

## Clearance guidance

This guidance was published in December 2008 and is now out of date. You'll find the most current guidance, published June 2009, on the regulator's website:

[www.thepensionsregulator.gov.uk/guidance/clearance/index.aspx](http://www.thepensionsregulator.gov.uk/guidance/clearance/index.aspx)

## Key points

- Clearance is the voluntary process for obtaining a clearance statement from the regulator.
- A clearance statement is not approval of a transaction such as an acquisition or merger; rather it gives assurance that we will not use our anti-avoidance powers in relation to that transaction.
- Clearance is relevant for those considering corporate transactions or scheme-related events which are materially detrimental to a defined benefit pension scheme and its members (known as 'type A events').
- This guidance is primarily aimed at professional advisers, who should bring it to the attention of employers involved in schemes, as well as parties who are connected and associated with employers, and trustees.

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please refer to the regulator's  
website for the version  
dated June 2009.

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## Introduction

1. The Pensions Regulator (the 'regulator') is the regulatory body for work-based pension schemes in the UK. The Pensions Act 2004 (the '**Act**') gives the regulator a set of specific objectives, which are:
  - to protect the benefits of, or in respect of, members of occupational pension schemes;
  - to reduce the risk of situations arising that may lead to claims for compensation from the Pension Protection Fund (the 'PPF'); and
  - to promote, and to improve understanding of, the good administration of work-based pension schemes.
2. '**Clearance**' is the term used to describe the voluntary process of obtaining a **clearance statement** from the regulator. A **clearance statement** gives assurance that, based on the information provided, the regulator will not use its anti-avoidance powers to issue to the **applicants** either **contribution notices** or **financial support directions** in relation to a defined benefit occupational pension **scheme** and a particular **event**. '**Events**' include transactions, agreements, decisions, other acts and failures to act.
3. A **clearance statement** will not bind the regulator if circumstances are materially different from the contents of the application.
4. **Contribution notices** require payment to be made into a **scheme**, and **financial support directions** require financial support to be put in place for a **scheme**. They were introduced by the **Act** in order to protect the benefits of **scheme** members and to ensure that pension liabilities are not avoided or unsupported. Further information about these powers can be found in Appendix B.
5. These powers are only part of the regulator's approach to ensuring that **schemes** are properly funded, administered and supported. The regulator also has powers in relation to scheme funding, as well as other powers to protect members' benefits, such as powers to wind up **schemes** or to appoint an independent trustee. Further information about these other regulatory powers can be found on our website: About us / Our powers.

## About this guidance

6. This guidance is primarily aimed at professional advisers, who should bring it to the attention of **employers** involved in **schemes** as well as parties who are connected and **associated** with **employers** and trustees. It has been updated in light of our experience of operating **clearance** and reflects the way that both the regulator and the market have developed since **clearance** was introduced in April 2005.

7. It is clear that there are many **events** that could be detrimental to the ability of a **scheme** to meet its liabilities ('**detrimental events**'). However, in line with its commitment to operate in a risk-based and proportionate manner, the regulator expects a **clearance statement** to be sought only in relation to '**type A events**'.
8. **Type A events** are materially detrimental to the ability of the **scheme** to meet its pension liabilities. **Type A events** are either **employer-related events** or **scheme-related events**. **Employer-related events** are only **type A events** if the **scheme** has a **relevant deficit**. **Scheme-related events** are always **type A events**, regardless of whether the **scheme** has a **relevant deficit**. Trustees and **employers** therefore need to recognise and understand **type A events**.
9. Part I of this guidance provides information about:
  - identifying **type A events** - assessing the impact of the event on the **scheme**; and
  - what action **applicants** and trustees should take during the **clearance** process, including mitigation and negotiation.
10. Part II of this guidance gives further information about:
  - applying to the Pensions Regulator for a **clearance statement**; and
  - what happens during **clearance**.
11. It is not practical to devise guidance that contains sufficient detail to cover all possible circumstances and **events**. This guidance does not attempt to list all possible **type A events**.
12. Professional advisers should ensure that all parties involved in a possible **type A event**, including **employers** and trustees, are familiar with the content and spirit of this guidance.
13. This guidance itself is not a **clearance statement**, and it does not bind the regulator's use of its powers, whether or not there is a **type A event** in accordance with this guidance.

## Our approach

14. Broadly speaking, the regulator's power to issue a **contribution notice** is triggered by an act or a failure to act, whereas the power to issue a **financial support direction** arises because of the circumstances of the **employer**. However, it may be that consideration of an **event** leads us to conclude that it would be reasonable to issue a **financial support direction**. Therefore, **applications** will generally relate to an **event**.

15. We have developed guiding principles that trustees and **employers** should apply when dealing with **events** that may impact on the **scheme** and when applying for a **clearance statement**.

#### Trustees and employers

- Trustees and **employers** should recognise and understand that a **scheme** in deficit on any basis should be treated in the same way as any other material creditor.
- Trustees should recognise and understand their powers and duties and act appropriately, including managing any conflicts.
- Trustees should consider taking independent professional advice where appropriate.
- Trustees and **employers** should work together in relation to **events** that may be detrimental to the ability of the **scheme** to meet its liabilities or to the benefits of the **scheme** members, communicating and sharing appropriate information.
- Trustees and **employers** should understand the nature and the impact of the potentially **detrimental event** and the appropriate mitigation for the event.
- Trustees and **employers** should recognise that the regulator will wish to know about all **events** that have a materially detrimental effect on the ability of a **scheme** to meet its liabilities.

16. We have also developed guiding principles that govern the behaviour of the regulator in considering whether to grant a **clearance statement**.

#### The Pensions Regulator

- The regulator's preferred outcome is an appropriately funded **scheme** with a solvent **employer**.
- The regulator will deploy its resources in a risk-based manner, targeting risk in a proportionate, responsive, flexible, pragmatic, consistent, transparent and reasonable way.
- The regulator will seek to protect members' benefits and reduce the risk of calls on the **PPF**, while at the same time recognising commercial activity and business needs.

17. In this guidance, terms shown in **bold** are defined in the Definitions section.

## The effect of a clearance statement

18. A **clearance statement** only relates to the **applicants**, the relevant **scheme** and the **events** described in the **application**. For further information see paragraphs 157 to 159.
19. The granting of a **clearance statement** does not have any impact on the regulator's powers, other than the power to issue **contribution notices** or the power to issue **financial support directions** (as applicable).

## Who is clearance relevant to?

20. **Applications** may be made by those parties who could be subject to a **contribution notice** or **financial support direction** in relation to a **scheme**. This could include the **employer** and those **connected** or **associated** with the **employer**. Parties that may become an **employer**, or become **connected** or **associated** with an **employer** (for example a purchaser), may also wish to apply for a **clearance statement**.
21. The parts of this guidance that relate to the '**employer**', and in particular to steps that the **employer** should take, may apply equally to **connected** or **associated** parties or to parties that may become **connected** or **associated**.
22. We expect trustees to be involved in any **application** relating to their **scheme**. As part of an **application**, the trustees will be asked to comment on whether or not they support the **application** and to explain why.
23. It will not usually be appropriate for a trustee to apply for a **clearance statement**. The reasons for this are explained in paragraph 121. Further detail on who may apply for a **clearance statement** is also included at paragraphs 120 to 123.



## Part I – type A events

24. It is clear that there are many **events** that could be detrimental to the ability of a **scheme** to meet its liabilities. However, in line with its commitment to operate in a risk-based and proportionate manner, the regulator expects a **clearance statement** to be sought only in relation to **type A events**. **Type A events** are all **events** that are materially detrimental to the ability of the **scheme** to meet its pension liabilities. **Employer-related events** will only be **type A events** if the **scheme** has a **relevant deficit**. **Scheme-related events** are always **type A events** regardless of whether the **scheme** has a **relevant deficit**.

### Identifying type A events

25. **Employers** and trustees should assess whether any **detrimental event** is a **type A event**.
26. A **detrimental event**, including any **type A event**, will have one or more of the following effects, either immediately or in the future:
- it prevents the recovery of the whole or any part of the **employer's s75 debt**;
  - it prevents the **employer's s75 debt** becoming due or compromises the **s75 debt**;
  - it reduces the amount of the **employer's s75 debt** which would otherwise become due; or
  - it weakens the **employer covenant**, because:
    - it has an impact on the ability of the **employer** to meet its ongoing funding commitments to the **scheme**, or an impact on those commitments; or
    - it reduces the dividend that would be available to the **scheme** in the event of **employer** insolvency.
27. In order to assess whether an **event** is a **type A event**, **employers** and trustees must determine whether the **event** is an **employer-related event** or a **scheme-related event**.
28. An **employer-related event** will only be a **type A event** if the **scheme** has a **relevant deficit**. See paragraphs 48 to 55.
29. If a **scheme-related event** is detrimental to the ability of a **scheme** to meet its liabilities, or directly detrimental to members' benefits, and if the detriment is

material, then it will be a **type A event** whether or not the **scheme** has a **relevant deficit**.

30. When assessing any **event**, **employers** and trustees should also refer to the guidance on the 'Abandonment of defined benefit pension schemes', on our website: Regulatory guidance / Subject listing / Abandonment.

