

20 June 2008

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Dear Sir,

**Response to the Consultation on “Amendments to the anti-avoidance measures in the Pensions Act 2004” of April 2008**

PricewaterhouseCoopers LLP (PwC) and PricewaterhouseCoopers LLP Legal (PwC Legal) are pleased to be able to respond to this consultation.

As consultants and legal advisers to a wide range of organisations, including trustees, sponsoring employers, providers of capital and debt, and financial services providers, we understand well the current market together with the likely future developments. We also understand sponsors’ motivations in seeking to transfer risk.

We also have considerable experience of engaging with Pensions Regulator in relation to both Scheme Funding and Clearance issues on behalf of our clients.

In our view the current regulatory regime is working well. This view is supported by the NAO Report on the Pensions Regulator and the Regulator’s own annual reports.

The volatility of pension deficits and their impact on the balance sheet, together with additional cost, both monetary and time, of renegotiating with the pension scheme when any corporate transaction takes place, means that sponsors are looking at ways to reduce risk and the market is seeking solutions to assist them in that.

Currently the cost of fully buying out a scheme is notably lower than it was a year or two ago. However, it is still beyond the reach of most sponsors. We are therefore pleased that the Government welcomes innovations in the pensions market as current deficits, and thus security of members’ benefits, will otherwise remain at risk.

There are of course many reasons why a sponsor covenant may weaken, lack of investment in the business being one. We are aware anecdotally of decisions being made not to invest in sponsors of defined benefit pension schemes as a result of the proposals to extend the Regulator’s powers. It would be an unfortunate consequence of the proposed changes if they resulted in an increased call on the PPF and subsequent reduction of members’ benefits as a result of such lack of investment in sponsors.

Indeed, we are not convinced the extension of the powers is necessary to deal with the new models. The Regulator has many powers it has yet to exercise and its failure to attempt to exercise them does not as yet mean that they do not work.

Any new power should address the security given to a pension scheme and the risk of that security reducing and, in particular, address the risk of abandonment. We believe any new powers should focus on this, for example by requiring a new provider to put in place security up to the level of the previous employer covenant when the operating business fully or substantially ceases.

In our opinion, the proposals appear to go well beyond addressing the non insured business model but will result in a situation in which any significant corporate activity(ies) could be subject to a Contribution Notice if at some date in the future there is judged to have been a material detrimental impact upon the pension scheme – even if it was not noticed at the time of the event itself.

One of the consequences therefore will be a significant increase in clearance applications as industry will take the view that larger business decisions require Regulator sign-off.

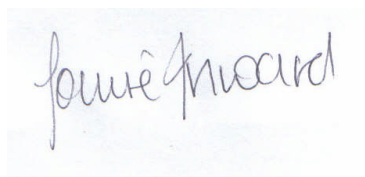
The changes in our view will make business turnarounds and recovery even more difficult. It will be almost impossible for an insolvency practitioner not appointed as such but seeking to rescue the business before insolvency to obtain new investment or sell assets to pay secured debt without being at risk. Of course Clearance could be sought. However often there will be extremely short timetables – for example where refinancing is critical to meet payroll obligations.

Our detailed comments on the issues raised are attached.

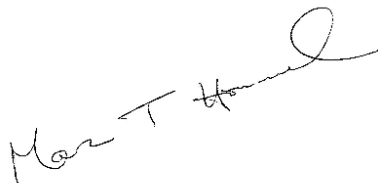
### Conclusion

We remain keen to work with you to ensure that if changes occur they do not have unforeseen consequences, on business, pension trustees or the Regulator, and have set out some alternative approaches that could be used in our detailed response. We are happy to continue to meet with officials to discuss how the policy intention might be met without damaging both business and defined benefit schemes.

