

## **Appendix 4 to the Board's determination under Section 175(5) of the Pensions Act 2004 in respect of the financial year 1 April 2009 – 31 March 2010**

### **Contingent assets**

#### ***General***

1. For the purposes of calculating the risk-based levy in accordance with the Schedule to the Determination, one or more contingent assets shall be taken into account if and to the extent that the Board is satisfied that –
  - (a) The appropriate certificate or certificates (“contingent asset certificates”) have been provided as required by paragraph 29 of the Schedule, and in conformity with the rules set out in Annex C and any notes accompanying the relevant form of certificate;
  - (b) Satisfactory supporting documents have been provided to the Board, at or before 5 p.m. on 31 March 2009, in the manner called for by Annex C or the notes accompanying the relevant form of certificate including where relevant and without limitation a legal opinion satisfactory to the Board; and
  - (c) The contingent asset or assets which are the subject of the certificate or certificates fulfil the conditions set out in paragraphs 2 to 5 of this Appendix.
2. A contingent asset must be a Type A asset, a Type B asset or a Type C asset.
3. A contingent asset must comprise or result from an arrangement which becomes or became effective no later than 1 April 2009 or in the case of a new scheme the date on which the new scheme becomes an eligible scheme if later and which may reduce the risk of compensation being payable from the Pension Protection Fund in the event of an insolvency event occurring in respect of an employer in relation to the scheme (“the scheme employer”), and without prejudice to the more specific provisions set out below, may only be taken into account to the extent that it appears to the Board to have that effect.
4. Where one or more contingent assets was recognised by the Board for the purposes of calculating a scheme's risk-based levy for a levy year ending on or before 31 March 2009, then the Board shall not give that scheme credit for contingent assets for the levy year 1 April 2009 – 31 March 2010 unless the requirements of paragraph 24 or, if applicable, paragraph 29 are satisfied.

#### ***Types of contingent asset***

5. For the purposes of the following paragraphs, references to an agreement being “in appropriate form” mean:

- (a) If the agreement was executed on or after 11 September 2006, in one of the forms for the relevant asset type attached as Annexes D – F, subject to such variations as that form and Annex C permit; or
  - (b) If the agreement was executed prior to 11 September 2006, in one of the forms for the relevant asset type as published by the Board on or prior to, and still current as at, the date of execution, subject to such variations as that form and Annex C permit.
- 6. A Type A asset is a guarantee in appropriate form which (without prejudice to any additional requirements stipulated in Annex C) fulfils the following conditions –
  - (a) The guarantor is an associate, within the meaning of section 435 of the Insolvency Act 1986, of one or more of the scheme employers; and
  - (b) The guarantor is domiciled in a state which is a member of the European Union or the Organisation for Economic Co-operation and Development.
- 7. A Type B asset is one of the following, in appropriate form, in relation to which the mortgagor or chargor is an associate within the meaning of section 435 of the Insolvency Act 1986 of one or more of the scheme employers, and which (without prejudice to any additional requirements stipulated in the appropriate contingent asset certificate or the accompanying notes) is irrevocably available to the trustees or managers of the scheme upon the insolvency of the scheme employer(s):
  - (a) Cash in sterling deposited in a bank account and subject to a first priority legal mortgage or fixed charge in favour of the trustees or managers of the scheme;
  - (b) Real estate situated in England, Wales, Scotland or Northern Ireland and subject to a first priority legal mortgage or fixed charge in favour of the trustees or managers of the scheme; or
  - (c) Securities in which the scheme is permitted to invest by its trust deed and rules (but disregarding any restrictions in relation to employer-related investments) held by a custodian which satisfies the criteria for a custodian set out in the relevant contingent asset certificate and where the owner's interest under the relevant custodian agreement and the securities themselves are subject to a first priority legal mortgage or fixed charge in favour of the trustees or managers of the scheme.
- 8. A Type C asset is a letter of credit or bank guarantee in favour of the trustees of the scheme in appropriate form, in relation to which the purchaser identified in the contingent asset certificate is an associate within the meaning of section 435 of the Insolvency Act 1986 of one or more of the scheme employers, and which (without prejudice to any additional requirements stipulated in the appropriate contingent asset certificate or the accompanying notes) is given by a counterparty that:

- (a) Has a current Moody's credit rating of Aa3 or better, or a current Standard and Poor's credit rating of AA- or better, or a current Fitch credit rating of AA- or better;
- (b) Has been regulated and approved for business by the Financial Services Authority, either directly or on the basis of rights in European Union law; and
- (c) Is domiciled in a state which is a member of the European Union or the Organisation for Economic Co-operation and Development.

