

Pensions Client Directorate

**Government response to
consultation**

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

March 2010

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Introduction

1. Between 19 October 2009 and 11 December 2009, the Department for Work and Pensions (DWP) undertook a consultation exercise on the draft Pensions Regulator (Contribution Notices) (Sum Specified following Transfer) Regulations 2010. The draft regulations were made available on the DWP website.
2. DWP received written responses from seven organisations. A list of respondents is included at Annex A. The Department is grateful for the contributions received to this consultation.
3. The final regulations will be laid before Parliament and debated. As set out in the consultation document, these regulations do not place a requirement on business. Therefore the Government intends, subject to Parliamentary approval, to commence the regulations the day after they have been made, rather than align to a common commencement date.
4. Since the consultation closed on 11 December the Department has conducted a thorough analysis of the responses. This document provides a summary of contributions we received from respondents and provides the Government's response. The response sets out the Government's view on the legal effect of the regulations, where relevant, but it should not be taken as an authoritative interpretation of the law, which only the Court can determine. Separately, the response should not be relied upon as legal advice.
5. The final regulations and accompanying explanatory memorandum will be available on the Office of Public Sector Information's website at:
<http://www.opsi.gov.uk/si/si-2010-index>
6. This document is available on the DWP website at:
<http://www.dwp.gov.uk/consultations/2009/>
7. A paper copy of this document can be obtained from:

Lizzy Holliday
Department for Work and Pensions
7th floor
Caxton House
Tothill Street
London SW1
Email: Lizzy.Holliday@dwp.gsi.gov.uk
Telephone: 020 7449 7416

Background

8. The draft regulations are being introduced under section 39A(5) of the Pensions Act 2004 (as inserted by Schedule 9 to the Pensions Act 2008) which provide for the implementation of one of the changes to the Pensions 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 of the Pensions Act 1995 does not apply.

9. Section 39 of the Pensions Act 2004 deals with the calculation of Contribution Notices in all other circumstances. These draft regulations are intended to provide for a calculation that offers equivalent protection for members in the case of this particular avoidance activity, as that which exists under section 39. The grounds for issuing a Contribution Notice are not altered by these regulations.

Responses to the consultation on the draft Pensions Regulator (Contribution Notices) (Sum Specified following Transfer) Regulations 2010

10. Written responses to the consultation on the draft regulations were received from seven organisations, including a number of professional organisations and pensions industry stakeholders. The responses were generally supportive of the Government's policy objectives and the structure of the regulations. There were a small number of suggestions on drafting detail, which were mainly seeking to clarify and put beyond doubt the intended meaning of the regulations, and ensure that they deliver the policy objectives. The Government welcomes the helpful responses received which has helped shape the final regulations. Comments on the draft regulations and the Government's responses follow below.

Regulation 1 (Citation, commencement and interpretation)

11. No comments were received in respect of regulation 1. The Government has amended the regulations to include additional definitions. These include a reference to the Pension Schemes Act 1993 "the 1993 Act" along with definitions of the terms 'rights acquired', and 'earner'. This is to further clarify the consultation intention that it is only the value of the rights acquired as part of the scheme to scheme transfer

Regulation 2 (Manner of determination of contribution notice sum)

12. Regulation 2(1) sets out where the regulation applies. A new paragraph (c) has been added, which further clarifies the circumstances in which regulation 2 applies.

13. **Regulation 2(3)** outlines stage one of the calculation – to identify the share of the ‘baseline sum’ at the relevant time which, in the Pensions Regulator’s opinion, is attributable to the transferred members.

14. The Association of Pension Lawyers (APL) suggested that the word ‘amount’ should be replaced with ‘share’, to align with Employer Debt Regulations and in light of past discussions about the meaning of the term ‘amount’ in this context. The Government has considered this suggestion, but has not adopted this proposal. This is because there is no single term that covers all cases in secondary legislation that relate to proportion of liabilities, and also the situation for which these regulations are designed to cater is not identical with that in the Employer Debt Regulations. The Government’s view is that the term ‘amount’ is therefore suitable in this context and delivers the policy intention.

15. **Regulation 2(4)** sets out the second stage of the calculation 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.

16. In the draft regulations, regulation 2(4) did not specify who was to calculate the ‘aggregate cash value’. In response to a suggestion from the APL the draft regulations have been amended to clarify that this amount is to be calculated by the Regulator. This is a helpful change which puts the intended meaning beyond doubt.