Yours sincerely



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**The powers of the Pensions Regulator:**

**Proposed amendments to the anti-avoidance measures in the Pensions Act 2004**

**Response of PricewaterhouseCoopers Legal and PricewaterhouseCoopers LLP to the  
Consultation Paper dated April 2008**

## Executive Summary

- **The current regulatory regime is working well**
- **The volatility and impact of pension deficits means sponsors seek ways to minimise the risks their schemes pose to their businesses**
- **Innovative solutions are needed to reduce risk**
- **Any extension to regulatory powers should be carefully targeted to catch scheme abandonment only**
- **There is a risk the proposed changes will result in an increased call on the PPF**
- **There is no evidence that the Regulator's current powers do not work**
- **The proposals will affect corporate transactions and increase the number of Clearance applications**
- **Business recovery is likely to be affected if the proposed changes are implemented**

## Current Situation

The introduction of the Pensions Regulator and Pension Protection Fund has greatly increased the security of members' benefits and, rightly, increased both the financial and management commitment sponsors must give to defined benefit schemes.

The Regulatory regime is in our view currently working well. This view is supported by the NAO Report on the Pensions Regulator and the Regulator's own annual reports.

We recognise however that the market is changing. The volatility of pension deficits and their impact on the balance sheet, together with additional cost, both monetary and time, of renegotiating with the pension scheme when any corporate transaction takes place, means that sponsors are looking at ways to reduce risk and the market is seeking solutions to assist them in that.

Currently the cost of fully buying out a scheme is notably lower than it was a year or two ago. However, it is still beyond the reach of most sponsors. We are therefore pleased that the Government welcomes innovations in the pensions market as current deficits, and thus security of members' benefits, will otherwise remain at risk.

Sponsors can be trapped in a situation where pension scheme deficits are reducing the business options available to them, be that taking on more debt in order to grow, giving security over assets to refinance at more favourable rates or paying dividends to shareholders (which of course include other pension schemes). All these options now have an additional cost in that the current Regulatory regime means that mitigation for the pension scheme must be put in place. For some smaller sponsors, this means that no profit is made as all the money flows back to the scheme. Others are unable to borrow to grow. This can also mean reduced or no management rewards, reducing the pool of qualified people willing to manage such businesses.

As a result of these pressures, there is a considerable push to reduce pension risk, either by a buy-out, insured or otherwise, or by means of other methods such as an enhanced transfer exercise, the purchase of longevity swaps or hedging of some of the risks.

## **Proposed changes – summary of views**

We welcome a number of the suggestions raised in the consultation document, albeit the devil will be in the detail. For instance the ability to consider a group of connected companies rather than being required to find a single entity when meeting the requirements of the “insufficiently resourced” test could be advantageous, but only if “group” is appropriately defined to prevent cherry-picking of assets by the Regulator. We also welcome the proposal that a former employer can be directed to compensate a non-connected scheme created from a bulk transfer of liabilities from the employer's scheme as this helps ensure that transferred members are protected.

## **New models**

The proposed changes are designed to restrict non-insured buy-outs. Whilst we recognise the danger of a reduced employer covenant to pension schemes, we do not agree that a non-insured buy-out is inherently wrong. If such a sponsor were able to match or improve the existing sponsor covenant then a non-insured buy-out should in our view be allowed. Indeed it appears to us that the non-insured model may be preferable in some situations – for example where there is a management buy-out of the sponsor when the reduction in covenant may allow the business to continue.

We consider it misguided to focus on profit to be made by the new sponsor. Profit from the scheme can only be received once it is fully funded. We note that insurance companies profit from the sale of annuities as do many others involved in pension schemes. Indeed, it could be argued that the best results and security for a pension scheme could be achieved if all the stakeholder interests are aligned.

Any new power should address the security given to a pension scheme and the risk of that security reducing and, in particular, address the risk of abandonment. We believe any new powers should focus on this, for example by requiring a new provider to put in place security up to the level of the previous employer covenant when the operating business fully or substantially ceases.

There are of course many reasons why a sponsor covenant may weaken, lack of investment in the business being one. We are aware anecdotally of decisions being made not to invest in sponsors of defined benefit pension schemes as a result of the proposals to extend the Regulator's powers. It would be an unfortunate consequence of the proposed changes if they resulted in an increased call on the PPF and subsequent reduction of members' benefits as a result of such lack of investment in sponsors.