9. The maturity date of a Type C asset shall be:

- (a) In the case of a Type C contingent asset in the prescribed form labelled "Type C(i)", not earlier than 31 March 2010; and
- (b) In the case of a Type C contingent asset in the prescribed form labelled "Type C(ii)", not earlier than five days after the last "Planned Contribution" (as defined in the standard form of Type C(ii) asset) is due.

10. In the case of a Type A or a Type B asset, the maximum amount guaranteed or secured may be:

- (a) A fixed monetary sum (and the maximum amount must be so fixed in the case of a scheme to which paragraph 39 of the Schedule to the Determination applies);
- (b) The lowest non-negative amount which, when added to the assets of the scheme, would result in the scheme being funded at a given percentage level (referred to below as G%) on the date on which any liability under the Type A or Type B asset arose, calculated on the basis set out in section 179 of the Pensions Act 2004, were a valuation to be conducted as at that date;
- (c) The lower of (i) the lowest non-negative amount which, when added to the assets of the scheme, would result in the scheme being funded at a given percentage level (referred to below as G%) on the date on which any liability under the Type A or Type B asset arose, calculated on the basis set out in section 179 of the Pensions Act 2004, were a valuation to be conducted as at that date, and (ii) a fixed monetary sum (referred to below as £H);
- (d) The entire aggregate liability, on the date on which any liability under the Type A or Type B asset arose, of every employer (within the meaning set out in Section 318 of the Pensions Act 2004 and regulations made thereunder) in relation to the scheme, were a debt under Section 75(2) of the Pensions Act 1995 to have become due on that date; or
- (e) The lower of (i) the entire aggregate liability, on the date on which any liability under the Type A or Type B asset arose, of every employer (within

the meaning set out in Section 318 of the Pensions Act 2004 and regulations made thereunder) in relation to the scheme, were a debt under Section 75(2) of the Pensions Act 1995 to have become due on that date; and (ii) a fixed monetary sum (referred to below as £H).

11. The value of a Type A<sup>1</sup> or a Type B asset for the purposes of this Appendix shall be as follows, provided that the value of a Type B asset shall not in any event exceed, as the case may be, the amount of the cash deposited, the value of the real estate, or the value of the securities, in each case as shown in the contingent asset certificate and meeting the requirements in relation to valuation specified in the notes to the relevant certificate, and provided further that the value shall never be less than zero:

- (a) In a case falling within paragraph 10(a) above, that fixed monetary sum;
- (b) In a case falling within paragraph 10(b) above, the amount by which G% of the protected liabilities of the scheme exceeds the amount of its assets, determined in accordance with paragraph 10 of the Schedule (but for this purpose taking account of deficit-reduction contributions to the extent set out in paragraph 28 of the Schedule);
- (c) In a case falling within paragraph 10(c) above, the lower of (i) the amount by which G% of the protected liabilities of the scheme exceeds the amount of its assets, determined in accordance with paragraph 10 of the Schedule (but for this purpose taking account of deficit-reduction contributions to the extent set out in paragraph 28 of the Schedule), and (ii) £H;
- (d) In a case falling within paragraph 10(d) above, the amount by which 140% of the protected liabilities of the scheme exceeds the amount of its assets, determined in accordance with paragraph 10 of the Schedule (but for this purpose taking account of deficit-reduction contributions to the extent set out in paragraph 28 of the Schedule);
- (e) In a case falling within paragraph 10(e) above, the lower of (i) the amount by which 140% of the protected liabilities of the scheme exceeds the amount of its assets, determined in accordance with paragraph 10 of the Schedule (but for this purpose taking account of deficit-reduction contributions to the extent set out in paragraph 28 of the Schedule); and (ii) £H.

12. In the case of a Type C(i) asset, the letter of credit or bank guarantee must be for a fixed monetary amount, and the value of such an asset for the purposes of this Appendix shall be that amount. In the case of a Type C(ii) asset, the letter of credit or bank guarantee must be for a fixed monetary amount which reduces upon the making of Planned Contributions (as defined in the standard form of Type C(ii) asset), and the value of such an asset for the purposes of this

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<sup>1</sup> The "value" of a Type A contingent asset calculated in accordance with paragraph 11 is relevant for the purposes of the conditions set out in paragraph 24 et seq. However the treatment of such assets in the calculation is set out in paragraphs 13-23.

Appendix shall be the amount of the letter of credit or bank guarantee as at 1 April 2009.