## Employer-related type A events

### Assessing an employer-related event

31. To assess whether an **employer-related event** is a **type A event**, **employers** and trustees should:
- compare and contrast the pre- and post-**event employer covenant**;
  - assess whether any weakening of the **employer covenant** is to such a degree that the **event** could be considered to be materially detrimental to the ability of the **scheme** to meet its liabilities; and then
  - identify whether the **scheme** has a **relevant deficit**.
32. In general, it is important to carry out these three steps in the above order because the outcome of the first two steps may determine what basis should be used for the **relevant deficit**. However, depending on the circumstances, it may be possible to form an initial view of the appropriate basis for the **relevant deficit** at the outset.

### The employer covenant

33. The **employer** plays a vital role as the **scheme** sponsor. It effectively underwrites the risks that the **scheme** is exposed to, including existing underfunding, longevity, investment and inflation.
34. The **employer covenant** and its strength is determined by:
- the **employer's legal obligations** to the **scheme**; and
  - its **financial position** (both current and prospective).
35. Appendix A discusses how to assess **employer covenant**.

### Assessing whether there has been a weakening of the employer covenant

36. When assessing the pre- and post-**event employer covenant**, **employers** and trustees should analyse both the **employer's legal obligations** to the **scheme** (to ascertain any change that might occur to the **employer's legal**

**obligation** to support the **scheme**) and the **employer's financial position** (to ascertain any change in the financial strength of the **employer** and the **wider employer group**).

37. Appendix A discusses how to do this in more detail.
38. **Employers** and trustees should consider whether the **event** has any of the effects listed in paragraph 26.
39. In order to assess whether a particular **event** weakens the **employer covenant**, it is often necessary to consider where the pension creditor sits in the allocation of proceeds in the event of the insolvency of the **employer**, and then consider the impact of that **event** on the potential allocation.
40. The **scheme** is usually an unsecured creditor of the **employer**. The priority of an unsecured creditor, with regard to the realisation of the assets of a company in the event of insolvency and when compared to other creditors, is broadly summarised below:
  1. creditors with **fixed charges**;
  2. preferential creditors;
  3. creditors with **floating charges**;
  4. unsecured creditors (usually including the pension creditor);
  5. subordinated creditors;
  6. equity.
41. When considering potentially **detrimental events**, it is therefore helpful to assess the effect on creditors, including the pension creditor.
42. Trustees and **employers** should also keep in mind the long-term nature of the **employer's** pension obligation, and should therefore consider the **employer's** long-term future.
43. An **event** may also be detrimental because of its impact on the ability of the **employer** to meet its ongoing funding commitments to the scheme. This could be because of an **event's** effect on the **employer's** cash flow or balance sheet, for example, because of an **employer's** dividend policy, intra-group arrangements or debt repayments.
44. Assessing the impact of a possible **type A event** may be a complex process. Where trustees feel they may not have the necessary financial or legal skills to allow them to assess an **event**, they should consider obtaining independent professional advice. If trustees decide not to take independent professional advice, they should document the reasons for this decision (for example, because the cost of advice would be disproportionate to the possible detriment), as well as their views on the particular **event**.

45. If a **type A event** is due to occur, the regulator expects that responsible **employers** will wish to pay for the trustees to obtain independent financial advice in relation to the **event** where appropriate. Where trustees obtain such advice, **applications** are likely to progress more efficiently.

### **Assessing whether a weakening of the employer covenant is material**

46. Where a weakening of the **employer covenant** has been identified by comparing the **employer covenant** pre- and post-**event**, the trustees and **employers** need to assess whether that weakening is materially detrimental to the ability of the **scheme** to meet its liabilities. The judgement as to whether an **event** is materially detrimental can be made by reference to and comparison of a number of factors, which may include:
- the amount by which the **employer covenant** is weakened;
  - the size of the **employer** after the **event**: for example, the net assets of the **employer** or **wider employer group**;
  - the size of the **scheme**; for example, the value of the assets or number of members;
  - the amount of the **scheme's relevant deficit**.
47. This judgement will often be a complex matter, for which both **employers** and trustees may need independent professional advice.

### **Identifying the relevant deficit**

48. An **employer-related event** will not be a **type A event** unless the **scheme** has a **relevant deficit**.
49. The regulator's duty to protect pension benefits must be balanced with the choice of a sensible deficit trigger for operating a risk-based approach to **clearance**.

#### **Relevant deficit for employer-related events**

##### **The general rule**

The **relevant deficit** for an **employer-related event** will usually be the highest of the **scheme's** deficits according to the following bases:

- **FRS17/IAS19** (current accounting standards);
- **s179** (PPF levy basis);
- **technical provisions** (scheme funding basis, where available);

- **ongoing** (following **scheme** valuation, where **technical provisions** are not yet available).

#### **Exceptions**

- The **relevant deficit** will sometimes be measured by a higher basis, reflecting the impact of an **event** identified by trustees and **employers** where the **employer-related event** is significantly materially detrimental to the **scheme's** ability to meet its liabilities (including where there is a significant weakening of the **employer covenant**).
- The **relevant deficit** will be measured by the **S75 basis** where there are 'going concern' issues, the **scheme** is in wind-up, or there is **scheme** abandonment.

#### *The general rule*

50. In most cases the appropriate **relevant deficit** will be measured on the higher of **FRS17/IAS19, s179, technical provisions** or **ongoing** bases.

#### *Exceptions*

51. There are certain circumstances where the appropriate measure for the **relevant deficit** will differ from the higher of the **FRS17/IAS19, s179, technical provisions** or **ongoing deficits**.
52. Where the **event** is significantly detrimental to the **scheme's** ability to meet its liabilities, including where there is a significant weakening of the **employer covenant**, then trustees and **employers** may judge that using the highest of **FRS17/IAS19, s179, technical provisions** or **ongoing deficits** as the basis for the **relevant deficit** does not properly reflect the impact of the **event**. In such cases, a higher basis would be appropriate.
53. Where there are reasonable doubts that the **employer** will continue as a going concern, where the **scheme** is in wind-up, or the **event** may result in **scheme** abandonment, then the **s75 basis** applies.
54. In addition, where the **FRS17** deficit for the **employer** group cannot be allocated on a company-by-company basis, and **technical provisions** are not yet available, the trustees may consider that some other basis would be appropriate.
55. The **relevant deficit** is a trigger for **clearance** and is not an indication that **employers** and trustees should only fund **schemes** to this level. If there is no **relevant deficit**, this is not an indication that the **employer-related event** is not detrimental to the **scheme** only that it is not a **type A event**. Any identified

**relevant deficit** does not restrict the trustees', the **employer's** or the regulator's duties, powers and obligations, including in relation to scheme funding under Part 3 of the Act. The **relevant deficit** is designed to give clarity to the market as to when an **employer-related event** might be a **type A event**.

### Examples of employer-related events

56. Some examples of **employer-related events** that could be **type A events** include:

- a change in priority – a change in the level of security given to creditors; for example, the granting or extending of a **fixed charge** or **floating charge** over assets of the **employer** or the **wider employer group**;
- a return of capital – a reduction in the overall assets of the **employer** or the **wider employer group**; for example:
  - dividend payments (such as special dividends);
  - share buy backs;
  - repayment of subordinated debt; and
  - distributions in specie, including de-mergers;
- a change to group structure, including a change of control; for example, a change or partial change to the control structure of an **employer** or a change to the parties who could be subject to a **financial support direction**, which reduces the overall **employer covenant**. This could include, for example, a change to the parent company or the ultimate holding company of the **employer**. Note that a change of control may be accompanied by new or increased debt, which may be secured. A change of control may be a **notifiable event**;
- a change to the **employer** in relation to the **scheme**, including replacement of a participating **employer** or the merger of two or more **employers**;
- sale and leaseback transactions in so far as these lead to a reduction of assets or adversely affect net cash available to support the **scheme**;
- the granting or repayment of inter-company loans, particularly where the loan is not on 'arm's-length' terms, where it is not properly documented or where there is credit risk;
- 'phoenix events' – an arrangement resulting in the **employer** re-emerging as substantially the same entity following an insolvency event;
- business and asset sales from the **employer** or the **wider employer group**, particularly where the transaction is not at arm's length for fair

value, where the sale proceeds are not retained, or where the whole or a substantial part of the operating business is sold; or

- a corporate **event** that would reduce sustainable cash flow cover for the **wider employer group's** funding commitment to the **scheme**; for example, an increase in debt or a reallocation of debt.

57. These are only examples, and this is not a complete list of **employer-related events** that could be **type A events**.

58. To establish whether there is a **type A event** in a particular case, a comparison of the pre- and post-**event employer covenant** is needed and the **scheme** must have a **relevant deficit**. In some circumstances **events** listed above will not be a **type A event**.

59. For example, a change in priority is more likely to result in a material weakening of the **employer covenant** if it does not relate specifically and solely to new money.

60. Similarly, a return of capital may be more likely to be a **type A event** if any of the following apply to it:

- it is made by an **employer** to the **wider employer group**;
- it is made to an entity outside the EU;
- it is made to a party who could not be subject to a **financial support direction**; or
- it is a large or unusual return.

