



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
 - [^{F1}(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—

Status: Point in time view as at 30/11/2016. This version of this provision has been superseded.

Changes to legislation: Pensions Act 2004, Section 38 is up to date with all changes known to be in force on or before 08 August 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

- (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 [^{F2}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) ^{F3}... 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 [^{F4}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 [^{F5}giving of a warning notice in respect of] the contribution notice in question.
- (7) [^{F6}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),
 - [^{F7}(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.
- [^{F8}(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 [^{F9}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).
- [^{F10}(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).]

[^{F11}(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**

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