**Calculation of risk-based levy taking into account contingent assets**

13. In the following paragraphs 13-23:

- (a) the underfunding U of a scheme shall be calculated in the manner set out in the Schedule, provided however that the assets of the scheme shall be treated as having been increased by an amount equal to the aggregate value, calculated in accordance with paragraphs 11 and/or 12 above, of all contingent assets of Types B and/or C (but not of Type A) which fall to be taken into account in relation to that scheme;
- (b) P, R and c shall have the meanings give to them by, and be calculated in accordance with, the Schedule;
- (c) P<sub>G</sub> shall be the probability of insolvency of the guarantor in relation to a Type A contingent asset, calculated in accordance with paragraphs 30 to 32 of the Schedule as if the guarantor were an employer in relation to the scheme;
- (d) in any case where, under the same Type A asset, there are two or more guarantors jointly and severally liable for the same amount, then P<sub>G</sub> in relation to that guarantee shall be calculated as if the guarantor with the lowest probability of insolvency (calculated in accordance with subparagraph (c) above) were the sole guarantor;
- (e) in any case where, in relation to a Type A asset, P<sub>G</sub> is higher than P for the scheme to which the Type A asset relates, then that Type A asset shall be ignored for the purposes of calculating the risk-based levy; and
- (f) the total amount of risk-based levy calculated in each case shall be subject to paragraph 20 of the Schedule (levy cap).

14. Where, in relation to a scheme, one or more contingent assets of Type B and/or Type C, but no contingent assets of Type A, fall to be taken into account in accordance with this Appendix, the risk-based levy for that scheme shall be:

$$U \times P \times R \times c$$

15. This paragraph applies where, in relation to a scheme, there falls to be taken into account a single Type A contingent asset in which the amount guaranteed is of the form set out in paragraph 10(a) above (fixed monetary sum). Where this paragraph applies, the risk-based levy for that scheme shall be:

$$[(U - \text{£}H) \times P + \text{£}H \times P_G] \times R \times c \quad \text{if } \text{£}H \leq U$$

$$U \times P_G \times R \times c \quad \text{if } \text{£}H > U$$

where £H is the fixed monetary sum guaranteed.

16. This paragraph applies where, in relation to a scheme, there falls to be taken into account a single Type A contingent asset in which the amount guaranteed is of

the form set out in paragraph 10(b) above (guarantee resulting in funding at G%). Where this paragraph applies:

- (a) if G is equal to or greater than 105, the risk-based levy for that scheme shall be:

$$U \times P_G \times R \times c$$

- (b) if G is less than 105, the risk-based levy for that scheme shall be:

$$[V \times P + (U - V) \times P_G] \times R \times c \quad \text{if } V \leq U$$

$$U \times P \times R \times c \quad \text{if } V > U$$

where V, the “non guaranteed amount”, is calculated as follows:

$$V = \frac{105 - G}{100} \times L$$

17. This paragraph applies where, in relation to a scheme, there falls to be taken into account a single Type A contingent asset in which the amount guaranteed is of the form set out in paragraph 10(c) above (lower of G% and £H). Where this paragraph applies, the risk-based levy for that scheme shall be equal to the higher of:

- (a) the risk-based levy which would apply if there was a single guarantee of £H, calculated in accordance with paragraph 15 above; and  
(b) the risk-based levy which would apply if there was a single guarantee of G%, calculated in accordance with paragraph 16 above.

18. This paragraph applies where, in relation to a scheme, there falls to be taken into account a single Type A contingent asset in which the amount guaranteed is of the form set out in paragraph 10(d) above (guarantee of full section 75 debt). Where this paragraph applies, the risk-based levy for that scheme shall be:

$$U \times P_G \times R \times c$$

19. This paragraph applies where, in relation to a scheme, there falls to be taken into account a single Type A contingent asset in which the amount guaranteed is of the form set out in paragraph 10(e) above (lower of section 75 and £H). Where this paragraph applies, the risk-based levy for that scheme shall be equal to the higher of:

- (a) the risk-based levy which would apply if there was a single guarantee of £H, calculated in accordance with paragraph 15 above; and  
(b) the risk-based levy which would apply if there was a single guarantee of the full section 75 debt, calculated in accordance with paragraph 18 above.