## **Reservations**

Indeed, we are not convinced the extension of the powers is necessary to deal with the new models. The Regulator has a number of powers it has yet to exercise and its failure to attempt to exercise them does not as yet mean that they do not work.

Our greatest reservations relate to the proposed change to s38 Pensions Act 2004 where the test for issuing a Contribution Notice is to move from purpose/intention to effect of the act/transaction. According to the consultation document, the intention behind the proposals is to address the launch of new business models severing the link between the employer and the pension scheme.

In our opinion, the proposals appear to go well beyond addressing that position to one in which any significant corporate activity(ies) could be subject to a Contribution Notice if at some date in

the future there is judged to have been a material detrimental impact upon the pension scheme – even if it was not noticed at the time of the event itself.

We note the comments about the difficulty of proving intent. However, it only needs to be shown that the Regulator reasonably believes the purpose, or one of the purposes, is to avoid the pension deficit. This can be shown by looking at all the circumstances including the Regulator's guidance.

If there must be an extension of the power to ensure those that do not consider the pension scheme when taking an action can be subject to a Contribution Notice then it should be done by including those who recklessly or negligently take such actions, thus ensuring those properly carrying out their duties are not at risk for the following six years.

We note that the likely individual recipients of Contribution Notices, directors, already have a duty to consider the wider implications of their acts under the Companies Act. 2006 which says at s172;

### **Duty to promote the success of the company**

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.

In our view, the impact of any action must already weigh on any directors' decision. There is a danger that these changes will mean directors will not give these considerations equal weight, nor be able to act to promote the success of the company if they are at personal risk.

### **Business recovery**

These changes in our view will make business turnarounds and recovery even more difficult. It will be almost impossible for an insolvency practitioner not appointed as such but seeking to rescue the business before insolvency to obtain new investment or sell assets to pay secured debt without being at risk. Of course Clearance could be sought. However often there will be extremely short timetables – for example where refinancing is critical to meet payroll obligations.

A number of banks have confirmed to us they will be unwilling to lend such additional money without security. The risk to the new director, or shadow director of granting such security is likely to mean that he will have to seek Clearance or put the business into insolvency which would of course lead to a claim on the PPF.

## **Clearance**

We note there is a proposed statutory defence, that the detriment to the scheme was not reasonably foreseeable, and that Government believe this should help negate concerns. However, this is a hindsight test and it is not entirely clear how a view that might be taken when an event has occurred as to whether it was reasonably foreseeable.

One of the consequences therefore will be a significant increase in clearance applications as industry will take the view that larger business decisions require Regulator sign-off.

We consider that the proposals will put trustees under increasing pressure to seek additional funds from their sponsor; it will be difficult for them and the Regulator to justify why a materially detrimental event has occurred with their agreement and Clearance. It seems to us that they will as a starting point always require mitigation to the level of the potential detriment rather than to address the Relevant Deficit as now.

## **Process**

The proposals to change these particular powers, which were heavily debated and amended in Parliament, by way of regulations is not in our view consistent with good policy making. It denies Parliament the proper opportunity to consider the impact and make appropriate amendments.

Affirmative regulations will not provide the proper level of scrutiny or opportunity for amendment. We are also concerned that the powers are too wide and the reduction or otherwise by guidance is unacceptable. Guidance can be changed at any time and without consultation and is in event by its very nature not authoritative on when the powers would or would not be used.

We believe that amendments such as these should take place by way of primary legislation and the restrictions on their use placed in regulations which could be changed only after consultation.

We also consider that a full Regulatory impact assessment on the cost of these changes should be carried out.

## **Appendix A – Detailed Comments**

**Proposed Amendment** To provide that the aggregate resources of a whole group of companies may be considered when determining whether an FSD can be issued – as an alternative test, rather than always requiring the Regulator to identify one single company which is sufficiently resourced to enable the issue of a Direction.

**Government’s rationale for change** For the purposes of the insufficiently resourced test for issuing an FSD, there must be a single person associated or connected to the employer who is sufficiently well-resourced that it has the resources itself to meet the difference between the employer’s resources and at least half its section 75 debt to the scheme. This condition means that the members of a group of companies, for example, could divide up the resources of the group amongst themselves so that no one of them has sufficient resources to meet the difference. The test will therefore not be satisfied, with the consequence that no FSD could be issued.

