

**Pensions Protection and  
Stewardship Division**

**The Pensions Regulator  
(Contribution Notices) (Sum Specified  
following Transfer) Regulations 2010**

Consultation on draft regulations

October 2009

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## Foreword

### Preface

1. The Government are seeking views on the enclosed draft of the *Pensions Regulator (Contribution Notices) (Sum Specified following Transfer) Regulations 2010*.

### Who this consultation is aimed at

2. The Government primarily welcomes contributions from pensions industry professionals, pension schemes, trustees, and industry and member representative organisations, but we would be interested in views from any source.

### Subject of consultation

3. This consultation primarily concerns the Government's proposals to introduce regulations under section 39A(5) of the Pensions Act 2004 (as inserted by Schedule 9 to the Pensions Act 2008) to set out how the Regulator will calculate the amount in a Contribution Notice where the conditions for a Contribution Notice have been met, and where a transfer of two or more members has occurred to a scheme to which section 75 of the Pensions Act 1995 does not apply, or does not apply to the transferred members.

### Scope of consultation

4. This consultation applies to England, Wales and Scotland.

### Duration of the consultation

5. The consultation period begins on 19 October 2009 and runs until 11 December 2009.
6. Your comments on any aspect of the draft regulations would be welcomed. This document is available on the Department's website at:  
<http://www.dwp.gov.uk/consultations/2009/>

### How to respond

7. Please send your consultation responses to:  
Lizzy Holliday  
Department for Work and Pensions  
7th Floor,  
Caxton House  
Tothill Street  
London  
SW1H 9NA

Tel: 020 7449 7416

Email: [PENSIONSREGULATOR.DWPCONSULTATION@DWP.GSI.GOV.UK](mailto:PENSIONSREGULATOR.DWPCONSULTATION@DWP.GSI.GOV.UK)

Please ensure your response reaches us by 11 December 2009.

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8. When responding, please state whether you are doing so as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents, and where applicable, how the views of members were assembled. We will acknowledge your response.

### **Queries about the content of this document**

9. Any queries about the subject matter of this consultation should be made to Lizzy Holliday at the above address.

### **Freedom of information**

10. The information you send us may need to be passed to colleagues within the Department for Work and Pensions and published in a summary of responses received, and referred to in the published consultation report.
11. All information contained in your response, including personal information, may be subject to publication or disclosure if requested under the Freedom of Information Act 2000. By providing personal information for the purposes of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information which is provided, or remove it completely. If you want the information in your response to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this. We cannot guarantee confidentiality of electronic responses even if your IT system claims it automatically.
12. If you want to find out more about the general principles of Freedom of Information and how it is applied within DWP, please contact:

Central Freedom of Information Team  
Department for Work and Pensions,  
The Adelphi,  
1-11 John Adam Street,  
London, WC2N 6HT  
email: [freedom-of-information-request@dpw.gsi.gov.uk](mailto:freedom-of-information-request@dpw.gsi.gov.uk)

Please note that the Central FOI Team cannot advise or comment on this particular consultation exercise, only on Freedom of Information issues.

13. More information about the Freedom of Information Act can be found on the website of the [Ministry of Justice FoI](#) pages.

### The consultation criteria

14. The consultation is being conducted in line with the Government Code of Practice on Consultation – [www.berr.gov.uk/files/file47158.pdf](http://www.berr.gov.uk/files/file47158.pdf) – and its seven consultation criteria, which are as follows:
- **When to Consult.** Formal consultation should take place at a stage when there is scope to influence the outcome.
  - **Duration of consultation exercises.** Consultations should normally last for at least 12 weeks, with consideration given to longer timescales where feasible and sensible. Please see paragraph 15.
  - **Clarity of scope and impact.** Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence, and the expected costs and benefits of the proposals.
  - **Accessibility of consultation exercises.** Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is designed to reach.
  - **The burden of consultation.** Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
  - **Responsiveness of consultation exercises.** Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
  - **Capacity to consult.** Officials running consultation exercises should seek guidance in how to run an effective consultation exercise, and share what they have learned from the experience.
15. The Government Code of Practice on Consultation recommends a minimum 12 week consultation period for public consultations, unless there are good reasons for a limited consultation period. In this case the issue is of narrow, specialist and technical interest only, and the regulations will only apply in certain limited circumstances. Ministers have, therefore, decided that an 8 week consultation only should be undertaken.

