

## New contribution notices under PSA21 – TPR consults on code of practice changes



### Introduction

On 27 May 2021, TPR published a [consultation](#) on draft changes to [Code of Practice 12](#) (to be titled “Contribution Notices: Circumstances in relation to the material detriment test, the employer insolvency test and the employer resources test”). The proposed changes address the two new tests for imposing a Contribution Notice (“CN”), part of TPR’s anti-avoidance armoury, being introduced under [the PSA21](#).

### Key points

- The consultation covers changes to both the code and accompanying code-related guidance. TPR has also taken the opportunity to update and clarify the code and corresponding examples in its guidance based on its experience of using its CN powers to date.
- Those potentially in the frame for a CN are the scheme employers and anyone associated or connected with them.
- TPR’s new powers are expected to take effect from this autumn and TPR confirms that they will not apply to acts taking place before then.

### Background

Amongst other things, the PSA21 lays the groundwork for strengthening TPR’s powers. These new powers include the introduction of a new criminal offence of failure to comply with a CN or, in the alternative, a civil penalty of up to £1 million. The two new snapshot tests for imposing a CN (under which TPR can require payment to be made into a scheme with DB benefits) focus on “employer insolvency” and “employer resources”.

TPR is required to publish a code setting out the circumstances in which it expects to issue a CN if it is of the opinion that either of the two new tests have been met.

### The tests – current and new

## Current tests

A CN can currently be imposed where:

- the main purpose, or one of the main purposes, of an act or deliberate failure to act is to avoid or reduce the recovery of a statutory employer debt, or
- an act or deliberate failure to act has detrimentally affected in a material way the likelihood of accrued scheme benefits being received (“the material detriment test”).

As TPR’s power under the material detriment test is potentially very wide, safeguards were introduced with the aim of ensuring that it is appropriately targeted. These included:

- a requirement for TPR to publish a code of practice on the circumstances in which it expects to issue a CN based on this test, and
- a statutory defence.

## The two new tests

Subject to statutory defences, TPR will be able to impose a CN in either of the following circumstances:

- the “employer insolvency test” – broadly, this will be met if TPR considers that immediately after an act or failure to act a scheme was in deficit and, had a statutory employer debt fallen due (under section 75 of PA95), this act or failure to act “would have materially reduced the amount of the debt likely to be recovered by the scheme”
- the “employer resources test” – broadly, this will be met if TPR considers an act or failure to act “reduced the value of the resources of the employer” and that reduction was material relative to the estimated statutory employer debt in relation to the scheme.

A recent Government consultation on [draft regulations](#) makes clear that its preferred approach for assessing “employer resources” is by reference to “normalised profits” before tax (ie stripping out non-recurring or exceptional items).

# The draft revised code

The draft code sets out detail of the tests and how relevant figures are to be calculated. The value of scheme assets and liabilities, as well as the amount of any statutory employer debt, will all be estimated by TPR.

The list of circumstances in which TPR would expect to issue a CN where one of the three tests could be met are as follow:

- sponsor support is removed, substantially reduced or becomes nominal (any of the tests)
- there is a weakening of the scheme’s creditor position (material detriment and/or employer insolvency tests)
- some instances of paying a dividend or a return of capital by a sponsoring employer (any of the tests)
- payments favouring other creditors of the employer over the scheme where no such sums are then due to those creditors (any of the tests).

However, a CN may only be issued if it is reasonable to impose liability on the person to pay the sum specified in the CN, having 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, and
- such other matters as TPR considers relevant.

It is therefore possible for one of the three tests to be met but for TPR decide not to issue a CN in the circumstances.

## Guidance

The code-related guidance provides examples to illustrate how the three tests might be considered in practice.

As with the previous iteration of the guidance, the examples are for illustrative purposes only; TPR notes that they should not be considered as setting precedents, and that they are not exhaustive and do not illustrate all instances where TPR may or may not act.

The updated draft notes in addition that TPR may choose to run more than one case in the alternative (for example, on the basis that the employer resources test is met or, in the alternative, because the material detriment test is met).

A number of new illustrative examples are given, setting out actions that TPR considers could be the subject of a CN meeting one of the three tests. In each example, it is assumed that no or inadequate mitigation was provided. The updated and additional examples include:

- a restructuring, where sponsor support is reduced
- a “manufactured” insolvency where sponsor support is removed
- an increase in debt or prior-ranking security, or a leveraged acquisition, with a weakening of the scheme’s creditor position
- payment of unusual dividends to the parent company.

## Next steps

The consultation closes on 7 July 2021.

The updated code will be presented in the new “single code” modular format (see our [Alert](#)) when it is finalised later in the year.

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