61. Measuring the effect of a change in control structure is difficult, but some guidance can be found in existing market practice, and in particular by looking at commonly applied financial ratios or banking covenants.

62. There are some **employer-related events** that may weaken the **employer covenant** but that result from normal commercial activity and may not be within the **employer's** control, such as losing a key supplier or customer contract. By themselves these are not generally **type A events** but trustees and **employers** should still consider the impact on the **scheme**, and the regulator may wish to monitor or investigate if there is possible **employer insolvency** or the **scheme** appears to be at risk.

## Scheme-related type A events

### Assessing a scheme-related event

63. Although a **scheme-related event** may have a direct impact on the **employer's legal obligations** to a **scheme**, the detriment resulting from a **scheme-related event** cannot usually be assessed solely by reference to the **employer covenant**. The method for assessing whether a **scheme-related event** is a **type A event** will vary, depending on the specific **event**. In addition, some **scheme-related events** will be directly detrimental to members' benefits rather than to the ability of the **scheme** to meet its pension liabilities, and these may also be **type A events**, depending on the particular circumstances.
64. **Employers** and trustees should always consider an **event** both in terms of its immediate impact on the **scheme** and members' benefits and in terms of the **event's** possible impact into the future. Assessing the impact of a **scheme-related event** can be very complex and independent professional advice will often be appropriate.
65. Examples of **scheme-related events** that could be **type A events** include:
- compromise agreements – an agreement entered into by the trustees to compromise the **employer's s75 debt** and reduce the amount that will be paid to the **scheme**;
  - apportionment of a **scheme's** deficit – the rules of some multi-employer **schemes**, and any **scheme apportionment arrangement**, may determine how the total **scheme's** deficit will be apportioned between **employers**, for example when an **employer** exits the **scheme** or when the **scheme** winds up. The effect of the apportionment is to modify the amount of the **employer's s75 debt** that would otherwise become due. A **regulated apportionment arrangement** may also be a **type A event**;
  - non-payment of all or any part of a **s75 debt** for an unreasonable period (for example, more than 12 months); or
  - an arrangement that has the result of preventing a **s75 debt** from triggering.
66. These are only examples, and this is not a complete list of **scheme-related events** that could be **type A events**.

### Compromises

67. There are some limited circumstances in which trustees may agree to the compromise of a **s75 debt** due to the **scheme**. Any such attempt to compromise will always be a **type A event**, irrespective of the level of the



**scheme's** deficit before or after the compromise. The regulator will wish to understand the reasons for and effect of the compromise.

68. **Schemes** for which a compromise agreement has been reached may be ineligible for entry to the **PPF**. For more information on eligibility, see the **PPF** website ([www.pensionprotectionfund.gov.uk](http://www.pensionprotectionfund.gov.uk)).
69. Trustees and **employers** should note that any decision to compromise the **s75 debt** is also a **notifiable event**.

### **Apportionment of a scheme's deficit**

70. The use, amendment or insertion of an apportionment rule or the use or agreement of a **scheme apportionment arrangement** is a **type A event**, except where:
- it increases the **s75 debt** that is immediately payable by an **employer**, who can afford the increased **s75 debt**; or
  - it is a practical option because the cost and complexity of the other alternatives (including calculation of the unmodified **s75 debt** or an **approved withdrawal arrangement** or a **withdrawal arrangement**) are far greater or disproportionate, the apportionment results in a **s75 debt** that is the scheme actuary's best estimate of the unmodified **s75 debt** and it is immediately payable by the departing **employer**; or
  - the **s75 debt** arises in circumstances in which there is no net reduction of **employer covenant** – for example on the consolidation of several **employers** within the **employer** group in certain circumstances, provided that all **employer** assets and their pension liabilities transfer.
71. Apportionment that does not have any of the above features is a **type A event**, irrespective of the level of the **scheme's** deficit before or after the apportionment. Such an apportionment will also be a **type A event** irrespective of whether the power to apportion under the **scheme's** rules is only exercisable at a party's discretion or is automatic.
72. Trustees and **employers** should note that any retrospective apportionment (taking place after the event which has triggered the **s75 debt**) is similar to compromise and is always a **type A event**. This is regardless of whether or not the apportionment is under a **scheme apportionment arrangement**. The decision to enter into a **scheme apportionment arrangement** retrospectively is also a **notifiable event**. Unless the apportionment is a **scheme apportionment arrangement** or a **regulated apportionment arrangement** the trustees should consider any impact on eligibility for entry to the **PPF**.
73. When considering any apportionment, trustees should seek to understand the purpose of the apportionment and all of the circumstances, including any

related disposals of **employers**, substitution of **employers**, or changes to the **wider employer group**. Trustees should be cautious about agreeing to the use, amendment, insertion or agreement of any apportionment rule or **scheme apportionment agreement** and should consider their fiduciary duties and the likely impact on **scheme** members in addition to the statutory tests that determine whether a **scheme apportionment arrangement** is possible.

74. When considering any apportionment proposals, trustees should also consider the alternative of a **withdrawal arrangement** or an **approved withdrawal arrangement**, which would result in a guarantee to the **scheme** of the remainder of the full amount of the departing **employer's s75 debt**. The regulator has produced separate material on **withdrawal arrangements**.
75. **Employers** and trustees should also consider whether there is any **employer-related event** linked with any apportionment, or the prospect of such an **event** in the near future. If there is a linked **employer-related event**, **employers** and trustees should consider what is appropriate mitigation for any apportionment and **employer-related event** taken together.

#### **Regulated apportionment arrangements**

76. A **regulated apportionment arrangement** may be a **type A event**. If an **application** is made the regulator will consider it together with the applications for a **regulated apportionment arrangement**.

#### **Withdrawal arrangements and approved withdrawal arrangements**

77. An **approved withdrawal arrangement** may have a related **type A event**, particularly where the guarantee under the **approved withdrawal arrangement** does not provide sufficient mitigation for the **event** in the circumstances. For example, if a departing **employer** is financially strong but employed a small proportion of members of the **scheme** and the debt (Amount B) to be guaranteed under the arrangement is relatively small then the guarantee will not sufficiently mitigate the reduction in the strength of overall **employer covenant**. A **withdrawal arrangement** can equally relate to a **type A event**.
78. **Approved withdrawal arrangements** are required under legislation to be approved by the regulator. Other **withdrawal arrangements** do not require the regulator's approval, and we would not expect all **withdrawal arrangements** to come to the regulator for a **clearance statement**. However, there are some circumstances in which a **withdrawal arrangement** could itself be detrimental to the ability of a **scheme** to meet its pension liabilities, particularly if the guarantee does not sufficiently mitigate the fact that the **s75 debt** is not being paid in full. This may be for a number of reasons, for example the choice of guarantor, the agreed payment events for the guaranteed debt (Amount B), or because the agreement does not comply with statutory

requirements and the non-compliance results in material detriment to the **scheme**.

### **Any other scheme-related event**

79. Any other **scheme-related event** which prevents the recovery of the whole or any part of the **employer's s75 debt**, prevents the **s75 debt** becoming due, compromises or settles the **s75 debt**, or reduces the amount of the **s75 debt** which would otherwise become due, may be a **type A event**, irrespective of the level of the **scheme's** deficit before or after the **event**.

### **Events that are related to each other**

80. Trustees and **employers** should note that sometimes an **event** can be composed of several distinct **events**, or several **events** may be related to each other. If this is the case, then, as well as assessing the overall effect of the **events**, trustees and **employers** should assess each component **event** separately to establish whether it could be a **type A event**.
81. There may be both **employer-related** and **scheme-related** components to the **event**, for example, on the sale of a business and any apportionment. If so, it is possible that the **employer-related** component will not be a **type A event**, because there is no **relevant deficit** in the **scheme**, whereas the **scheme-related** component is a **type A event**.
82. Where there are component or related **type A events**, trustees and **employers** should consider what the appropriate mitigation is for each **event**. Where **applicants** are applying for a **clearance statement** for more than one **type A event** in relation to the same **scheme**, these should usually be described in one **application**.

### **Where an event is type A**

83. Where the **employers** and trustees have identified a possible **type A event**, they should consider and agree the most appropriate mitigation.

### **Considering mitigation**

84. The level and type of appropriate mitigation will vary, depending on the nature, circumstances and impact of the **event** and the funding level of the **scheme**, taking into account the **relevant deficit** (see paragraphs 80 to 88).
85. The appropriate mitigation should be identified for each **type A event**.
86. Any mitigation agreed does not restrict in any way the trustees', the **employer's** or the regulator's duties, powers and obligations in relation to scheme funding under Part 3 of the **Act**. Further information on these powers,

duties and obligations can be found in the scheme funding section on our website: Regulatory guidance / Subject listing / Scheme specific funding.

87. Trustees should seek appropriate independent professional advice to enable them to assess their powers and duties in relation to a **type A event** and ascertain what mitigation may be appropriate. This will allow any **application** to proceed more efficiently.