### Feedback on this consultation

16. We value your feedback on how well we consult. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact our Consultation Coordinator:

Name: Roger Pugh  
Address: DWP Consultation Coordinator,  
Room 4F, Britannia House,  
2, Ferensway, Hull HU2 8NF  
Phone: 01482 609571  
Fax: 01482 609658  
Email: [roger.pugh@dwp.gsi.gov.uk](mailto:roger.pugh@dwp.gsi.gov.uk)

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17. In particular, please tell us if you feel that the consultation does not satisfy the consultation criteria. Please also make any suggestions as to how the process of consultation could be improved further.
18. If you have any requirements that we need to meet to enable you to comment, please let us know.
19. The responses to the consultation will be published in due course in a report on our consultation website that will summarise the responses and the action that we will take as a result of them. We will aim to publish this summary within three months of the consultation closing.

## Consultation on draft regulations

### Introduction

1. These draft regulations provide for the implementation of one of the changes to the Regulator's anti-avoidance powers first announced in April 2008. They set out **how the Regulator must calculate the amount to be specified in a Contribution Notice** issued where:
  - the grounds for issuing a Contribution Notice (under section 38 of the Pensions Act 2004) have been met; and
  - the accrued rights of two or more members are transferred to another work-based pension scheme to which section 75 does not apply.
2. These draft regulations are intended to provide for a calculation that offers equivalent protection to members in the case of this particular avoidance activity, as that which exists under section 39 of the Pensions Act 2004. The grounds for issuing a Contribution Notice are not altered by these regulations.

### Background

3. The Pensions Act 2004 provides the Pensions Regulator with anti-avoidance powers, including issuing Contribution Notices. These are a regulatory tool which allow the Regulator to require a person (which can include a company) to put money into a defined benefit pension scheme up to a specified amount, broadly:
  - where that person has been involved in a deliberate act to avoid pension liabilities, or
  - where the effect of the act or failure to act was materially detrimental to the likelihood of a member receiving those benefits, the rights to which had accrued up to the time of the act or failure to act.
4. The Pensions Act 2008 made a number of amendments to the Pensions Regulator's anti-avoidance powers, one of which was to address the unforeseen effects in the way the legislation operated in the context of bulk transfers. Under the 2004 Act the Regulator could only direct the Contribution Notice to the scheme to which the avoidance act related. Therefore following the transfer of liabilities to a new scheme, there may have been no deficit justifying a Contribution Notice benefiting the former scheme; or where there was a deficit the payment of funds to the original scheme would not assist those members who had transferred.
5. The legislation was amended so that if the Regulator would have issued a Contribution Notice but for the fact a transfer had taken place, it could do so after the transfer – the 2008 Act amendment specifically allows the Regulator to direct support following a transfer, and to issue the notice in relation to either the original or the new scheme (or to both where appropriate). This is to ensure that the funds from a Contribution Notice follow the member to whom those funds relate. It also allows the Regulator to issue a Contribution Notice where the transfer itself is the act or part of a series of acts.

6. The 2008 Act amendments also provided for regulations to be made (under section 39A(5) of the Pensions Act 2004), to specify how the amount in a Contribution Notice should be determined where the transfer is to a defined contribution scheme. This is because the existing method for calculating the amount is based on defined benefit funding rules and the relevant deficit in a defined benefit scheme.
7. The draft regulations provide for two scenarios in the calculation – one where the transfer itself is the act (or part of a series of acts) in relation to which the conditions for issuing a Contribution Notice have been met (the ‘offending act’); and one where the transfer is not part of the offending act. The draft regulations require the Regulator to calculate the amount of the Contribution Notice as follows:

**Scenario One** – where the transfer itself is the offending act, or part of a series of offending acts the Regulator must:

- identify the amount of the full liabilities of the original (transferor scheme) at the time of the offending act, and
- attribute the amount of those liabilities that is due in respect of the transferred members, and
- identify the amounts already transferred to the members’ individual accounts in the defined contribution scheme in the form of transfer credits and rights acquired (under existing pension legislation); and
- deduct this amount from the full liabilities attributable to the transferred members; and
- determine how much of the resulting sum it would be appropriate to specify in the Contribution Notice – it could be the whole sum, or part of the sum.