17. The Association of Consulting Actuaries (ACA) commented that ‘aggregate cash value’ is not defined in the Pensions Act 2004 or the draft regulations. The Government considered that, on balance, a definition was not required in the regulations and that the words should be given their ordinary, natural meaning. This is because there is no suggestion that this would cause practical or operational difficulty and the natural meaning delivers the policy intention.

18. The ACA also noted that the time at which the aggregate cash value should be calculated was not specified. The draft regulations have been amended to address this issue. New draft regulation 2(6)(a) and (b) specify that in estimating the full

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liabilities of the initial scheme, the Regulator is to disregard the reduction in liabilities brought about by the transfer, and to calculate the aggregate cash value of the transfer credits and rights acquired in the transferee scheme as at the time of the acquisition of those credits and rights.

Regulation 3 (Manner of determination of contribution notice sum: transfer not amounting to act or failure to act)

19. 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. Regulation 3(1) includes a minor alteration in the first line, which clarifies the circumstances in which regulation 3 applies.

20. The APL suggested an additional definition – to define the term ‘shortfall sum’. The Government considered this suggestion and agrees that an additional definition is necessary as the term has more than one meaning in the Pensions Act 2004. And, in any event, the meaning used in the regulations is a slightly qualified version of that found in section 39 of that Act. A definition is now provided at regulation 3(2).

Additional comments

21. A number of other comments were made in the consultation responses which related to the wider legislative framework.

Use of the funds provided by the contribution notice

22. The APL noted that under the contribution notice powers generally there is no requirement for the trustees of the transferee scheme to use the funds provided in accordance with the contribution notice for the benefit of particular members, and that they are required to consider the interests of the members as a whole (not just transferred members).

23. The Government acknowledges this point in cases where there is no transfer. However, because the Government recognised that this point could become an issue where a transfer had occurred, provision was made at section 39A(6) of the Pensions Act 2004 that the Regulator may direct the Trustees to apply the funds in a particular manner. That provision constitutes the mechanism by which the contribution notice monies can be made to apply for the benefit of the transferred members in circumstances where the transferee scheme’s rules would not otherwise have that effect.

24. Therefore the framework provided by the primary legislation ensures that, in a situation in which these regulations apply, the funds from a contribution notice may be applied in respect of the members to whom those funds relate.

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25. In connection with this issue, it is also important to note that protection is afforded to members remaining in the initial scheme. In a situation where a transfer satisfied the grounds for issuing a contribution notice in respect of the members remaining in the initial defined benefit scheme, the Regulator could consider use of their powers under section 38 of the Pensions Act 2004. These regulations would not apply in these circumstances, as the calculation set out in section 39 of the Pensions Act 2004 provides the appropriate legal basis for the contribution notice calculation.

Definition of work-based pension scheme

26. The Society of Pension Consultants and Eversheds both commented that the legislation defines the ‘transferee scheme’ as a ‘work based pension scheme’. Consequently a Group Personal Pension arrangement, unless there is a Direct Payment Arrangement in place, will be outside the scope of these regulations.

27. The Government agrees that this is the case in respect of these regulations. The regulations must, however, reflect the scope of the primary legislation under which they are made which, here, is focused upon work based pension schemes. Other legislation exists to deal with other types of pension schemes and related financial arrangements.

Policy Objective III

28. The consultation document set out the Government’s policy objectives that the regulations were intended to deliver. Objective III is that the draft regulations ensure that the same outcome can be achieved both where the transfer is itself the offending act, and also where the transfer is not an offending act and which occurs at the same time or after an offending act. That is, the contribution notice can specify a sum up to an amount that relates to the scheme’s full liabilities on a full buy-out basis (under section 75 of the Pensions Act 1995), attributable to the transferred members, at the time of the offending act. This is consistent with the outcome for the contribution notice calculations in section 39 of the Pensions Act 2004.

29. The ACA pointed out that what is specified in a contribution notice can differ between these two scenarios. It allows the Regulator to apply a penalty which in principle could fully fund the affected members’ benefits as they stood prior to the trigger point.

30. Although the Government does not agree that a contribution notice is a punitive measure but is, rather, restorative in nature, it agrees with the other elements of this alternative description. However, it also stands by the objective as expressed in the consultation document, as the ‘same outcome’ was not intended to be read as ‘the same amount’.

Consultation Questions

Consultation response

31. There was general agreement to the following two questions raised in the consultation document.

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

Annex A – List of respondents to the consultation

The Association of Pension Lawyers
The Association of British Insurers
Eversheds LLP
The Society of Pension Consultants
The Association of Consulting Actuaries
Trade Unions Congress
Unite