#### *Types of mitigation*

88. There are different types of possible mitigation, for example:
- additional contributions of cash or other assets;
  - an improvement in priority; for example, granting a **fixed charge** or **floating charge** to the pension creditor, alongside, or in priority to, a lender;
  - escrow accounts: an escrow account is an arrangement (not available in Scotland) whereby the **employer** pays funds into an account that will pass to the **scheme** under certain conditions, otherwise being returned to the **employer**;
  - standby letters of credit, guarantees or insurance: **employers** may obtain these from banks or financial institutions to cover, for example, contributions to the **scheme** and/or the **s75 debt**;
  - negative pledges: a negative pledge is a commitment by the company that something will not be done – for example, that no new security will be granted without the agreement of the trustees;
  - parental and intra-group guarantees: where there is a **wider employer group**, the parent company or another company within the group can guarantee, for example, the payment of contributions and/or the payment of the full **s75 debt** in certain circumstances;
  - joint and several liability: the **employers** or the **wider employer group** can be made jointly and severally liable for the funding of, or debts due to, the **scheme**;
  - performance thresholds: trustees and **employers** may agree financial thresholds for the **employer** that, if breached, would have to be reported to the trustees. These are unlikely to be sufficient mitigation alone for any **detrimental event**, but in combination with other forms of mitigation would act as an early warning for trustees of any deterioration or change in the **employer's** financial circumstances and provide an early opportunity for dialogue; or
  - **scheme** rule changes: making an amendment to the **scheme's** trust deed and rules to change the balance of powers.

89. There may be other forms of mitigation. Which type, or which combinations of types, is appropriate will depend on the relevant circumstances. Please note that some forms of mitigation will reduce future **PPF** levy bills. For more information on **PPF** rules on contingent assets, see the **PPF** website ([www.pensionprotectionfund.gov.uk](http://www.pensionprotectionfund.gov.uk)).

*Additional considerations for **scheme-related events***

90. For **scheme-related events**, **employers** and trustees may be able to agree mitigation that changes the **event** itself. For example, appropriate mitigation for apportionment not subject to a **scheme apportionment arrangement** could (alongside other forms of mitigation) include an amendment to the rule so that:
- it is only exercisable at the trustees' discretion;
  - it is specific to a particular **event**, **employer**, time period or set of circumstances.
91. For any apportionment, **employers** and trustees should also consider what amount should be payable to the **scheme** in the particular circumstances in place of the **s75 debt** that would otherwise become due.
92. Trustees should be cautious about agreeing to any apportionment (including a **scheme apportionment arrangement**) that is far in advance of the time a **s75 debt** will trigger, because it would be less likely that both the full effect of the apportionment can be properly considered and that the statutory tests that determine whether a **scheme apportionment arrangement** is possible could be met. Similar considerations apply to **withdrawal arrangements**.
93. When considering a compromise of a **s75 debt**, trustees should also seek to understand the purpose of the compromise, the history of the **scheme** and the **employer** and what the dividend would be for the **scheme** in the event of **employer** insolvency. Trustees should also consider and compare the outcome for other creditors, as well as the **employer's** situation following the compromise, in particular whether the **scheme** could receive further support in the future whether or not there is any compromise.
94. When considering **withdrawal arrangements** or **approved withdrawal arrangements**, trustees should consider whether the guarantee provides sufficient mitigation in all the circumstances. Relevant factors may include the payment events for the guaranteed debt (Amount B), or any payment on account of this, and the choice of guarantor. A guarantee from an existing **employer** may provide less mitigation than a guarantee from another party who does not already have an obligation to the **scheme**. Trustees should consider their fiduciary duties and the likely impact on **scheme** members to determine whether a **withdrawal arrangement** would be appropriate. These are in addition to the statutory tests that determine whether a **withdrawal**

**arrangement** is possible. The parties should also take care to ensure that the contents of the agreement comply with statutory requirements.

95. When considering mitigation, **employers** and trustees should always consider both the immediate and the possible future impacts of a **scheme-related event**.

### The role of the trustees

96. The regulator expects trustees to, as soon as reasonably practicable, be involved in any **application** relating to their **scheme** and as part of an **application**, the trustees will be asked to comment on whether or not they support the **application** and explain why. For an **application** to proceed efficiently, the regulator will expect trustees to have had the opportunity to assess the impact of a **type A event**, to consider appropriate mitigation, and to negotiate where appropriate, taking independent professional advice where needed. The regulator will consider the trustees' views when deciding whether to grant a **clearance statement**, but trustee support does not ensure it will be granted and lack of support does not ensure it will not be granted.
97. Trustees have the prime responsibility for safeguarding members' interests. Their powers and duties are set out in statute, trust and pensions law as well as in the **scheme's** governing documents, mostly the trust deed and rules. They must always, and in particular during the course of an **application**, be familiar with those powers and duties and should act in accordance with them. For example, trustees may have powers that are relevant to the **type A event**, such as setting contributions and/or winding up the **scheme** in certain circumstances.
98. If it is in deficit on any basis, the **scheme** is a creditor of the **employer**. Usually, because of the size of the deficit, it is a material creditor. Although a **scheme** is not identical to a large unsecured bank loan, it does (particularly because of the long-term nature of the pensions obligation) have many similarities in the form of:
- its size relative to other unsecured creditors; and
  - its importance to the company.

### *Negotiation*

99. When negotiating with an **employer**, trustees should generally adopt the approach of a bank that has advanced a large unsecured loan. **Employers** should view the **scheme** in a similar way, and **employers** and **trustees** should co-operate with each other to achieve an appropriate outcome for the scheme.

100. Trustees must ensure that they understand the nature of the **employer-trustee** relationship including the identity of the **employers** for the relevant purposes as described more fully at paragraphs 165 to 173.
101. Trustees should consider whether they have the necessary negotiation skills and whether they should instruct independent professional advisers to assist them in the negotiation process.
102. Trustees should be cautious about agreeing to fetter their powers or discretions or restrictions to their duties. For example, trustees should not generally fetter their discretions in relation to investment decisions and should not be restricted from discussing any matters with the regulator.
103. Trustees can also contact the regulator, who may be able to provide help and guidance.
104. In addition to negotiations relating to the **event**, **employers** and trustees may separately need to consider the **statutory funding objective** and the impact on the **technical provisions** and any recovery plan that is in place.

#### *Confidentiality*

105. Most of the information trustees receive in their position as trustees will be confidential. Confidentiality will be particularly important when trustees receive sensitive information about **scheme** members or the **employer**, including price-sensitive information. Trustees should be able to pass all information to their appointed professional advisers, if appropriate.
106. One way of ensuring that all parties understand the importance of confidentiality is to enter into a confidentiality agreement. This agreement should ideally be reviewed and revised every time a new trustee joins the board, rather than waiting until there is some important issue, which the **employer** may be reluctant to discuss because of confidentiality issues. The lack of a confidentiality agreement may cause delay, which would be a particular problem if quick action by trustees is required.
107. Confidentiality agreements should not restrict the trustees' duties or fetter their power or discretion or seek to prevent the trustees from contacting the regulator. If trustees feel that the terms of an agreement would affect their ability to carry out their duties as trustees, they should consult their independent legal advisers and consider raising this with the **employer** and with the regulator, as appropriate.

#### *Conflicts of interest*

108. Trustees, who may include directors of the **employer**, will often have conflicts of interest. Other conflicted trustees may include shareholders of the

**employer** or union representatives. Conflicts will be particularly relevant when trustees are negotiating with the **employer** in relation to a possible **detrimental event**, including a **type A event**.

109. We would generally expect trustees to seek legal advice in those cases where material conflict is identified to ascertain the best way to proceed.
110. The regulator expects a trustee who has a conflict or potential conflict of interest to notify other trustees at the earliest opportunity.
111. Further information and assistance on dealing with conflict of interest can be found in our free e-learning programme, the Trustee toolkit ([www.trusteetoolkit.com](http://www.trusteetoolkit.com)) and in the Conflicts of interest consultation document available on our website: Online publications / Policy documents.

## Considering clearance

112. **Clearance** is only appropriate for **type A events**. **Clearance** is a voluntary process.

### When there is a type A event and a clearance statement is not sought

113. If the trustees become aware of an **event** that they believe could be a **type A event**, they should raise their concerns with the **employer** and other relevant parties to the **event**, in order to ensure that appropriate mitigation is considered and to ascertain whether an **application** is being considered.
114. Where an **application** is not being considered and the trustees are concerned that no mitigation is being offered, or that mitigation is inadequate, they should consider contacting the regulator.
115. Certain occurrences relating to **employers** and **schemes** must be reported to us as **notifiable events**. For more information on **notifiable events**, see our separate guidance, code of practice and directions on our website: Regulatory guidance / Subject listing / **Notifiable events**.
116. Where there has been a breach of the law, trustees (amongst others) are required to report the matter to us. For more information on reporting breaches of the law, see our code of practice and guidance on our website: Codes of practice / Reporting breaches of the law.

### When a detrimental event is not a type A event

117. An **application** will not usually be an appropriate course of action if there is no **type A event**. When there is uncertainty as to whether there is a **type A event**, parties should take appropriate advice. **Employers** and trustees can



contact our Corporate Risk Management team with an enquiry (see paragraph 153 for further details).

118. **Type A events** are defined for the purpose of the **clearance** process. An **event** that is not a **type A event** may still be a **detrimental event**, or may be detrimental to the benefits of **scheme** members, so it may still be appropriate for **employers** and trustees to consider the impact of that **event** and any appropriate mitigation.

