

### Response to the Pensions Regulator's consultation on draft code of practice 12: Application of the material detriment test

Buck Consultants is pleased to have this opportunity to comment on the draft code.

We recognise that this is a difficult area to regulate effectively. The demand from schemes and their sponsoring employers for solutions in this space is strong and the amounts of money potentially involved are often very large. These factors have driven innovation already, and will continue to do so in the future. We recognise that it would not be practical (nor be in accordance with its flexible, 'light touch' approach to regulation) for the Regulator to require that every innovative approach that is developed should be reviewed in detail by the Regulator and formally 'approved' (or not) in each case.

So in principle the proposed approach, where the Regulator establishes a Code in which the basis for determining whether or not a material detriment has occurred as a result of the transaction, appears to be sensible. However, this approach means that there is a lack of certainty about how any particular transaction will be viewed by the Regulator – which is exacerbated by the fact that such constraints upon the Regulator's assessment powers as are installed must be largely general in nature to leave the Regulator flexibility, because the nature and form of every future transaction cannot be anticipated.

For this reason, we think that broadly the list of circumstances where the Regulator would expect to issue a contribution notice on the material detriment test strikes an acceptable balance and we cannot think of any further circumstances that may present unacceptable risks to members' benefits that would not be covered by this list.

However, in respect of the relevance of the actual circumstances listed, we are not clear how the circumstance where the scheme is transferred out of the jurisdiction of the UK would arise, and clarification of exactly what is intended here would be helpful; in the absence of any clear circumstance being identified, the reference should be deleted.

We note that there are a number of hurdles that the Regulator would have to clear before a transaction could be judged to meet the material detriment test; these are both sensible and necessary. However, the description of the circumstance of a business model or operation that is *designed to create a financial benefit for the employer or some other person from the scheme* is, we believe, not appropriate.

The fact is that in many cases one of the drivers of a transaction is a desire to reduce the cost burden on the employer – even if only in terms of removing potential volatility of future contributions to the scheme. We understand that it not the policy intention behind the legislation that this should become an illegal motive. It is true that the paragraph goes on to link this to inadequate account being taken of members' interests, but whether or not an employer or any other connected person would gain a 'financial benefit' in the widest definition of the term is not a relevant consideration.

Consequently, we would welcome a change to this wording, either to qualify the term 'financial benefit' or to remove it altogether to put it beyond doubt that, as long as no material detriment results, the fact that the employer or any other person might be thought to have gained a financial benefit from the transaction *per se* is not a relevant consideration when considering the issue of a contribution notice on the basis that the material detriment test has been met.

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