**Scenario Two** – where the transfer is not itself the offending act or part of series of offending acts the Regulator must:

- identify the shortfall sum in line with section 39(2) of the Pensions Act 2004 in the transferor scheme at the time of the offending act, and
- attribute the amount of the shortfall due in respect of the transferred members; and
- determine how much of the attributed amount it would be appropriate to specify in the Contribution Notice – it could be the whole amount, or part only of the amount.

8. This approach has been developed to meet five important policy objectives:
  - I.it provides, as required, **a reference point** for the calculation when the defined benefit funding rules do not apply;
  - II.it ensures that the **calculation is always tied to the offending act and the time of the offending act** (the ‘relevant time’). This is a requirement of the Pensions Act 2004;
  - III.it ensures that the **same outcome** can be achieved in both scenarios – that the Contribution Notice can specify (up to) an amount that relates to the scheme’s full liabilities on a buy-out basis, attributable to the transferred members, at the time of the offending act. This is consistent with the

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outcome for existing Contribution Notice calculations in section 39 of the 2004 Act;

IV.it is **consistent with existing transfer regulations**;

V.it requires the Regulator, in **scenario one**, to **off set the actual value of transfer credits or rights acquired for the members' benefit, against the full liabilities** – whether the transfer credit is based on an enhanced transfer value or a reduced value. (An examination of the transfer payment in this way is **not appropriate in scenario two** because, unlike scenario one, the transfer itself is not the offending act and also may not be at the time of the act – meaning the calculations would not be tied to the offending act or time of the offending act).

9. As a public body the Regulator is subject to demanding standards in terms of its decision-making, and it has an obligation under its public law duties to act reasonably. This of course applies both to the operation of these regulations, and to the application of the existing legal requirements in relation to the grounds for issuing a Contribution Notice.

## Commentary on the draft regulations

The following summary explains the purpose of each of the provisions:

### **Regulation 1**

Regulation 1 contains the citation and commencement arrangements and interpretation of terms and references used.

### **Regulation 2**

Regulation 2(1) establishes the context in which these regulations apply – namely where the Regulator has determined to issue a Contribution Notice under section 38 of the Pensions Act 2004, in relation to a transferee scheme in accordance with section 39A(2) of the Pensions Act 2004, where section 75 of the Pensions Act 1995 does not apply to that scheme, or the liabilities of that scheme to which section 75 does apply do not relate to the members of the transferor scheme (the initial scheme).

Regulation 2(2) provides that the Regulator may specify either the whole or a specific part of the amount calculated in accordance with the following provision, except where the transfer itself does not amount to an ‘act’ or ‘failure’ under section 38 of the Pensions Act 2004. Regulation 3 applies in those circumstances.

Regulation 2(3) sets out the first stage of a two stage calculation where the transfer is, or is part of, the offending act. The Regulator is to identify the attributable amount – which is that portion of the total section 75 liabilities in the transferor scheme at the relevant time which, in the Regulator’s opinion, is attributable to the members who have transferred. The relevant time has the same meaning as that in section 39(4) of the Pensions Act 2004, and relates to the time of the offending act.

Regulation 2(4) is the second stage, which is to deduct from the attributable amount, the amount of the aggregate cash value of the transfer credits and rights acquired in the transferee scheme by the members transferred. As transfer credits and rights acquired are secured to the members’ individual account in the transferee scheme, this stage of the calculation ensures that the Contribution Notice does not include these amounts, but instead treats these as credits in relation to the full liabilities.

Regulation 2(3) and 2(4) apply where the transfer is, or is part of, the offending act and is to a scheme to which section 75 does not apply, or does not apply to the liabilities in relation to the members transferred. In this situation the calculation will consider the liabilities in the initial scheme at the time of the act or failure (the transfer) and the amount secured (as part of the scheme to scheme transfer transaction) at that time to the members’ individual accounts as transfer credits and rights acquired.

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Regulation 2(5) allows that where the offending act (other than the transfer itself) reduces the section 75 liabilities in the transferor scheme (the “baseline sum”), the Regulator may increase that baseline sum by an appropriate amount. This is in line with legislation regarding Contribution Notices in other circumstances.

