

# alert

## MATERIAL DETRIMENT CODE REVISITED

### 1 INTRODUCTION

Largely, in response to fears that the Pensions Regulator's (TPR) anti-avoidance powers were not sufficient to tackle risks posed to members' benefits by "new business models" and the like, the Pensions Act 2008 expanded TPR's armoury.

A significant addition was the power to impose contribution notices, in certain circumstances, where a party's action or failure to act has a materially detrimental effect on the likelihood of members receiving their benefits (the "material detriment test").

As part of a number of safeguards on the use of this new power, TPR must produce a code of practice setting out the circumstances in which it expects to issue contribution notices on the basis of the material detriment test. This code was issued, in draft, for consultation in December 2008.<sup>1</sup> On 5 May 2009, a response to the consultation was published together with a revised draft of the code (which has been laid before Parliament for final approval).

### 2 KEY POINTS

- As a result of the consultation, the code has been revised to "ensure [that it] is clear and that it interacts well with other rules and regulations".
- The new powers are expected to come into effect in summer 2009, but TPR can apply them retrospectively to 14 April 2008 (the date on which the extended powers were announced).
- TPR aims to publish further guidance and examples at that time.
- Addressing industry concerns, TPR confirms that the amended powers are not intended to capture "routine business transactions".

<sup>1</sup> For further details, please see our Alert: "Risky Business? Material Detriment Code Published" (dated 19 December 2008)

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### 3 THE CODE OF PRACTICE

TPR has developed and amended the draft code to take on board comments made during the consultation process<sup>2</sup>. In particular, it has tightened up some of the definitions used and provided further clarification of defined terms.

The code sets out the circumstances in which TPR expects to issue a contribution notice based on the new material detriment test. These are:

- the transfer of a scheme out of the UK;
- the transfer of a sponsoring employer out of the UK or the replacement of a sponsoring employer with an entity that does not fall within the UK;
- “sponsor support” is removed, substantially reduced or becomes nominal;
- the transfer of scheme liabilities to another pension scheme or arrangement which leads to a significant reduction in sponsor support in respect of these liabilities or funding to cover them; or
- a business model or the operation of a scheme in a way which creates or is designed to create, from the scheme, a financial benefit for the employer or some other person where proper account has not been taken of members’ interests, including increased risks to members.

### 4 WHICH TRANSACTIONS WILL BE AFFECTED?

TPR explains that “it is not the aim of the amended contribution notice powers to capture ‘routine business transactions’”. The Government is satisfied that, with the combined safeguards of the code and the statutory defence<sup>3</sup>, the legislation is sufficiently focused on the risks it is intended to cover (broadly “new business models” and “non-insured buy-outs”).

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<sup>2</sup> A copy of our response is available on the client area of our website

<sup>3</sup> which encompasses giving appropriate prior consideration to the impact of a transaction upon the scheme, documenting decisions and, where necessary, providing appropriate mitigation (something in return) for the scheme

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However, in response to concerns raised during the consultation, TPR will be producing further guidance on the legislative framework including illustrative examples that will show how the code and the new material detriment test will work in practice. TPR also points out that where parties require further certainty, they have the option to apply for clearance.

## **5 DATE FOR YOUR DIARY?**

Although retrospective to 14 April 2008 (the date on which the extended powers were announced), subject to Parliamentary approval, TPR's new powers and its code are expected to come into force this summer. TPR is aiming to publish its illustrative guidance at the same time.