

**THE PENSIONS REGULATOR - CODE OF PRACTICE 12:
APPLICATION OF THE MATERIAL DETRIMENT TEST
RESPONSE TO CONSULTATION ON DRAFT CODE**

The comments set out below form the formal response (“Response”) of Sacker & Partners LLP (“Sackers”) to the consultation by the Pensions Regulator (“TPR”) on its draft code of practice 12: Application of the Material Detriment Test (“the Draft Code”) which was published on 15 December 2008 (“the Consultation Document”).

Sackers is a firm of solicitors specialising in pensions law. The views expressed in this Response have been collated following discussions with a representative group of the firm’s solicitors.

General Comments

1. We note that the aim of this consultation is to enable TPR to assess the appropriateness of the draft code in delivering policy and legislative intention which is primarily aimed at tackling “new business models” in pensions which, in severing the link between sponsor and scheme, might have the effect of reducing security for members and increasing the risk of schemes going into the Pension Protection Fund.
2. The Draft Code provides a list of circumstances in which TPR will be able to exercise its powers in relation to the new material detriment test (“the Test”). However, although the introduction to the Draft Code states that codes are intended to “provide *practical guidelines* in relation to the exercise of functions under pensions legislation” (our emphasis), a list of circumstances by itself does not go very far towards providing guidance or assistance for trustees and employers in terms of the practical application of the Draft Code. It would therefore be helpful if the Draft Code were to include some examples of scenarios in which TPR envisages the Test applying (and not applying as the case may be).

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Circumstances in which TPR expects to issue contribution notices

Circumstance (iii) - the severing of employer support

3. As noted in the background to the Consultation Document, the purpose of the Code is to provide certainty for the pensions industry as to the type of buyout model which is targeted by the new Test. This reflects the assurance given in the statement by the Department for Work and Pensions (“DWP”) of 14 April 2008 (and reiterated in the Ministerial Statement given on 25 April 2008) that “the overwhelming majority of pension schemes will not be affected by these changes”. Taking that into account, we would suggest that circumstance (iii) is widely stated for the reasons set out below.
4. As drafted, it has the potential to apply in the course of “ordinary” corporate transactions, not solely those relating to the new business models which the Test is designed to cover. While it is, in our view, clear that circumstances (i), (ii), (iv) and (v) target specific issues which are unlikely to arise in the course of an ordinary transaction, circumstance (iii) is less clear cut. For this reason, we are concerned that significant numbers of parties to “ordinary” transactions may wish to apply for clearance, in order to obtain confirmation that they are outside the territory for contribution notices under circumstance (iii).
5. We believe that this concern could be practically addressed in a number of ways including:
 - (a) confirmation in the Draft Code: although (as noted above) the DWP has already sought to reassure the industry in relation to the intended application of the new Test, it would be helpful if this point could be reinforced in the Draft Code itself;
 - (b) clarification of circumstance (iii): the wording “employer support is removed” suggests that *any* removal of employer support (whether material or immaterial, in whole or in part) could, in theory, trigger the application of the Test. We do not believe that this is the policy intention (because circumstance (iii) otherwise refers to the employer support being “substantially reduced”) but could, as drafted, create uncertainty on ordinary commercial transactions. One example of this would be when a company leaves a group, resulting in an employer exiting a scheme. Even though the departing employer will be

required to comply with the employer debt legislation, without further clarification, circumstance (iii) could be considered to apply in this situation, because part of the employer support for the scheme will be removed. The addition of the word “wholly” before the word “removed” would make it clear that (iii) would not apply in these circumstances.

Sacker & Partners LLP
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