for specified purposes, 5.12.2005 for specified purposes) by [The Financial Assistance Scheme Regulations 2005 \(S.I. 2005/1986\)](#), regs. 1(1), 4, **Sch. 1**
- C2** Ss. 38-56 modified (1.9.2005) by [The Pensions Regulator \(Financial Support Directions etc.\) Regulations 2005 \(S.I. 2005/2188\)](#), regs. 1, **15**, 16

**Commencement Information**

- I5** S. 41(1)-(9)(10)(a)-(e)(11)(12) in force at 6.4.2005 by [S.I. 2005/275](#), art. 2(7), **Sch. Pt. 7**

**42 Section 38 contribution notice: clearance statements**

- (1) An application may be made to the Regulator under this section for the issue of a clearance statement within paragraph (a), (b) or (c) of subsection (2) in relation to circumstances described in the application.
- (2) A clearance statement is a statement, made by the Regulator, that in its opinion in the circumstances described in the application—
- (a) the applicant would not be, for the purposes of subsection (3)(a) of section 38, a party to an act or a deliberate failure to act falling within subsection (5)(a) of that section,
  - (b) it would not be reasonable to impose any liability on the applicant under a contribution notice issued under section 38, or
  - (c) such requirements of that section as may be prescribed would not be satisfied in relation to the applicant.
- (3) Where an application is made under this section, the Regulator—
- (a) may request further information from the applicant;
  - (b) may invite the applicant to amend the application to modify the circumstances described.
- (4) Where an application is made under this section, the Regulator must as soon as reasonably practicable—
- (a) determine whether to issue the clearance statement, and
  - (b) where it determines to do so, issue the statement.
- (5) A clearance statement issued under this section binds the Regulator in relation to the exercise of the power to issue a contribution notice under section 38 to the applicant unless—
- (a) the circumstances in relation to which the exercise of the power under that section arises are not the same as the circumstances described in the application, and
  - (b) the difference in those circumstances is material to the exercise of the power.

**Modifications etc. (not altering text)**

- C1** Pt. 1 applied in part (with modifications) (20.7.2005 for specified purposes, 1.9.2005 for specified purposes, 5.12.2005 for specified purposes) by [The Financial Assistance Scheme Regulations 2005 \(S.I. 2005/1986\)](#), regs. 1(1), 4, **Sch. 1**

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**C2** Ss. 38-56 modified (1.9.2005) by [The Pensions Regulator \(Financial Support Directions etc.\) Regulations 2005 \(S.I. 2005/2188\)](#), regs. 1, **15**, 16

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**Commencement Information**

**16** S. 42(1)(2)(a)(b)(3)-(5) in force at 6.4.2005 by [S.I. 2005/275](#), art. 2(7), **Sch. Pt. 7**



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