

**THE BOARD OF THE PENSION PROTECTION FUND**

**Guidance in relation to contingent assets**

17 December 2010

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## 1 INTRODUCTION

### 1.1 Pension Protection Fund recognition of contingent assets - General

1.1.1 This guidance incorporates all relevant information on the types of contingent asset arrangements that are recognised by the Board, including how they are valued in the risk based levy calculation. However, the definitive rules as to calculation of the levy for any given year are set out in the Determination for that year. In the event of any conflict between the rules as they are described in this guidance and the Determination, the Determination will prevail.

1.1.2 A contingent asset is an asset that will produce cash for a pension scheme if certain events happen, in particular when the sponsoring employer suffers an insolvency event.

1.1.3 For each levy year from 2006/07 to 2010/11, the Board of the Pension Protection Fund (the **Board**) took account of the following contingent asset arrangements when calculating the amount of risk based levy payable by a particular scheme, provided they were put in place using the Board's standard documentation and certified to the Board by the relevant deadline for that levy year:

- Guarantees given by parent/group companies and undertakings (Type A)
- Security over cash, real estate and securities (Type B)
- Letters of credit and bank guarantees (Type C)

1.1.4 Following consultation with the industry, the Board will take account of the same types of contingent asset arrangements for the 2011/12 levies. This guidance note is an updated version of the comprehensive guidance first published in September 2006 to reflect the Board's approach to contingent asset arrangements for the levy year 2011/12.

1.1.5 The Board reviewed and updated the standard forms of agreement, and published new versions on 18 December 2009, which should be used for new contingent assets entered into on or after that date.

1.1.6 For 2010/11 onwards the requirement for certain entities to be domiciled in the OECD was extended to include Hong Kong, as well as all states of the EU. This applies to guarantors in relation to Type A contingent assets, the account bank/custodian in relation to Type B(i) and B(iii), and issuers of Type C contingent assets.

1.1.7 From 2010/11, the Board also required evidence that the corporate benefit of entering into contingent asset agreements has been considered and established – see Chapter 5 for further details.

- 1.1.8 As for 2010/11, the submission of contingent asset certificates for 2011/12 will be via the Pensions Regulator's scheme maintenance system, Exchange. However hard copy supporting documents must still be sent to the Pension Protection Fund. For 2011/12 onwards, we also require that schemes include, with their hard copy supporting documents, a print-out of the contingent asset certificate itself. In practice the majority of schemes already meet this new requirement. Please see Chapter 3 of this guidance for further detail.
- 1.1.9 This document will be of use to those schemes seeking to re-certify existing contingent assets as well as to parties seeking to put in place new arrangements using the standard documentation.
- 1.1.10 This guidance may be further updated and expanded from time to time in the light of, for example, issues arising, or queries received by the Pension Protection Fund.
- 1.1.11 The Board will continue to recognise arrangements put in place by and recognised for previous levy years using the relevant versions of the standard documentation in those years, provided that the trustees re-certify the arrangement before 5pm on 31 March 2011 confirming that the arrangement will remain in place for 2011/12. The Board's intention is that once a scheme has put a contingent asset in place in accordance with the Board's policies in any given year, a scheme will continue to receive credit for that arrangement in the levy calculation for future years, assuming the arrangement continues to meet the Board's requirements, and is re-certified each year.
- 1.1.12 Version 6.0 of this guidance note is published to accompany the 2011/12 Pension Protection Levy Policy Statement and the Board's Determination of the levies for 2011/12.
- 1.1.13 Employers and trustees that are considering putting in place a new contingent asset with a view to recognition in the 2011/12 levy are encouraged to commence the process as early as possible, so as to ensure all of the requirements can be completed in advance of the 31 March 2011 deadline.