This version is out of date,  
please refer to the regulator's  
website for the version  
dated June 2009.

## Part II – applying for a clearance statement

119. This part of the guidance provides more information on the process of applying for a **clearance statement** from the regulator, including the type of information **applicants** will need to supply and the timescales involved.

### Who can apply

120. **Applications** may be made by those parties who could be subject to a **contribution notice** or **financial support direction** in relation to a **scheme**. This could include the **employer** and those **connected** or **associated** with the **employer**. Parties that may become an **employer**, or become **connected** or **associated** with an **employer** (for example, a purchaser), may also wish to apply for a **clearance statement**.
121. While some corporate trustees may be **connected** or **associated** with **employers**, it will not usually be appropriate for any trustee to apply for a **clearance statement** because of the conflicts the **application** would create between the trustee's duties to members and the trustee's personal interests. In most cases, corporate trustees will not have any assets (other than the **scheme** assets), so the practical risk of **contribution notices** or **financial support directions** will be minimal. Most directors of corporate trustees as well as individuals will not be **connected** or **associated** with an **employer** as a result of their trusteeship.
122. If an **applicant** does not appear to be **connected** or **associated** with an **employer**, the regulator may ask that **applicant** to explain why an **application** would be appropriate.
123. If there are multiple **applicants** see paragraphs 132 to 135.

### How to apply

124. An **applicant** may apply by completing an **application** form, available on our website: Online services / Forms for download, enclosing the associated information and documents. All this should be sent electronically to:

[clearance@thepensionsregulator.gov.uk](mailto:clearance@thepensionsregulator.gov.uk)

or by post to:

Corporate Risk Management  
The Pensions Regulator  
Napier House  
Trafalgar Place  
Brighton  
BN1 4DW

## Information and documents to be included in an application

125. Any **application** should include full and accurate disclosure of relevant information. **Clearance statements** will only be effective in relation to the **event** detailed in the **application**. Before a **clearance statement** is granted, the substance of the **application** may be revised. A **clearance statement** will not bind the regulator if the circumstances giving rise to the regulator's powers to issue a **contribution notice** or a **financial support direction** (as appropriate) are materially different from the circumstances described in the **application**.
126. To allow the regulator to consider an **application**, relevant documents should be attached to the **application** form, examples of which are listed below.

### *Corporate documents*

127. To be provided with all **applications**:
- family tree showing composition of the **wider employer group**, and identifying the **employers**;
  - table showing the estimated outcome for creditors pre and post **event**, both at group level and **employer** level on an ongoing and an insolvent basis;
  - latest statutory accounts of all relevant entities (additionally latest draft accounts where prepared).

If any of these documents are not provided **applicants** should provide an explanation of why the document is not relevant to the **application**.

128. To be provided where relevant:
- relevant correspondence with key stakeholders regarding the **event** (for example negotiations with trustees);
  - financial forecasts/management accounts for all relevant entities;
  - financial and other reports relevant to the **event** for which a **clearance statement** is being sought and the **employer's** viability;
  - fair value reports or opinions, where the **event** for which a **clearance statement** is being sought involves a related party transaction;
  - up-to-date valuation of significant assets of particular relevance to the **employer** or other **applicants**, the **event** or the **scheme**;
  - details of debt and any other creditor that ranks above the **scheme**;
  - details of intra-group balances and guarantee arrangements; and

- summary of related party transactions not disclosed in the statutory accounts provided.

#### *Scheme information and documents*

129. To be provided with all **applications**:

- any relevant documents relating to the effect of the **event** on the **scheme** or actions to be taken to improve the position of the **scheme**;
- any independent reports that the trustees have commissioned in respect of the **events** described in the **application**;
- where trustees have not taken independent professional advice, the document recording this decision, as well as the trustees' views of the **events** described in the **application**;
- a copy of the current and complete winding-up power from the **scheme's** trust deed and rules;
- a copy of the current and complete power to set contributions from the **scheme's** trust deed and rules;
- a copy of the most recent actuarial valuation of the **scheme** and, where applicable, recovery plan and schedule of contributions;
- a copy of the assumptions used in assessing the **scheme** deficit on an **FRS17/IAS19** basis, where relevant;
- a copy of any **withdrawal arrangement** relating to the **scheme**;
- a copy of any relevant proposed rule amendments relating to the **event**; and
- a copy of any existing apportionment rule from the **scheme's** trust deed and rules and any **scheme apportionment arrangement**.

If any of the above documents are not provided **applicants** should provide an explanation of why that document is not relevant to the **application**. Parties may wish to send confidential documents such as legal advice and minutes of trustee meetings directly to the regulator. The regulator will not disclose such documents to the **applicants** without the relevant parties' consent.

130. **Applications** should only contain relevant information. Lengthy submissions will increase the time it takes us to consider an **application**. Extracts or summaries of documents should be provided whenever possible. As a general principle, information provided to the regulator should be similar to the amount of information and level of detail provided to non-executive directors of a quoted company to allow them to make informed decisions.

131. Documents attached to an **application** should be clearly indexed and referred to in the **application** form where appropriate.

## Multiple applicants

132. If there is more than one **applicant**, it is preferable to have all **applicants** included on one **application** form. Each **applicant** must be clearly identified, for example by registered company name and number. Each **applicant** should identify clearly whether they are seeking a **clearance statement** in relation to a **contribution notice** or a **financial support direction** or both, or complete separate forms for the different types of **clearance statements**. If there are numerous **applicants**, they should be listed in a separate annex to the **application**. The **application** form must be signed by, or on behalf of, each **applicant**.
133. **Applicants** should be named individually, not described only by reference to their connection or association with an **employer**.
134. Where one **applicant** wishes to apply in relation to different or separate circumstances, a separate **application** form may be appropriate. This may be the case, for example, where a seller and purchaser both wish to apply for a **clearance statement**. Whenever possible, copies of any related **application** forms should be attached and referred to.
135. If there are related **applications**, the **application** process is likely to proceed more efficiently if the **applicants** liaise with each other as appropriate. Separate **applications** regarding the same circumstances should refer to each other.

## Approved withdrawal arrangements and type A events

136. If an **approved withdrawal arrangement** application is made and there is a related **type A event** for which parties wish to apply for a **clearance statement**, separate applications should be made for approval of the **approved withdrawal arrangement** and for a **clearance statement**.
137. In most cases, the **approved withdrawal arrangement** will be relevant to the **application**, and therefore the **approved withdrawal arrangement** application should be submitted with the **application**.

## Regulated apportionment arrangements and type A events

138. A **regulated apportionment arrangement** may be a **type A event**. If an **application** is made the regulator will consider it together with the applications for a **regulated apportionment arrangement**.

## Clearance statements requested

139. In addition to **clearance statements** that confirm that in the opinion of the regulator it would not be reasonable to impose the requirements of a **financial support direction** or a **contribution notice** in relation to the **scheme**, the **applicants**, and the circumstances described in the **application**, the regulator has a power to grant a **clearance statement** in relation to **contribution notices** which states that, in its opinion and in the circumstances described in the **application**, the **applicant** would not be a party to an act or a deliberate failure to act. This would require significantly more evidence and, therefore, extensive due diligence, which would take much more time. It would, therefore, be more appropriate and proportionate for the **applicant** and also for the regulator to consider granting a **clearance statement** based upon reasonableness.

## What happens when an application is received?

140. Once the regulator's corporate risk management team has received the completed **application** form, a multidisciplinary case team will be allocated.
141. The case team will usually discuss the **application** with the **applicants** and the trustees to seek clarification or explore the facts of the case further. The regulator will expect the trustees to have full knowledge of the **application** and to have had time to consider the impact of the **type A event**, to have considered appropriate mitigation, and to have entered into any necessary negotiations, taking independent professional advice as required.
142. Once we have received the final, signed **application** form with sufficient information, we will formally consider whether to grant a **clearance statement**. In some circumstances, a **clearance statement** may not be granted.
143. A decision by the regulator to grant a **clearance statement** is subject to a formal statutory process.
144. If we are minded to grant a **clearance statement**, we will issue all **directly affected parties** with a 'warning notice'. This is a document that describes the circumstances set out in the **application** and that the regulator is relying on. It warns the **directly affected parties** that the regulator is considering granting a **clearance statement** based on these facts.
145. All **directly affected parties** will have an opportunity to provide representations on the warning notice and any representations received before the stated deadline are considered prior to issuing any determination to grant a **clearance statement** (which would be in the form of a 'determination notice' together with the **clearance statement**). The time allowed for representations will usually be discussed with the **directly affected parties**.

146. During **clearance**, the regulator has the power to ask for further information or to request that the **application** be amended. The determination notice confirms the contents of the **application**.
147. It is inappropriate for the regulator to intervene on behalf of every **scheme** in relation to every **type A event**. Our preference is to be a referee in most transactions, rather than a player. We recognise, however, that this is an aspiration and that we will need to drive best practice, and it should be noted that the regulator has objectives over and above those of trustees, including the objective to reduce the risk of calls on the **PPF**.
148. If it appears that the trustees have not dealt with any conflicts of interest, have not had the opportunity to consider the **application**, or have not taken independent professional advice to allow them to do so, then the progress of the **application** will be delayed.
149. Where the insolvency of the **employer** is likely and the **scheme** may be assessed by the **PPF**, then the **PPF** may be included in any discussions with the **applicants** and trustees. The **PPF** is a separate body from the regulator.