To address this issue the Government proposes to amend the test so that the test could also be satisfied if a group of associated or connected persons is between them sufficiently resourced to meet the test. This would be more in line with the support that can already be required under an FSD and would remove the risk that a group of companies could manipulate their affairs to avoid the issue of a Direction.

**Government’s position on the expected impact of proposed change**

- It should be easier for Regulator to issue FSDs in terms of meeting the insufficiently resourced test (as stated above it should address the issue of entities moving assets around within in a group to avoid being sufficiently resourced).
- No change to the reasonableness test in terms of when appropriate for Regulator to issue an FSD.

**Comment** *Assessing the need for change*

- We recognise that there may be circumstances where fragmentation of value between companies may frustrate the meeting of the "insufficiently resourced" test; however we have not seen companies being structured to achieve this and suspect that they are relatively uncommon. In most instances fragmentation of value between entities would be likely to be under common ownership of an ultimate parent which itself would be eligible for inclusion within the test.

### *Effect of the change in principle*

- We believe the principal entities that will fall within the test under the proposed arrangement will be:
  1. Groups that hold several valuable investments (none sufficiently valuable on a standalone basis) but also have significant debt in other entities (which reduces the value of resources of the top or intermediate companies). The proposed amendment would appear to allow the test to "cherry pick" valuable connected and associated companies while excluding others.
  2. Companies that are owned by a number of individually "poor" corporate shareholders.
- In our view, the population of entities that are "insufficiently resourced" only by virtue of the proposed amendment may be more likely to be inappropriately affected by the serving of an FSD, either because they are individually poor, or there is significant debt that they may be supporting that has been excluded from the analysis.
- We therefore consider that the broadening of the scope of the insufficiently resourced test gives rise to a greater burden on the assessment of "reasonableness".

### *Drafting and implementation*

- Including multiple entities is likely to introduce unwelcome complexity. For example, the drafting required under existing regulations to avoid double-counting of value is not straightforward. The complexity of the necessary adjustments under the proposed rules, the drafting of these in regulations, and their application by companies may be disproportionately burdensome relative to their benefit.
- As increased emphasis is placed on "reasonableness" further clear guidance on its principles and application (including the Regulator's publication (anonymously) of clearances and determinations) becomes more important.

### **Suggested alternative approaches**

#### *Drafting and implementation*

- A structural safeguard against entities being unreasonably brought within scope of an FSD may be achieved by careful drafting of what is meant by "group of entities" and avoiding cherry picking.
- The current "insufficiently resourced" test is inconsistent as entities satisfying the test may not be the entities that are ultimately served with an FSD. We note that contrary to one of the objectives in the consultation document, the proposed amendment does not address this inconsistency.
- Including in the test only those entities to whom an FSD could be reasonably be issued would address this inconsistency.

**Proposed Amendment** Contribution Notices to be issued where the effect of an act is materially detrimental to the security of members' benefits.

**Government's rationale for change** The Government considers that the current tests set out in s.38 of the Act, which enables the issue of Contribution Notices, may be circumvented. In effect, these tests require the Regulator to consider and prove the intent in the mind of a potential subject of a Contribution Notice.

The Government therefore proposes to amend s.38 in order to also permit the issue of a Contribution Notice when an alternative test is met. This test would focus on the effect of the transaction in question, rather than the motivations of the parties to the deal.

**Government's position on the expected impact of proposed change**

- The Government's view is that the overwhelming majority of pension schemes will not be affected by these changes. The Government's proposals seek to strike a balance between ensuring that the anti-avoidance powers remain adequate to mitigate risks, without placing an undue burden on business, employers or pension schemes. In operation, the Regulator has demonstrated that it takes a proportionate approach to regulating pension schemes, and only uses its powers where it is reasonable to do so: this approach will continue to be underpinned by the proposed legislation.
- The Government's primary basis for the view that a shift from the intent of the act to the effect of the act not having a dramatic impact on clearance/business activity is that (1) the act must be materially detrimental and (2) there will be a Statutory Defence to the act, namely that the materially detrimental effect was not reasonably foreseeable.
- The Government's position is that the Statutory Defence should be effective where the parties have carried out sufficient due diligence and provided any appropriate mitigation.