## 1.2 Sources of information

- 1.2.1 This document is intended to assist the trustees and managers of schemes, as well as employers and other group companies, which are considering entering into contingent asset arrangements for which they would seek credit in the risk based levy calculation. Some of the information in this guidance, particularly that relating to the precise mathematical treatment of contingent assets in levy calculations, is of a technical nature and trustees and managers may find it helpful to consult the scheme actuary to understand fully how it relates to their scheme. The vast majority of the document however is intended for trustees. This guidance should be

read in conjunction with the following documents, all of which are available through the pension protection levy section of the Pension Protection Fund's website at <http://www.pensionprotectionfund.org.uk/>, save for the certificates, which are available via Exchange on the Pensions Regulator's website

- standard form agreements for contingent assets;
- certificates for notifying the Pension Protection Fund, via Exchange, of the existence of a contingent asset;
- the Board's formal determination (**Determination**) under section 175(5) of the Pensions Act 2004 in respect of the levy year 2011/12 (published on 17 December 2010), specifically the Contingent Asset Appendix;
- the Board's Determination in respect of the previous levy years 2006/07 to 2010/11 inclusive;
- the current version of the Board's Levy Practice Guide (first formally published on 18 December 2009), which refers to amendment and replacement of contingent assets;
- any new Frequently Asked Questions in relation to contingent assets which may be published in the future; and
- the Board's consultation documents, including the 2011/12 Pension Protection Levy Consultation Document, published in September 2010, and the Board's response to that consultation published in December 2010, which provide further background on the development of the Board's policies in this area.

1.2.2 You are advised to read all of this information in full before taking action in relation to new contingent assets or certifying any such assets to the Board. The person submitting the contingent asset certificate on Exchange will be required to declare that they are aware of this guidance.

1.2.3 References in this document to **trustees** should, except where the context requires otherwise, be taken to include references to managers.

1.2.4 **In the case of sectionalised schemes, all references to a scheme in this document should be taken to apply to the relevant section.**

1.2.5 All dates and times are measured by GMT or, if it is in force at the relevant time, BST.

## 1.3 **Structure of this document**

1.3.1 The remaining sections of this document cover the following areas:

- Chapter 2: general issues in relation to the Board's policies on contingent assets;
- Chapter 3: detailed information on the process for certifying a new contingent asset arrangement for inclusion in the 2011/12 levy calculation, applicable to all contingent asset types;
- Chapter 4: detailed information on the process for re-certifying an existing contingent asset for inclusion in the 2011/12 levy calculation, applicable to all contingent asset types;
- Chapter 5: requirements applicable to all contingent asset types;
- Chapter 6: specific information in relation to Type A contingent assets;
- Chapter 7: specific information in relation to Type B contingent assets;
- Chapter 8: specific information in relation to Type C contingent assets;
- Chapter 9: amending and replacing contingent assets;
- Chapter 10: what you can expect after submitting information on a contingent asset to the Board;
- Appendix 1: checklists of information required to be sent to the Board;
- Appendix 2: sample covering letter for the submission of documentation;
- Appendix 3: Notes and queries on legal opinions.

## 2 **RECOGNISING CONTINGENT ASSETS**

### 2.1 **Use of standard form documentation**

2.1.1 The Board only recognises contingent asset arrangements that are put in place using the standard forms of documentation published by the Board. This reduces the enforceability risk to and the administrative burden on the Board (and hence the administration levy). Trustees (or a person authorised by them) are asked to certify that the contingent assets for which they seek credit are in the Board's standard form and are legally valid, binding and enforceable.

2.1.2 The Board's standard forms may be accessed as Word documents via the pension protection levy section of the Pension Protection Fund website. The standard forms were updated on 18 December 2009, to be used for agreements entered into on or after that date. Please note that the Determination requires the person providing the contingent asset certificate to certify that the agreement is in the standard form published by the Board and in force at the date on which the agreement was entered into. The chosen agreement should then be completed (with legal advice) to include the parties involved, details of any underlying assets charged etc. prior to execution by the parties.

2.1.3 Please note that changes that, in the opinion of the Board, would have a materially detrimental effect on the rights of the trustees by comparison with the standard forms are not permitted. However, companies and trustees are free to agree deviations from the standard form which are not materially detrimental, e.g. changes which are minor or reflect the legal form of the contingent asset provider or which enhance the position of the trustees. Please see paragraph 2.1.5 below in this regard. In such a situation the trustees must provide to the Board a clear statement of the changes, and the formal legal opinion will need to confirm that the changes do not have a materially detrimental effect on the rights of the trustees as compared with the standard form, and opine specifically on why each of those changes are not thought to be materially detrimental. It is compulsory to provide a blacklined document (e.g. one generated by CompareRite™ or similar software) where there is any change that goes beyond the necessary selection of options and the insertion of details of the parties - see section 3.4 below.