## Timescales for clearance

150. Our timescales for dealing with an **application** will be reduced if **applicants** carry out the following steps as early as possible:
  - involve the trustees and share relevant information;
  - ensure that any trustee conflicts have been dealt with;
  - ensure that the **applicants** and trustees have taken appropriate independent professional advice;
  - discuss and agree mitigation proposals;
  - inform the corporate risk management team of the likely **application**, and provide an outline of the **event**;
  - inform the corporate risk management team of any timescales and external deadlines, and provide an explanation of those deadlines;
  - liaise with any parties who are making a related **application**, as appropriate;
  - ensure that the **applicants** and the trustees will be available to discuss the **application** with the regulator; and
  - provide the appropriate information to support the **application**.

151. These steps will help us try to meet any reasonable timescales or deadlines the **applicant** may have.
152. During **clearance**, the parties should inform the relevant case team within corporate risk management if there are any changes to the proposed **event** or external deadlines.

## Enquiries

153. The corporate risk management team is happy to accept preliminary enquiries by relevant parties, such as potential **applicants** or trustees. These can be made on a no-names basis if necessary, although the level of guidance the regulator can provide may be limited accordingly. Such preliminary enquiries should be made direct to the corporate risk management team by contacting: **clearance@thepensionsregulator.gov.uk**
154. Those considering making an **application** should note that preliminary enquiries are not a substitute for obtaining a **clearance statement**. If an enquiry develops into an **application**, our view may change as new information and details are provided.
155. The information we provide in the course of any enquiry, or in the course of an **application**, is for guidance only and should not be taken as a definitive interpretation of the law.
156. The regulator does not accept liability for any reliance placed on any such information or guidance. Such information or guidance cannot be relied upon as assurance that the regulator will not later use its powers in relation to an **event**.

## The effect of a clearance statement

157. A **clearance statement** does not relate to any other **events** or circumstances, whether prior to, subsequent to or concurrent with the **event** described in the **application**. For example, if the regulator issues a **financial support direction clearance statement** in relation to the sale of the **employer** as described in the **application**, then this **clearance statement** will not restrict the regulator's powers to act in relation to any other **events** or circumstances. Using the same example, such a **clearance statement** would not prevent, for instance, the regulator issuing a **financial support direction** taking into account a return of capital that occurs after the sale of the **employer**, a prior apportionment of an **employer's s75 debt** or security granted to lenders as part of the transaction.
158. In some circumstances, the regulator may decide not to grant a **clearance statement**. A **clearance statement** does not represent approval of an **event**,



and a failure to obtain a **clearance statement** does not, by itself, prevent an **event** from proceeding.

159. A **clearance statement** will not bind the regulator if the circumstances giving rise to the regulator's powers to issue a **contribution notice** or a **financial support direction** (as appropriate) are materially different from the circumstances described in the **application**. Therefore, a **clearance statement** will only be of benefit if the **event**, any mitigation, and other relevant circumstances are accurately and fully described in the **application**. If it is not and the differences are material, or if circumstances change in a material way, the regulator may consider exercising its anti-avoidance powers.

### **Changes to the circumstances described in an application**

160. After a **clearance statement** has been granted, any material changes to the **event** or circumstances described in the **application** should be notified to the regulator. If the parties wish to apply for a **clearance statement** in relation to a materially different **event** or circumstances, a new **application** must be submitted. If the regulator considers that the difference is not material, confirmation of this can be requested by the **applicants**.

This version is out of date.  
please refer to the regulator's  
website for the version  
dated June 2009.

## Appendix A: Assessing the employer covenant

161. When assessing the strength of the **employer covenant** it is necessary to assess both:
- the **employer's legal obligations** to the **scheme**; and
  - its **financial position** (both current and prospective).
162. Also relevant in the context of **type A events** and an **application** is the covenant of the **wider employer group**. This is always relevant but will be of particular importance where:
- the **financial position** of the identified **employers** is not of sufficient strength to support the **scheme**;
  - the **event** affects the **financial position** of the **wider employer group**, for example by removing entities from the group or transferring assets (whether within or outside) the group;
  - the **employers** have indicated that the trustees should take the **financial position** of the **wider employer group** into account when assessing the **employer's financial position**;
  - there is existing support for the **scheme** from the **wider employer group**, for example in the form of a parental guarantee; or
  - there is interdependency between entities in the **wider employer group** and the **employer**.
163. Employees and trustees should remember, though, that only certain members of the **wider employer group** (**employers** or those with contractual obligations) may be legally liable to contribute to the **scheme**. Therefore, whilst the **wider employer group** is always relevant, trustees should be cautious about over-reliance on the **wider employer group**.
164. When assessing the **employer covenant**, trustees may also consider the **employer's** willingness to fund the **scheme**. However, they should be aware that assurances from the **employer** that are not legally binding may not protect the position of the **scheme**.

### Assessing the employer's legal obligation to the scheme

165. To carry out a covenant assessment it is always necessary to identify the legal **employers** in relation to a **scheme**. This is important, because the scope of **legal obligations** to the **scheme** will define the extent of support for the **scheme** that trustees can legally enforce. The **financial position** of the

**employer** and other relevant parties will determine the extent to which any **legal obligations** can be met.

166. Identifying the **employers**, and analysing and assessing their **legal obligations** to the **scheme**, can be a complex process and will normally require legal advice. **Employers** and trustees should identify:
- those **employers** who could be liable, now or in the future, to pay a **s75 debt**, and ascertain the likely amount of the **s75 debt** that may become due from each **employer** in a multi-employer **scheme** (which may depend upon the circumstances in which the **s75 debt** arises and the trust deed and rules as well as legislation and any **scheme apportionment arrangement, regulated apportionment arrangement, withdrawal arrangement** or **approved withdrawal arrangement**);
  - those **employers** required by a statutory schedule of contributions to pay contributions to the **scheme** and, in a multi-employer **scheme**, assess the proportion of the total contribution that is payable by each **employer**; and
  - those **employers** participating in the **scheme** and who are bound by the **scheme's** trust deed and rules, and identify the **employer's** powers and obligations under the deed and rules.
167. Depending on the circumstances, it may also be appropriate to identify: those **employers** whose insolvency could result in the **scheme** entering an **assessment period**.
168. In some cases, former **employers** will be included in the above categories because of the relevant statutory definitions.
169. It is important to remember that some **employers** may not fall into all of the above categories.
170. Where a review of the **wider employer group** is appropriate, it will also be relevant to identify which parties are within the **wider employer group**.
171. Other **legal obligations** of either the **employer** or another entity in the **wider employer group** to the **scheme** will also be relevant, for example, in any guarantee, ancillary deed or agreement.
172. The legal relationships between the **employer** and the rest of the **wider employer group** are also relevant because these could have an impact on the **employers**.
173. The legal domicile of the **employers** and the **wider employer group** should also be considered.

## Assessing the employer's financial position

174. Assessing an **employer's financial position** can often be a very complex process, and may require independent professional advice where there is likely to be a materially **detrimental event**. The level of detail necessary for such a financial review will usually be proportionate to the level and materiality of the potential detriment. The relevant factors to consider in assessing the current and prospective **financial position** of the **employer** (and, where relevant, the **wider employer group**) may vary depending on the nature and effect of the **detrimental event**, and may include:

- the nature and prospects of the industry in which it operates;
- its competitive position and its relative size within that industry;
- its management ability and track record;
- its financial policies;
- its profitability, capital structure (including balance sheet and financial leveraging), cash flow and financial flexibility; and
- its credit rating (if any), which may have some bearing on these considerations. However, the credit rating on its own should not be seen as a substitute for an independent review, unless the detail of the analysis behind the rating is made available and is acceptable to the trustees.

175. For many **detrimental events**, the nature and structure of the **wider employer group** will also be relevant, including the ultimate owners of the **employer** or the **wider employer group**. The extent of a review of the **wider employer group** will depend upon the nature and materiality of the **event**. Relevant considerations may include:

- the legal domicile of the entities within the **wider employer group**, including the ultimate owners;
- any restrictions or limits on capital and cash flows within the **wider employer group**;
- whether there is interdependency between the **wider employer group** and the **employer**, for example:
  - whether the **employer** is providing services to the rest of the group;
  - whether the **employer** services debt that sits elsewhere in the group;
  - whether there is security over the **employer's** assets in respect of any debt; or

- what additional funds, if any, exist within the **wider employer group** that the **scheme** may have recourse to, either through a financial guarantee or other legal right;
  - what additional covenant, if any, is provided by the **wider employer group**, and whether the structure of the **wider employer group** adds strength to the covenant of the **employer**;
  - any investment timeframe of the ultimate owners, covering the manner in which they extract returns on any capital invested and whether the ultimate owners have any **legal obligations** to support the **scheme**;
  - the potential for the **scheme** to have access to additional funds from the **wider employer group**; and
  - the nature and enforceability of any contingent security provided to the **scheme** by the **wider employer group**.
176. **Employers** and trustees should be careful to review the **financial position** of the **employers** and the **wider employer group** in the context of each entity's legal relationship with the **scheme** and the extent of its enforceable obligations.