**Comment**

- The Government's stated approach is to target the new buy out market and other pensions' innovations that put the security of member's benefits at risk. Despite reassurances that are provided throughout the consultation paper the current proposals seem far too broad brush to just have that impact.
- By changing the fundamental test from purpose to effect it could conceivably bring every transaction that could impact upon the employer covenant within the scope of a CN.
- When the law is effectively changed to merely the effect of the act and realistically, the only restriction on Regulator is for it to act reasonably when considering issuing a CN then the Statutory Defence can only ever realistically be a hindsight test. At the very least this uncertainty will either lead to significant clearance applications or will lead to significantly less transactions or investments in businesses with DB scheme.
- Another major concern is that Regulator/scheme trustees shall be effectively signing off companies' business plans – there may be an issue

about trustees and the Regulator being shadow directors

- Definition of materially detrimental is important. It is not a legal term and is used only once in one SI in relation to statistics.
- It is unclear how TPR will ever actually give clearance. At the least this change puts TPR at increased risk of JR if it allows a change that is materially detrimental.
- Government statements and TPR statements are not seen as binding on TPR and neither are statements in Parliament unless the legislation is ambiguous, obscure or absurd. Pepper and Hart was considered in the Sea Containers case and was rejected, as the legislation is clear.
- Individuals will be at substantial risk.
- There is a potential conflict with the Companies Act 2006 and the Enterprise Act 2002 and the duties of Directors and others under those provisions.

**Suggested alternative approaches**

- Move not from intent to effect but rather to broaden the test so that it includes reckless and/or imprudent behaviour on behalf of the person who would be subject to a CN
- Significantly narrow down the application of this extension to buy out/partial buy out or similar scenarios in legislation.
- Put in place a new power requiring that guarantees/letters of credit are to be put in place when an operating company ceases to do business or substantially ceases and the new employer is not in a similar field of business.
- Remove individuals from the scope of a Contribution Notice.
- Provide a statutory defence that is based on the circumstances that existed at the time of the event and what was known or should have been known to the potential recipient.
- Even when applying the material effect test, the Regulator should still have to consider the purpose when determining reasonableness

**Proposed Amendment**

The removal of the requirement for the Regulator to show that parties had not acted in good faith in preventing a s75 debt becoming due or compromising or reducing such debt.

**Government's rationale for change**

The rationale for change here is very similar to that set out above for the purpose to effect change.

**Government's position on the expected impact of proposed change**

- The Government's view is that the impact should not be major. The current test requires the production of evidence of bad faith, however operational experience has shown that this requirement is easy to circumvent. For example evidence of intent can be concealed.

<b>Comment</b>	<ul style="list-style-type: none"> <li>• It is unclear what the impact of the change is because the consultation paper ties in the effectiveness of the change with the proposed Statutory Defence described above, i.e. whether or not there is a negative impact on the members' benefits.</li> <li>• By its very nature any act which prevents such a s75 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 is going to impact upon the security of members' benefits and therefore the impact would be 'reasonably foreseeable' vis a vis the Statutory Defence and therefore potentially subject to a CN.</li> <li>• The only restriction on Regulator issuing a CN is that it has to be of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice. By removing the good faith provision this restriction becomes a lot easier to circumvent – it will almost be a strict liability test. Indeed it is difficult to see how TPR will be able to give Clearance.</li> <li>• There are legitimate instances where s75 debts are compromised or 'reduced', by removing the good faith test it puts business in a difficult position. Clearance is supposed to be a voluntary process, such a change would effectively make it mandatory and it is far from clear on what basis Regulator would be able to provide such clearance.</li> <li>• It must be shown that in the Regulators opinion the person has acted otherwise than in good faith and that opinion has to be a reasonably held opinion. This is a civil law jurisdiction and it is highly unlikely that the Regulator would have to establish beyond all reasonable doubt that the party intentionally acted in bad faith.</li> </ul>
<b>Suggested alternative approaches</b>	<ul style="list-style-type: none"> <li>• Extend the 'otherwise in good faith' test to include imprudent or reckless behaviour by the person.</li> <li>• Remove individuals from the scope of CN's would lessen the danger that directors would be unable to act properly or unwilling to take positions where a DB scheme was involved</li> </ul>
<b>Proposed Amendment</b>	<p>'Clarification' that the issue of a Contribution Notice can be triggered by a course of conduct, and not just a single act or omission aimed at avoiding a debt to a pension scheme.</p>
<b>Government's rationale for change</b>	<p>The Government considers that it has always been the case that the legislation for issuing Contribution Notices should be read to include more than one act or omission, but believes that it should be clear beyond doubt that the cumulative effect of a series of acts, or a series of deliberate failures to act (i.e. – a course of conduct), should also satisfy the test for the Regulator to issue a Contribution Notices. It therefore proposes to amend s. 38 of the Pensions Act 2004 to confirm this.</p>