Regulation 2(6) requires the Regulator to disregard the reduction in liabilities brought about by the transfer, when it estimates the full liabilities of the initial scheme. This is so that the calculation to establish the amount is based on the status of the scheme immediately before the act, in order to correctly establish the shortfall.

### **Regulation 3**

Regulation 3 (1) sets out how the sum is to be calculated where the transfer has occurred after or at the same time as the act or failure, but does not in itself constitute an act or failure under section 38. In this case the regulation provides that the Regulator may specify a sum in the Contribution Notice that is either the whole or a specified part of the applicable amount – which is the amount of the section 75 debt in the transferor scheme at the relevant time which, in the Regulator’s opinion, is attributable to the members transferred.

Regulation 3(2) has a similar effect to regulation 2(6) above - the Regulator is required to disregard any reductions in liabilities brought about by the transfer when it identifies the shortfall sum.

## Impact

These regulations are to set out the calculation method for the Regulator to use when specifying the amount in a Contribution Notice where there has been a transfer to a scheme (or part of a scheme) to which section 75 does not apply.

The measures provided for by these regulations will not have an impact on the costs of businesses, charities or the voluntary sector. The principle that the Regulator should be able to issue a Contribution Notice in these circumstances was established in the Pensions Act 2008 amendments to the Regulator's anti-avoidance powers – an Impact Assessment that considered the effect of the amendments overall was published at that time. These regulations do not place any new requirements on business or the pensions industry. They apply to the Regulator and in limited circumstances only.

## Commencement

These regulations are subject to the affirmative procedure, and so following a period of analysis of the consultation responses, and any further development that is required, the regulations will be laid in Parliament and debated. As these regulations do not place a requirement on business, it is intended, subject to Parliamentary approval, to commence the regulations the day after they have been made, rather than align to a common commencement date.

## Consultation Questions

1. Do you agree that the calculations provided for by the regulations deliver the policy objectives (as outlined at para 8)?
2. Do you agree with our assessment of the impact on business?

# Annex A – The draft regulations

*Draft Regulations laid before Parliament under section 316(2) of the Pensions Act 2004, for approval by resolution of each House of Parliament.*

*[Consultation draft]*

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D R A F T   S T A T U T O R Y   I N S T R U M E N T S

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**2010 No.**

**PENSIONS**

**The Pensions Regulator (Contribution Notices) (Sum Specified following Transfer) Regulations 2010**

*Made* - - - - - \*\*\*  
*Coming into force* - - - - - \*\*\*

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by sections 39A(5), 315(2) and 318(1) of the Pensions Act 2004(a).

In accordance with section 316(2)(zb) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament(b).

In accordance with section 317(1) of that Act the Secretary of State has consulted such persons as the Secretary of State considers appropriate.

**Citation, commencement and interpretation**

1.—(1) These Regulations may be cited as the Pensions Regulator (Contribution Notices) (Sum Specified following Transfer) Regulations 2010 and shall come into force on the day after the day on which they are made.

(2) In these Regulations—

the “1995 Act” means the Pensions Act 1995(c);

the “Act” means the Pensions Act 2004;

“baseline sum” means the sum which the Regulator estimates to be the amount of the liabilities of the initial scheme, were those liabilities to be determined, calculated and verified in accordance with section 75(5) of the 1995 Act(d);

“relevant time” has the meaning given by section 39(4) of the Act;

“transfer credits” has the meaning given by section 181(1) of the Pension Schemes Act 1993(a);

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(a) 2004 c.35; section 318(1) is cited because of the meaning it gives to “prescribed” and “regulations”. Section 39A was inserted by section 126 of, and Schedule 9 to, the Pensions Act 2008 (c.30).

(b) Paragraph 316(2)(zb) was inserted by section 126 of, and Schedule 9 to, the Pensions Act 2008 (c..30).

(c) 1995 c.26

(d) Section 75(5) was amended by section 271(1) and (3) of the Pensions Act 2004 (c.35).

(3) In these Regulations, a reference to a numbered section is a reference to the section of the Act bearing that number, unless the context otherwise requires.