#### **Information from the employer**

177. Information that may assist with the assessment of **employer covenant** may include the types listed below. The level and type of information that is appropriate will depend upon the nature and materiality of the **event**. Types of information may include:
- updates on the group's **financial position**, including key performance data and future business plans;
  - statutory company accounts (and management accounts if appropriate) to ascertain its profitability, capital structure, cash flow and financial flexibility;
  - independent business reports;
  - confirmation of compliance with banking and other creditor covenants;
  - information relating to security that has been or will be granted;
  - any reviews of the **scheme**, or any plans or proposals in relation to the **scheme**;
  - information from rating agencies or credit scoring institutions;
  - information from credit specialist advisers;
  - information that relates to the risk-based element of the **PPF's** levy;

- any new developments in the credit advisory services market aimed at assisting the trustees to evaluate the **employer's financial position**; or
  - publicly available information such as press reports and the **employer's** website.
178. **Employers** should recognise that it is in the best interests of all concerned to have properly informed, knowledgeable and competent trustees. To achieve this, they should share information relating to the **employer covenant** and plans for the **scheme** and any **type A event** that may occur with the trustees at the earliest opportunity. This should also help the **application** process proceed more quickly and efficiently. The confidentiality of information is discussed at paragraphs 105 to 107.
179. Much of the information provided to the regulator is restricted information, which means that the regulator is restricted by law from disclosing the information without consent, although some statutory exemptions apply.
180. Under the **scheme administration regulations**, the **employer** and its auditor or actuary is obliged, on request, to provide trustees with such information as the trustees or their professional advisers reasonably require for the performance of their duties. This includes information reasonably required to assess the **employer covenant**.
181. The **employer** is also required under the **scheme administration regulations** to make the trustees aware, within one month of its occurrence, of any **event** that could reasonably be considered of material significance to the trustees or their professional advisers in the exercise of their functions. This includes **type A events** and any **events** that may impact on the benefits of **scheme** members. In practice, the regulator would expect **employers** to notify trustees of **type A events** much earlier.

## Appendix B: Contribution notices and financial support directions

### Contribution notices

182. The regulator can issue a **contribution notice** to a **person**, requiring an amount up to and including the **s75 debt** which is due from the **employer**, or the **s75 debt** which might become due on the winding up of the **scheme**, to be paid to the **scheme** (or a **receiving scheme**), or the **PPF**, if the regulator is of the opinion that the main purpose or one of the main purposes of an act or deliberate failure to act was:
- to prevent the recovery of the whole or part of a **s75 debt** which was, or might become, due from the **employer** in relation to the **scheme**; or
  - 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.
183. A **contribution notice** may be issued to a **person** who is party to the act or failure to act and who is also the **employer** or a **person connected or associated** with the **employer**. This includes parties who knowingly assist in the act or failure to act. A **contribution notice** may be issued to one or more **persons**.
184. The regulator must consider that it is reasonable to impose liability on a **person** to pay the sum specified in a **contribution notice**. This will depend on various matters, examples of which are outlined below:
- the degree of involvement of that **person** in the act or failure to act; for example, did the **person** sanction the business deal?
  - the relationship the **person** has or had with the **employer**; for example, is the **person** a director or a senior executive of the **employer**? Is the **person** a company that is the parent company of the **employer**?
  - any connection or involvement the **person** has or had with the **scheme**; for example, is the **person** a trustee of the **scheme** or an **employer** in relation to it?
  - whether the act or failure to act was a **notifiable event** that the **person** had a duty to notify to the regulator but failed to do so;
  - all the purposes of the act or failure to act, including whether a purpose was to prevent or limit loss of employment;

- the financial circumstances of the **person**; for example, the regulator may consider that it is appropriate for less than the full **s75 debt** to be required if contributions to another **scheme** would otherwise be materially affected;
  - the value of any benefits which, directly or indirectly, the person receives or is entitled to receive from the **employer** or under the **scheme**;
  - the likelihood of **relevant creditors** being paid and the extent to which they are likely to be paid.
185. The regulator does not have to consider a matter listed above if it does not consider that it is relevant, and it will consider other matters outside this list, for example the status of the **scheme**, if it considers that such matters are relevant.
186. For acts or failures on or after 14 April, when considering whether it is reasonable to impose liability on a **person** to pay the sum specified in a **contribution notice**, the regulator must also have regard to 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.
187. The regulator can issue a **contribution notice** in relation to acts that occurred, or failures to act that first occurred, on or after 27 April 2004. The regulator can determine to issue a **contribution notice** up to six years after an act occurred, or up to six years after a failure to act first occurred or continued.
188. For acts occurring before 14 April 2008 an additional condition applies to **contribution notices** in some circumstances requiring the act to have had a main purpose that was 'otherwise than in good faith' (as set out in the previous version of this Guidance).
189. Government has confirmed and clarified the legislation so that an act or failure for a **contribution notice** can be taken to mean either a single act or failure or a series of acts or failures that a **person** was party to.

## Financial support directions

190. The regulator can issue a **financial support direction**, requiring financial arrangements to be put in place to support a **scheme**, when the **employer** is a **service company** or is **insufficiently resourced** at the relevant time. There is no requirement for there to have been an act or failure to act. The 'relevant time' is a time determined by the regulator which falls within the period of 12 months ending with the regulator's determination to issue the **financial support direction**.



191. A **financial support direction** can be issued to the **employer** or **persons connected** or **associated** with the **employer**. A **financial support direction** cannot normally be issued to an individual, except in specific circumstances.
192. Once the regulator has issued a **financial support direction**, those named in the direction must put forward proposals for financial support for the **scheme** (or **receiving scheme**). If the regulator considers these arrangements to be reasonable in the circumstances, it may issue a notice approving the arrangements.
193. The financial support arrangements which must be put in place under a **financial support direction** may include, but are not limited to:
- where an **employer** is part of a group, all members of the group becoming jointly and severally liable for the pension liabilities in relation to the **scheme**;
  - the holding company within the group becoming liable for the pension liabilities in relation to the **scheme**;
  - an arrangement whereby additional financial resources are provided to the **scheme**.
194. The **employer** is a **service company** if:
- it is a member of a group of companies; and
  - its turnover in the latest available statutory accounts is solely or principally derived from amounts charged for providing the services of its employees to other members of the group.
195. The **employer** is **insufficiently resourced** if:
- the value of its resources is less than 50 per cent of the estimated **s75 debt**; and
  - the value of the resources of a **person** who is **connected** or **associated** with the **employer**, or (at a time falling on or after 14 April 2008) the value of the aggregate resources of persons who are connected and associated with the employer and with each other, when added to those of the **employer**, would be 50 per cent or more of the estimated **s75 debt**.
196. Assessing a **person's** resources is a complex process. The Pensions Regulator (Financial support directions, etc.) Regulations 2005 prescribe how to determine what constitutes the resources of a **person** and how to determine, calculate and verify the value of a **person's** resources.

197. The regulator must consider that it is reasonable to impose the requirements of a **financial support direction** on a **person**. This will depend on various issues, examples of which are outlined below:
- the relationship the **person** has or had with the **employer**; for example, is the **person** a company that is the parent company of the **employer**?
  - the benefits the **person** has received directly or indirectly from the **employer**; for example, has the **person** received assets or dividends from the **employer**, or shared common security or cash flow arrangements or gained tax advantages?
  - any connection or involvement the **person** has or had with the **scheme**; for example, was the **person** a trustee of the **scheme** or an **employer** in relation to it?
  - the financial circumstances of the **person**.
198. The regulator does not have to consider a matter listed above if it does not consider that it is relevant, and it will consider other matters outside this list, for example the status of the **scheme**, if it considers that such matters are relevant.

#### **Connected persons**

199. A **person** is **connected** with a company if:
- he is a director or shadow director of the company, or an **associate** of such a director or shadow director; or
  - he is an **associate** of the company.

#### **Associated persons**

200. A **person** is an **associate** of an individual if that **person** is, for example:
- the individual's **husband** or **wife** or **civil partner**;
  - a **relative** of the individual;
  - a **relative** of the individual's **husband** or **wife** or **civil partner**;
  - the **husband** or **wife** or **civil partner** of a **relative** of the individual; or
  - the **husband** or **wife** or **civil partner** of a **relative** of the individual's **husband** or **wife** or **civil partner**.
201. A **person** is an **associate** of any **person** with whom he is in partnership, and of the **husband** or **wife** or **civil partner** or a **relative** of any individual with

whom he is in partnership. A Scottish firm is an **associate** of any **person** who is a member of the firm.

202. A **person** is an **associate** of any **person** whom he employs or by whom he is employed. Any director or other officer of a company is to be treated as employed by that company.
203. If a **person** is **associated** with another **person** then they are **associates** of each other.
204. A company is an **associate** of another company if:
- the same **person** has control of both, or a **person** has control of one and **persons** who are his **associates**, or he and **persons** who are his **associates**, have control of the other; or
  - a group of two or more **persons** has control of each company, and the groups either consist of the same **persons** or could be regarded as consisting of the same **persons** by treating (in one or more cases) a member of either group as replaced by a **person** of whom he is an **associate**.
205. A company is an **associate** of another **person** if that **person** has control of it or if that **person** and **persons** who are his **associates** together have control of it.