**Government's position on the expected impact of proposed change** As this change would merely clarify the wording initially considered by Parliament, the Government considers that it is appropriate for this change to have retrospective effect for acts occurring, or failures first occurring, on or after 27 April 2004: the date from which the powers currently have effect.

**Comment**

- It is unclear what a course of conduct is meant to be. What is the nexus between the events – both in time and purpose?
- Retrospectivity to 2004 is unlikely to be lawful.
- If there is to be any lack of clarity on the new 'effect' test then the likely response to this proposed change is to be a significant increase in clearance applications. When looking at a course of conduct it is inevitable that the reasonably foreseeable test under the Statutory Defence could only become a hindsight test.
- The key issue regarding the proposed change to the CN power needs to be addressed before considering whether a significantly different approach should be considered for the change suggested here.

**Suggested alternative approaches**

- For this 'clarification' to be workable there needs to be clarity as to what kind of time frame will be looked at for a course of events (and this would not be an overly long one) and there must be sufficient nexus between the events.
- This change not to be retrospective

**Proposed Amendment** Ensuring the Regulator can intervene, where appropriate, when there is a bulk transfer between schemes.

**Government's rationale for change** Where the Regulator could have been considering issuing a Contribution Notice before or after the bulk transfer took place. The Regulator may only issue a Contribution Notice where an employer is party to behaviour that is designed to prevent, avoid or compromise pension liabilities under section 75 of the Pensions Act 1995. This means that severing the link between the employer and the scheme containing the members may frustrate the use of this power, as the Regulator could not issue a Contribution Notice to require the former employer to make a financial contribution to the scheme that the members are actually in. The Government therefore proposes that where the Regulator could have issued a Contribution Notice but for the fact that the bulk transfer took place, it should still be able to issue that Contribution Notice.

The Government also intends that in circumstances where the bulk transfer has frustrated the Regulator's power to issue a FSD, a Contribution Notice could be considered under the proposed new test if it is appropriate and reasonable.

**Government's position on the expected impact of proposed change**

- The impact of the proposal is unclear because if a bulk transfer is made which puts members' benefits at risk and a purpose of that bulk transfer was to prevent the recovery of the whole or part of the s75 debt (including any contingent debt) then this should be caught under the current legislation.

**Comment**

- As stated in the bullet above, the mischief does appear to be one that can primarily be addressed under current legislation. It may be prudent to be clear in the legislation that where the CN relates to a bulk transfer the amount paid under the CN can be made available to both the original scheme and the receiving scheme.
- We understand from officials that the concern is once members have been transferred they cannot benefit from a Contribution Notice as it will only be available to direct funds to the transferring scheme. We agree this should be rectified.

**Suggested alternative approach (if any)**

- See bullet point above.

## **Annex B: Questions for consultation**

Where possible we have tried to provide useful comment in relation to the individual questions. However, generally our substantive commentary is set out in the preceding sections. The reason for this is that often the question raised is best not responded to in isolation as it can lead to confusion and, in our view it is preferable to respond to the concept as a whole as provided for in the previous section.