**Manner of determination of contribution notice sum**

2.—(1) This regulation applies where:

- (a) the Regulator determines to issue a contribution notice under section 38 in relation to a transferee scheme in accordance with section 39A(2); and
- (b) the transferee scheme:
  - (i) is a scheme to which section 75 of the 1995 Act does not apply, or
  - (ii) is a scheme to which that section applies but the liabilities of the scheme that would be taken into account for the purposes of that section do not relate to the members of the initial scheme.

(2) Subject to regulation 3, the sum specified by the Regulator in the contribution notice may be either the whole or a specified part of the amount calculated in accordance with the following provisions.

(3) Stage one of the calculation is to identify the attributable amount, being the amount of the baseline sum at the relevant time which, in the Regulator’s opinion, is attributable to the members transferred.

(4) Stage two of the calculation is to deduct from the attributable amount the amount of the aggregate cash value of the transfer credits and rights acquired in the transferee scheme by the members transferred, substituting zero if the calculation results in an amount less than zero.

(5) In any case in which this regulation applies and the Regulator is satisfied that, otherwise than by virtue of the transfer, the act or failure to act falling within section 38(5) resulted in the amount of the baseline sum being less than it would otherwise have been, the Regulator may increase the baseline sum by such amount as the Regulator considers appropriate.

(6) For the purposes of this regulation, in estimating the baseline sum the Regulator is to disregard the reduction of the liabilities of the initial scheme brought about by the transfer.

**Manner of determination of contribution notice sum: transfer not amounting to act or failure**

3.—(1) In any case in which regulation 2 applies and the transfer of the members of the initial scheme is not determined by the Regulator to amount to an act or failure to act falling within section 38(5), the sum specified by the Regulator in the contribution notice may be either the whole or a specified part of the applicable amount, being the amount of the shortfall sum in the initial scheme at the relevant time which, in the Regulator’s opinion, is attributable to the members transferred.

(2) For the purposes of this regulation, in estimating the amounts described in paragraph (a) or (b) of section 39(2) the Regulator is to disregard any reduction of the liabilities of the initial scheme brought about by the transfer.

Signed by authority of the Secretary of State for Work and Pensions.

*Angela Eagle.*  
Minister of State,  
Department for Work and Pensions

Date

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(a) 1993 c.48. Section 181(1) was amended by section 319(1) of , and Schedule 12 to, the Pensions Act 2004 (c.35).

## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations prescribe how, following a transfer of the accrued pension rights of two or more members of a defined benefit pension arrangement (the “initial scheme”) to a defined contribution pension arrangement (the “transferee scheme”), the Pensions Regulator is to determine the sum specified in a contribution notice (the “Sum”) issued in relation to the transferee scheme.

Regulation 1 provides for citation, commencement and interpretation.

Regulation 2 sets out how the Pensions Regulator is to determine the Sum in cases where the transfer amounts to an act or failure to act falling within section 38(5) of the Pensions Act 2004 (c.35). In these cases, the Regulator is to estimate what the full liabilities of the initial scheme would be at the time of the act or failure to act, were they to be calculated in accordance with section 75 of the Pensions Act 1995 (c.26) (the “liabilities”), identify so much of the liabilities as are attributable to the members transferred, and deduct from those attributed liabilities the aggregate cash value of the transfer credits and rights acquired by the members transferred in the transferee scheme. The Sum may be the whole or a specified part of resulting amount. The Regulator may increase the liabilities by an amount it considers to be appropriate where it is satisfied that, otherwise than as a result of the transfer, the act or failure to act falling within section 38(5) resulted in the amount of the liabilities being less than they would otherwise have been. The Regulator is required, in estimating the full liabilities of the initial scheme, to disregard the reduction in liabilities brought about by the transfer.

Regulation 3 sets out how the Pensions Regulator is to determine the Sum in cases where the transfer does not amount to an act or failure to act falling within section 38(5) of the Pensions Act 2004 (c.35). Here, the Sum is to be either the whole or a specified part of that amount of the shortfall sum in the initial scheme at the relevant time which, in the opinion of the Regulator, is attributable to the members transferred. For these purposes, “shortfall sum” and “relevant time” have the meanings set out in section 39(2) and 39(4) of the Pensions Act 2004 (c.35). The Regulator is required, in identifying the shortfall sum, to disregard any reduction in liabilities brought about by the transfer.

A full impact assessment has not been produced for this instrument as no impact on the private, public, and voluntary sectors is foreseen.