

Consultation document for Code of Practice 12: Contribution Notices

Circumstances in relation to the material detriment test, the employer insolvency test and the employer resources test

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Scope of the consultation exercise

The Pension Schemes Act 2021 has altered our Contribution Notice (CN) power in section 38 of the Pensions Act 2004. In addition to the existing main purpose and material detriment ‘act’ tests for use of that power, there will be two further alternative ‘act’ tests: the employer insolvency test, and the employer resources test.

As a result of these new tests, we have updated Code 12 to explain what the tests are and the circumstances in which we may expect to issue a CN. When finalised, this code will be published under powers given to us under section 90 of the Pensions Act 2004.

In addition to seeking general views on this draft code, we are asking questions on areas where we are particularly interested in feedback, and will consider all comments before laying the final version of the code before Parliament. Please note that this code will be presented in the new ‘single code’ format when it is finalised later in the year.

Who this consultation is for

This consultation is for anyone seeking to understand the two new ‘act’ tests and the circumstances in which we may expect to issue a CN if any or all of the tests, or the material detriment test, are met.

Government consultation principles

This consultation paper follows the government’s consultation principles at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.

The key principles state that consultations should:

- be clear and concise
- have a purpose
- be informative
- be only part of a process of engagement
- last for a proportionate amount of time
- be targeted
- take account of the groups being consulted
- be agreed before publication
- facilitate scrutiny
- be responded to in a timely fashion, and
- not be launched during local or national election periods

Consultation context

The government's policy intent in introducing the two new alternative 'act' tests to the existing CN power is to focus on the effect of an act on an employer, which in turn affects its capacity to support the scheme. These 'snapshot' employer-impact assessments contrast with the existing 'material detriment' test, which looks at the effect of an act on the prospect of scheme benefits being paid many years into the future. The introduction of these new 'act' tests therefore provides clarity to the regulated market about the circumstances in which we expect these new 'act' tests to be met.

The two new 'act' tests measure the impact that an act, or failure to act, has had on the employer relative to the scheme on a snapshot basis, comparing the situation with and without the act. The employer insolvency test considers the impact of the 'act' on the hypothetical insolvency outcome for the scheme, and the employer resource test considers the impact of the 'act' on the value of the employer's resources, relative to the scheme's deficit.

Both the employer insolvency test and the employer resources test are set out in the Pensions Act 2004, as inserted by the Pension Schemes Act 2021, but the meaning of 'employer resources' and how they will be determined will be set out in new regulations, a draft of which has been subject to a consultation by the Department for Work and Pensions.

Whether a CN would be pursued, or could be issued, would depend on the particular facts of the case, not just the 'act' test, including whether it would be reasonable to exercise that power.

The Pensions Act 2004, as amended by the Pension Schemes Act 2021, sets out a legal requirement for us to publish a code setting out the circumstances in which we expect to issue a CN if we are of the opinion that either of the two new 'act' tests added to section 38 of the Pensions Act 2004 have been met. This is an addition to the previously existing requirement to produce a code on the circumstances in which we expect to issue a CN if we are of the opinion that the material detriment test is met.

We have approached this requirement by updating Code of Practice 12 to include the two new 'act' tests. This new draft code now includes a set of circumstances that could apply to any of the three tests. We have also taken the opportunity to update and clarify the circumstances in the code, and corresponding examples in our guidance, based on our experience to date.

We have updated the circumstances to include:

- The removal or substantial reduction of sponsor support or where it becomes nominal
- Weakening of the scheme's creditor position
- Some instances of paying a dividend or a return of capital by the sponsoring employer
- Payments favouring other creditors of the employer over the scheme where no such sums are then due to those creditors

This consultation also includes guidance which sets out some examples relating to each of the circumstances laid out in the draft code and offers further detail on a range of areas based on our experience of investigating and issuing CNs.

Consultation on circumstances in relation to the material detriment test, the employer insolvency test and the employer resources test

Please fill in your response to the questions below, save this whole consultation form to your computer, and return the completed attachment by **8 July 2021** to: **Code12consultation@tpr.gov.uk**

When responding, please confirm if you are responding as an individual or on behalf of an organisation and, if on behalf of an organisation, whether only the views of the organisation are expressed in the response.

Your details

Your name:

Organisation (if applicable):

Responding as an individual or on behalf of an organisation:

If on behalf of an organisation, are only the views of the organisation expressed in this response?:

Job title (if applicable):

Postal address:

Telephone:

Email:

Your details continued...

Please select the category that best describes you or your organisation.
If you have multiple roles, please select all that apply.

- | | | |
|--|--------------------|----------------------|
| Adviser (Actuarial) | Adviser (Covenant) | Adviser (Investment) |
| Adviser (Legal) | Adviser (Other) | Administrator |
| Investment manager | Professional body | Provider |
| Scheme sponsoring employer | | Trustee |
| Other (Please describe in the box below) | | |

Confidentiality (Please complete as applicable)

Please confirm whether you would like us to list your name on our list of respondents to this consultation:

Yes, I wish my name to be included on the list of respondents

No, I do not wish my name to be included on the list of respondents

and/or:

Please confirm whether you would like us to list your organisation on our list of respondents to this consultation:

Yes, I wish my organisation to be included on the list of respondents

No, I do not wish my organisation to be included on the list of respondents

As this is a public consultation, we may need to share the feedback you send us within our own organisation or with other government bodies or in response to a request under the Freedom of Information Act 2000. In the interests of transparency and effective scrutiny, we may also publish this feedback as part of our response to the consultation. If you wish your response, in whole or in part, to remain confidential, please tick the box below and give your reasons and we will consider whether we can reasonably meet your request:

Yes, I wish my response to remain confidential

If 'Yes', please specify which part of your response you wish to remain confidential and why:

Consultation questions

1. Is our overall approach in the draft code and code-related guidance consistent with the policy intent behind the changes introducing the two new alternative 'act' tests to the CN power?

Yes

No

Please give your reasons below:

2. Is the code clear on what the tests are and the circumstances in which we will consider any of the tests to be met? If not, how could we make it clearer, without limiting the scope of the tests?

Yes

No

Please give your reasons below:

- 3. Are the examples provided in the code-related guidance useful in illustrating the circumstances in which we might consider the new 'act' tests to be met? Are there any other examples you would consider helpful?**

Yes

No

Please give your reasons below:

4. Do you have any other feedback?

Yes

No

Please give your reasons below:

How to contact us

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<https://www.thepensionsregulator.gov.uk/>

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