20. This paragraph applies where, in relation to a scheme, there fall to be taken into account two or more Type A contingent assets in which the amount guaranteed is of the form set out in paragraph 10(a) above (fixed monetary sum). Where this

paragraph applies, the guarantees shall be applied in descending order of guarantor strength until either all guarantors or all of the underfunding have been exhausted. Hence:

- (a) If the sum of all the fixed amounts is less than the total underfunding U, the risk-based levy for that scheme shall be equal to:

$$[\pounds H_1 \times P_{G1} + \pounds H_2 \times P_{G2} + \dots + \pounds H_n \times P_{Gn} + \left( U - \sum_1^n H_r \right) \times P] \times R \times c$$

where  $\pounds H_1 \dots H_n$  are the amounts of the guarantees and  $P_{G1} \dots P_{Gn}$  are the corresponding probabilities of insolvency of the guarantors arranged in ascending order of insolvency probability;

- (b) If the sum of all the fixed amounts is equal to or exceeds the total underfunding U, the risk-based levy for that scheme shall be equal to:

$$[\pounds H_1 \times P_{G1} + \pounds H_2 \times P_{G2} + \dots + \pounds H_{n-1} \times P_{G_{n-1}} + \left( U - \sum_1^{n-1} H_r \right) \times P_{Gn}] \times R \times c$$

where the guarantees are arranged in order as in paragraph (a) above,

and  $\sum_1^{n-1} H_r < U$  but  $\sum_1^n H_r \geq U$ .

21. This paragraph applies where, in relation to a scheme, there fall to be taken into account two or more Type A contingent assets in which the amount guaranteed is of the form set out in paragraph 10(b) above (guarantee resulting in funding at G%) and where in each case the percentage guaranteed is less than 105%. Where this paragraph applies, each guarantee shall be treated as though it had a fixed monetary value of  $(U - V_r)$  where  $V_r$  is the non guaranteed amount, calculated in accordance with paragraph 16, in relation to the  $r^{\text{th}}$  guarantee; and the risk-based levy shall then be calculated in accordance with paragraph 20 above.
22. This paragraph applies where, in relation to a scheme, there fall to be taken into account two or more Type A contingent assets in which the amount guaranteed is either of the form set out in paragraph 10(b) above (guarantee resulting in funding at G%), where the percentage guaranteed is equal to or greater than 105%, or of the form set out in paragraph 10(d) above (guarantee of full section 75 debt). Where this paragraph applies the risk-based levy shall be calculated on the basis of a single Type A contingent asset of the form set out in paragraph 10(d) above, given by a guarantor whose insolvency risk is equal to the lowest insolvency risk of all the guarantors.
23. If, in relation to a scheme, there fall to be taken into account a combination of Type A contingent assets not covered by paragraphs 13-22 above, the Board shall calculate the risk-based levy in a manner which in the view of the Board best gives effect to the approach set out in paragraphs 13-22 and results in the contingent assets being consistently treated for these purposes.

***Additional condition where scheme has obtained recognition for contingent asset(s) in immediately previous levy year***

24. If, in respect of a scheme, the Board gave credit for one or more contingent assets (referred to below as the original contingent asset(s)) for the purposes of the risk-based levy for the year 1 April 2008 – 31 March 2009, then, notwithstanding any other provision of this Appendix, the Board shall not take into account any contingent assets for the purposes of that scheme's levy for the year 1 April 2009 – 31 March 2010 unless either the condition set out in paragraph 25 below or the condition set out in paragraph 26 below (or both) is/are satisfied.

25. The first condition referred to in paragraph 24 is that, in respect of each original contingent asset:

(a) In the case of an original contingent asset of Type A or B, any amendments made to the terms of the original contingent asset on or after 1 April 2008 were made in accordance with the amendment and release provisions of the original contingent asset, that is, that under the terms of the original contingent asset, the trustees of the scheme would not have been permitted unreasonably to withhold their consent to the making of such amendments;

(b) In the case of an original contingent asset of Type C, either the original contingent asset remains in force on 1 April 2009 and has not been amended on or after 1 April 2008, or the original contingent asset has expired and the expiry and renewal provisions of the original contingent asset have been complied with, that is, that the original contingent asset has been replaced with cash or a replacement Type C contingent asset of a face value sufficient to ensure that no right to make a demand under the original Type C contingent asset arose upon its expiry.

26. The second condition referred to in paragraph 24 is that the condition set out in paragraph 4.1 of Annex G (Amendment and replacement conditions) is satisfied.

