



DRAFT CODE 12: CONTRIBUTION NOTICES: CIRCUMSTANCES IN RELATION TO THE MATERIAL DETRIMENT TEST, THE EMPLOYER INSOLVENCY TEST AND THE EMPLOYER RESOURCES TEST

Issued 8 July 2021

ICAEW welcomes the opportunity to comment on the Draft Code 12: Contribution Notices: Circumstances in relation to the material detriment test, the employer insolvency test and the employer resources test published by The Pensions Regulator on 27 May 2021, a copy of which is available from this [link](#).

This ICAEW response of 8 July 2021 reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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KEY POINTS

1. We support the overall approach of the employer insolvency test being a 'before and after' snapshot, which we consider to be consistent with the policy intent behind the introduction of the two new alternative 'act' tests to the CN power (see Q1 below).
2. However, the draft Code needs to be clearer in places, for example, there needs to be guidance on when the statutory defences might apply and also on how the Regulator will collect and assess evidence as to whether the defence might be made (see Q2 below).
3. Some of the examples provided in the code-related guidance are helpful, but some need more detail, for example, to understand why there was a risk that one of the tests was met or what made a difference where several facts are mentioned (see Q3 below).
4. It will be important to maintain a clear archive of the various editions of the code over time as the Regulator and/or a tribunal may need to judge the circumstances of a party's acts at particular points in history by reference to the then-published code (see Q4 below).

ANSWERS TO SPECIFIC QUESTIONS

Question 1. Is our overall approach in the draft code and code-related guidance consistent with the policy intent behind the changes introducing the two new alternative 'act' tests to the CN power?

5. Yes. Specifically we agree that the employer insolvency test is designed to be a before and after snapshot.
6. We have responded to the DWP's consultation that we consider it wrong in principle that the Regulator determines the key financial elements of the test as well as deciding whether or not to exercise its powers and against whom, including elements of reasonableness. In our view this concentrates too much subjectivity in determining whether a breach has occurred and then how to respond to any breach.
7. In this context, the reference to using the section 75 basis (para 10 d of the draft code) in the tests for assets and liabilities is helpful as it is more objective and transparent.

Question 2. Is the code clear on what the tests are and the circumstances in which we will consider any of the tests to be met? If not, how could we make it clearer, without limiting the scope of the tests?

8. No.
9. There is a reference to the statutory defence in each of the tests but no guidance at all as to when it might apply nor how the Regulator would go about collecting or assessing evidence as to whether the defence might be made.
10. The examples do not specify which test is met in each example that has been shown to meet the test. Further (as set out below) the examples do not say which facts in the example lead to the conclusion reached.

Question 3. Are the examples provided in the code-related guidance useful in illustrating the circumstances in which we might consider the new 'act' tests to be met? Are there any other examples you would consider helpful?

11. [No yes/no answer]
12. Some of the examples are helpful but some need more detail to understand either:
 - a) why there was a risk that one of the tests was met; the example of Employer B's pensioner buyout shows no content that indicates any engagement of any of the test:

- is the scheme in deficit?
- has s.75 cover for non-annuity members reduced?,

or

- b) what was it that made a difference where several facts are mentioned; Employer D granting security –
- is it an assessment of the charged assets against the uncharged?
 - is it the trustee engagement?
 - is it the appropriate mitigation?

13. Is the answer that for each example it is an overall combination of all the facts such that missing one element means readers cannot rely on the example? If so, that then that should be made clear and the examples are a lot less helpful and many more examples are needed.
14. Each of the examples where a test is met should specify which of the different legal tests are met, which can be more than one as indicated in the draft code. In the reference to 'In each of these examples, no or inadequate mitigation was provided to the relevant scheme.' it would help to give examples of mitigation that would make a difference such as a parent company guarantee, cash injection, security over assets in each case in excess of any section 75 deficit. A cross reference to clearance and guidance on clearance would also be helpful.
15. In the example of Employer O significantly more detail is needed to show which test is met and why – for instance, is 'fund' a reference to the new owners as opposed to the pension fund? If it is the pension fund, there seems to be no detriment to the fund.

Question 4. Do you have any other feedback?

16. We note that you have decided to provide the guidance on the new tests by updating and re-issuing the existing code of practice. We agree that this is a helpful approach. There is interplay between the different tests and they may need to be assessed together in a single case and we agree that there is content that applies across the existing and new tests. Note it will be important to maintain a clear archive of the various editions of the code over time as the Regulator and/or a tribunal may need to judge the circumstances of a party's acts at particular points in history by reference to the then-published code.