### **Control**

206. A **person** is to be taken as having control of a company if:
- the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions; or
  - he is entitled to exercise, or control the exercise of, one-third or more of the voting power at any general meeting of the company or of another company which has control of it.
207. Where two or more **persons** together satisfy either of the above conditions, they are to be taken as having control of the company.

## Appendix C: Definitions

The following terms, which are in bold in the text, are defined below. Please note that depending on the context of their use the single may also include the plural and the plural the single.

- **Act:** means the Pensions Act 2004 (as amended).
- **Applicant:** means those seeking a **clearance statement** as an applicant named in the **application**.
- **Application:** is an application made for a **clearance statement** under:
  - s42 of the **Act** in respect of the regulator's power to issue a contribution notice; or
  - s46 of the **Act** in respect of the regulator's power to issue a financial support direction.
- **Approved withdrawal arrangement:** is an approved withdrawal arrangement under the Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678) (as amended), which does require regulator approval.
- **Associated:** has the same meaning as in s435 of the Insolvency Act 1986. See also paragraphs 200 to 205.
- **Assessment period:** is the period after a qualifying insolvency event has occurred in relation to an **employer** of an eligible scheme, during which the **PPF** will assess whether or not it must assume responsibility for the **scheme**. See s132 of the **Act**.
- **Civil partner:** includes former **civil partner** and reputed **civil partner**.
- **Clearance:** is a term used to describe the voluntary process of obtaining a **clearance statement** from the regulator.
- **Clearance statement:** is statement that, in the regulator's opinion and in the circumstances described in the **application**, it would not be reasonable to impose, on the **applicants**, any liability under a **contribution notice** or the requirements of a **financial support direction**, all in relation to a **scheme** and a particular **event**. The form of the clearance statement will depend upon whether it is sought in respect of a **contribution notice**, a **financial support direction** or both. See also paragraphs 139 and 157 to 159.
- **Connected:** has the same meaning as in s249 of the Insolvency Act 1986. See also paragraph 199.
- **Contribution notice:** require payments to be made to the **scheme** (or a **receiving scheme**) or to the **PPF** by **employers** or **connected** or **associated**

**persons** and the term has the same meaning as in s38 of the **Act**. See also paragraphs 182 to 189.

- **Detrimental event:** is an **event** that could be detrimental to the ability of the **scheme** to meet its liabilities as well as some events that are directly detrimental to members' benefits. See also paragraph 26.
- **Directly affected party:** is a **person** appearing to the regulator to be directly affected by the regulatory action under consideration.
- **Employer:** is, as the context requires, an employer of persons in the description of employment to which the **scheme** in question relates for the purposes of the **contribution notices** and **financial support directions** as defined by s318(1) of the **Act** and as may be extended under s318(4) of **Act** , or an employer for any of the purposes referred to in paragraphs 165 to 169. See also paragraph 21. Also, in the case of a multi-employer **scheme**, where this guidance refers to the 'employer', this should be taken to include all employers.
- **Employer-related event:** is an **event** in respect of an **employer**. See also paragraphs 31 to 62.
- **Employer covenant:** is measured by the **employer's legal obligation** to the **scheme** and its **financial position** (both current and prospective). See also paragraphs 33 to 35 and Appendix A.
- **Event:** includes transactions, agreements, decisions, other acts and failures to act.
- **Financial position:** is the **employer's** financial standing and prospects (both current and prospective). See also paragraphs 174 to 176.
- **Financial support direction:** require financial support to be put in place for the **scheme** (or a **receiving scheme**) by **employers** or **connected** or **associated persons** and the term has the same meaning as in s43 of the **Act**. See also paragraphs 190 to 198.
- **Fixed charge:** is a charge either over ascertainable and defined assets or assets capable of being ascertained and defined that prevents those assets from being dealt with free from the charge without the consent of the chargee.
- **Floating charge:** is a charge over a class of present or future assets that allows those assets to be dealt with in the usual course of business until it becomes a **fixed charge** or crystallises upon the occurrence of an event or satisfaction of a condition.
- **FRS17/IAS19:** are current accounting standards for retirement benefits, the primary objective of which is to ensure that a company's statutory financial statements reflect, at fair value, the assets and liabilities attributable to the employees' retirement benefits entitlement and any related funding. The **FRS17/IAS19** deficit will be the amount reported in the latest available audited

statutory accounts, unless the trustees and the **employer** agree that an updated amount is appropriate.

- **Husband:** includes former husband and reputed husband.
- **Insufficiently resourced:** has the same meaning as in s44 of the **Act**. See also paragraphs 195 and 196.
- **Legal obligation:** is any legislative, contractual, trust based or other legal requirement (both current and prospective) imposed upon a **person** in relation to a **scheme's** funding. See paragraphs 165 to 173.
- **Notifiable events:** are events in respect of either a **PPF** eligible **scheme** or its **employer** which must be reported to the regulator in accordance with s69 of the **Act**. See also paragraph 115.
- **Ongoing deficit** – is the funding shortfall revealed in a valuation undertaken under the **scheme's** trust deed and rules.
- **PPF:** is the Pension Protection Fund.
- **Person:** may be an individual, a company, or a partnership, including a limited liability partnership. Its application will depend upon the context.
- **Receiving scheme:** is a work-based scheme that, on or after 14 April 2008, receives a transfer of liabilities from the initial scheme in relation to which the contribution notice or financial support direction conditions were met, in accordance with sections 39A, 39B, 43A and 43B of the Pensions Act 2004 (as inserted by the Pensions Act 2008). A work-based scheme is either an occupational pension scheme, a personal pension scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, or a stakeholder pension scheme.
- **Regulated apportionment arrangement:** is a regulated apportionment arrangement under the Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678) (as amended), which requires regulator approval.
- **Relative:** has the same meaning as in s435 of the Insolvency Act 1986 and is an individual's: brother; sister; uncle; aunt; nephew; niece; lineal ancestor; or lineal descendant (treating any relationship of the half blood as being a relationship of the whole blood and the stepchild or adopted child of any **person** as his or her child, and an illegitimate child as the legitimate child of his or her mother and reputed father).
- **Relevant creditors:** has the same meaning as in section 38(7A) of the Pensions Act 2004 and means creditors of the **employer** or 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**.

- **Relevant deficit:** only applies in relation to **employer-related events** and is any deficit revealed by the comparison of the **scheme's** assets with its liabilities, calculated in accordance with the appropriate basis as detailed in paragraphs 48 to 55.
- **Scheme:** is, for the purpose of **contribution notices** and **financial support directions**, an occupational pension scheme, but does not include a scheme that only provides money purchase benefits or is exempt from **contribution notices** and **financial support directions** as prescribed under s38(1)(b) and s43(1)(b) of the **Act** respectively. Other statutory definitions apply as the context requires.
- **Scheme administration regulations:** is the Occupational Pension Schemes (Scheme Administration) Regulations 1996 (SI 1996/1715) (as amended).
- **Scheme apportionment arrangement:** is a scheme apportionment arrangement under the Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678) (as amended), which does not require regulator approval.
- **Scheme-related event:** is an **event** in respect of the **scheme**. See also paragraphs 63 to 79.
- **S179:** refers to s179 of the **Act** and is the **PPF's** valuation basis for a **scheme's** deficit, and it is used for the purpose of calculating the risk-based pension protection levy.
- **S75 basis:** refers to s75 of the **Act** and it is often known as the buy-out basis for a **scheme's** deficit. S75 requires the scheme actuary to apply certain methodology to estimate the amount needed to secure the **scheme's** liabilities with annuities purchased from a regulated insurance company.
- **s75 debt:** is the debt (including a contingent debt) owed by the **employer** to the trustees of the **scheme** and calculated in accordance with the **s75 basis**, including the whole or part of any such debt and debts that are, or might become, due (as the context requires).
- **Service company:** has the same meaning as in s44 of the **Act**. See also paragraph 194.
- **Statutory funding objective:** has the same meaning as in s221 to s233 of the **Act** (Part 3 of the **Act**), which is that a **scheme** must have sufficient and appropriate assets to cover its **technical provisions** (its liabilities).
- **Technical provisions:** is a calculation, based on methods and assumptions usually agreed by the trustees and **employer** and set out in Part 3 of the **Act**, of the amount needed at a particular time to make provision for the **scheme's** liabilities. Technical provisions are individual to each **scheme**. This will not yet be available for every **scheme**. Further information can be found in the scheme funding section on the regulator's website.

- **Type A event:** is any **event** that is materially detrimental to the ability of the **scheme** to meet its pension liabilities, as well as some **events** that are directly detrimental to members' benefits, as described in more detail in Part I.
- **Wider employer group:** consists of any **person** who is **connected** to or **associated** with the **employer**.
- **Wife:** includes former wife and reputed wife.
- **Withdrawal arrangement:** is a withdrawal arrangement under the Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678) (as amended) which does not require regulator approval.

This version is out of date,  
please refer to the regulator's  
website for the version  
dated June 2009.