***Changes during the levy year***

27. If the trustees or managers of the scheme notify the Board, or if the Board otherwise becomes aware, that at some time during the financial year 1 April 2009 to 31 March 2010 the information contained in a contingent asset certificate has ceased or will cease to be true and correct, then:

(a) In a case where the terms of the instrument representing the contingent asset have been or are to be varied so as to reduce the value of the asset, or if any other step has been or is to be taken which has had or will have substantially the same effect, the Board will (subject to sub-paragraph (b) below) recalculate the risk-based levy in respect of the scheme as if the contingent asset had not existed at 31 March 2009 (that is to say, the contingent asset shall be wholly disregarded for the purposes of calculating the risk-based levy);

- (b) In a case falling within sub-paragraph (a) above, but where the reduction in the value of the asset satisfies either the condition set out in sub-paragraph (c) below or the condition set out in sub-paragraph (d) below (or both), the Board shall take no further action as a result of that reduction in value, that is, the risk-based levy for the year 1 April 2009 – 31 March 2010 shall be unchanged;
- (c) The first condition referred to in sub-paragraph (b) is that:
  - i. In the case of a contingent asset of Type A or B, the amendments were made in accordance with the amendment and release provisions of the contingent asset, that is, that under the terms of the contingent asset, the trustees of the scheme would not have been permitted unreasonably to withhold their consent to the making of such amendments;
  - ii. In the case of a contingent asset of Type C, the reduction provisions of the contingent asset have been complied with, that is, that any reduction in the face value of the Type C contingent asset was made in accordance with the express terms of the Type C contingent asset.
- (d) The second condition referred to in sub-paragraph (b) is that the condition set out in paragraph 4.2 of Annex G (Amendment and replacement conditions) is satisfied;
- (e) In other cases, the Board will recalculate the risk-based levy in respect of the scheme as if the contingent asset had not existed at 31 March 2009 (that is to say, the contingent asset shall be wholly disregarded for the purposes of calculating the risk-based levy), if it considers that the contingent asset would not have been taken into account if the changed circumstances had existed at 31 March 2009 and it is satisfied that in all the circumstances (including the nature of the change, the date when it has occurred or will occur, and the reasons for the change) it is appropriate for such a recalculation to be performed;
- (f) In a case where a recalculation of the risk-based levy is required, the Board will issue a revised notification of the amount of the levies in respect of the scheme.

28. For the avoidance of doubt:

- (a) A change in the value of real estate or securities comprising a Type B asset, after the date of the valuation given in the contingent asset certificate, is not a matter which falls to be notified to the Board, and will not lead to any recalculation of the risk-based levy;
- (b) A reduction in the face value of a Type C(ii) contingent asset in accordance with its terms upon the making of a Planned Contribution (as defined) shall not be regarded as a variation in the terms of that Type C(ii) contingent

asset, is not a matter which falls to be notified to the Board during the levy year, and will not lead to any recalculation of the risk-based levy; and

- (c) The risk-based levy will not be recalculated if steps are taken to increase the value of a contingent asset during the financial year.

***Additional condition where scheme has previously benefited from acceptable contingent asset(s) but those assets were subsequently reduced in an impermissible way***

29. If, in respect of a scheme:

- (a) one or more contingent assets was in place as at 1 April in a particular year (that 1 April being referred to in the remainder of this paragraph as the pre-reduction reference date);
- (b) all necessary certification and supporting documentation had been provided by the relevant deadline, and the contingent asset(s) satisfied all the requirements for recognition, such that those contingent asset(s) could have been recognised for the purposes of the risk-based levy for the financial year commencing on the pre-reduction reference date;
- (c) either:
  - (i) during the financial year commencing on the pre-reduction reference date, a change was made to one or more of the contingent assets, or some other event occurred, which resulted in the risk-based levy for that financial year being recalculated as though one or more of those contingent assets had not existed at the start of the year; or
  - (ii) for the financial year commencing one year after the pre-reduction reference date, no contingent assets were recognised for the purposes of the risk-based levy whether as a result of the operation of a rule equivalent to paragraph 24 above or otherwise; and
- (d) the Board has not given credit for any contingent assets in the risk-based levy for any financial year starting on or after the pre-reduction reference date,

then, notwithstanding any other provision of this Appendix, the Board shall not take into account any contingent assets for the purposes of that scheme's levy for the year 1 April 2009 – 31 March 2010 unless the condition set out in paragraph 4.3 of Annex G (Amendment and replacement conditions) is satisfied.

### ***Interpretation***

30. For the purposes of this Appendix, the following states shall (in addition to the full members of the organisation) be treated as members of the Organisation for Economic Co-operation and Development:
- (a) Channel Islands
  - (b) Isle of Man
  - (c) Gibraltar
  - (d) Bermuda