### **Q: Its proposal that the resources of the whole group of associated or connected persons should be considered when assessing whether a Financial Support Direction can be issued**

A: Our principal concern is that the Regulator could unfairly cherry pick targets in order to satisfy the insufficiently resourced test. We believe that the proposed changes could introduce unwelcome complexity in the Regulations and their application.

### **Q: The issues that should be considered in drafting legislation to introduce this test, and in particular the proposal set out above**

A.: Consideration needs to be given as to whether individual group entities can be considered or should the whole group be considered and what in effect is a 'whole group'. It would make more sense if those who could be subject to an FSD and to whom it would be reasonable to issue one were the only entities which could be considered.

### **Q: Whether a non-exhaustive statutory checklist of factors to consider in any detriment test would be useful for parties who could be subject to the issue of a Contribution Notice under the new test**

A: A statutory checklist would be of some use. However, if it is non-exhaustive and as broadly drafted as in the consultation document then naturally its use will be severely limited. Currently the list catches many normal transactions or business activities such as the movement of assets within a group.

### **Q: The additional 'reasonableness factors' it proposes to prescribe should be taken into account when considering the issue of a Contribution Notice**

A: The focus of the proposal is not in our view the appropriate one. The fact of changing the test from one of purpose to effect is the major concern here. However as a matter of course, we consider the legislation should continue to require the Regulator to act reasonably in the circumstances and those suggested seem acceptable. We would also suggest that the Regulator must consider any other duties to which the recipient is subject or was subject at the time of the act.

Even when applying the material effect test, the Regulator should still have to consider the purpose when determining reasonableness.

### **Q: The value of setting out such a non-exhaustive list, where to set out this list and on the proposed characteristics**

A: Please see the answer above to the question on the statutory non exhaustive checklist.

**Q: Other provisions that could be included in legislation or elsewhere to ensure that the new test to issue Contribution Notices is effectively targeted on risks to scheme members' benefits**

A: The main concern, in relation to the proposal, is that whilst the consultation states that the focus for the Government is upon the new business models, the likely effect of the proposals is going to be much broader as they potentially capture all significant business event which could in the long/medium term have a negative impact upon the pension scheme irrespective of intention.

In order to capture the new models a separate power would be the most effective answer and one with least impact on business.

**Q: The proposed removal of the words 'otherwise than in good faith' from s. 38(5)(a)(ii) of the Pensions Act 2004**

A: It is difficult to follow the rationale of this proposal or how it is intended to work. There will always be instances where there is a legitimate need, for instance, to compromise a s75 debt – under our understanding of the proposal all such instances would potentially be subject to a CN as the inevitable effect is that the members' benefits would be detrimentally affected. The proposed "statutory defence" is of little assistance in these circumstances because the negative impact would always be reasonably foreseeable.

**Q: Its proposed statutory defence for parties who could be subject to the issue of a Contribution Notice**

A: As stated above, we consider the emphasis for the CN change is wrong. A clear part of the thinking for that stance is the statutory defence. Such a defence would always be incredibly difficult to draft and we consider it inevitable (despite the best intentions of the draftsman) to be a hindsight test where facts can be made to fit the circumstances – particularly if the parties had not chosen to have gone for clearance in relation to the event or events. The statutory defence creates too much uncertainty for business that will either lead to a reduction in business activity or a significant increase in clearance applications.

**Q: Its proposed clarification of s. 38 of the Pensions Act 2004**

A: Please see the relevant part of the "Summary of Proposals" section on this point.

**Q: Its proposal that the use of Contribution Notices should not be prevented by effecting bulk transfers**

A: On the basis that the proposal is one in which the basis for Contribution Notices is not altered as it is merely a question of making a former employer be subject to a Contribution Notice in which liabilities have been transferred to a new arrangement then that proposal seems sensible. However, it should be clear that any such CN may only be commensurate with the liabilities transferred away.

**Q: Its proposal that the Regulator should be able to issue a Contribution Notice against a party that effects a bulk transfer that is not in the interests of members**

A: See above.