2.1.4 Please note that the Board will not provide prior confirmation on an individual basis of the acceptability or otherwise of any particular proposed variation to the standard form documentation. It will be a matter for the trustees and their legal advisers to satisfy themselves, prior to making their contingent asset submissions, that the proposed variations do not have a materially detrimental effect as compared with the standard form, rather than the Board providing any such confirmation. This is one of the matters which

the trustees (or persons authorised by them) are required to certify to the Board and which must be supported by a legal opinion (see Chapter 5 and Appendix 3). The Board will then consider whether the changes are in fact materially detrimental as compared with the standard form.

2.1.5 The requirement that any variations from the standard form must not be materially detrimental to the rights of the trustees is quite deliberately a stringent test, to ensure fairness between schemes. If the document is negotiated between the parties, with the result that some changes are made which benefit the trustees and some which are materially detrimental to the trustees, the trustees' legal adviser will not be able to give the confirmation required and the contingent asset cannot be recognised. For the avoidance of doubt, a single materially detrimental change will mean that the contingent asset cannot be recognised, notwithstanding there may be materially beneficial changes which the parties involved believe outweigh the negative change. Furthermore, the requirement is that the variations are not materially detrimental **from the standard form**; the fact that the agreement might represent a more favourable position for the trustees than no agreement at all is not relevant.

2.1.6 Where the Board becomes aware of issues around the documents which are not specific to individual schemes, it may publish clarification by way of FAQs to assist users.

## 2.2 **Pre-existing contingent assets**

2.2.1 Schemes that already have contingent assets in place which are not in the Pension Protection Fund's standard form will need to move to the standard forms (if they have not done so already) if they are to receive credit for those assets in the risk based levy for 2011/12 and beyond. This rule applies to all schemes, regardless of when the pre-existing contingent asset was entered into.

## 2.3 **The levy determination**

2.3.1 In accordance with its statutory obligations under section 175(5) of the Pensions Act 2004, the Board publishes each year a "determination" of the pension protection levy (the **Determination**), setting out the rules by which the scheme based and risk based levies for that year will be calculated for every eligible scheme. The Determination includes details of how contingent assets are recognised for the relevant levy year. The final Determination for 2011/12 was published on 17 December 2010 and is available in the pension protection levy section of the Pension Protection Fund website.

## 2.4 **Obtaining legal advice**

2.4.1 The Board's rules for the recognition of contingent assets require the trustees of a scheme/section to obtain a formal legal opinion in

relation to the contingent asset from an appropriately qualified person, and to provide a copy of that opinion to the Board. Trustees/employers are therefore encouraged to obtain legal advice at an early stage as this will assist in the production of the legal opinion. The lawyers will also be able to advise in detail on the effect of the provisions in the Pension Protection Fund's standard forms of documentation, and their implications for the employer groups and schemes concerned. Further guidance in relation to the form and content of legal opinions is set out below and in Appendix 3. The form of certificate in Exchange requires the trustees to certify a list of statements (which varies by contingent asset type) and to confirm that those statements are made on the basis of a legal opinion; for the avoidance of doubt the legal opinion must, therefore, address each of those statements.

## **2.5 Versions of standard documentation**

2.5.1 On 23 January 2006, the Board published the final versions of the standard documentation for contingent assets which the Board would recognise for the levy year 2006/07. In September 2006 it published updated versions of the same documents to be used for all agreements entered into on or after 11 September 2006. As mentioned above, in December 2009 it published further updated versions of the same documents to be used for all agreements entered into on or after 18 December 2009.

2.5.2 For levy recognition, an agreement must be in the PPF standard form in force at the date of execution - so any new agreement entered into at the date of this guidance (December 2010) would need to be in the 18 December 2009 standard form.

2.5.3 Parties should not "mix and match" provisions from the different versions of the standard form. In other words, if the parties to an existing contingent asset move from the September 2006 version to the December 2009 version, they must adopt all the new provisions and not only some of them.

## **2.6 Responsibility for standard documentation**

2.6.1 Please note that it is the reader's responsibility to obtain legal advice before using the Pension Protection Fund's standard documentation - you should not rely on this guidance note or on other documentation published by the Pension Protection Fund. The Board accepts no responsibility to trustees or any other person for the efficacy of the standard documentation or for any legal effects that such documentation may have if used in any circumstances.

## **2.7 Sanctions**

Please note that it is a criminal offence under section 195 of the Pensions Act 2004 for a person knowingly or recklessly to provide materially false or misleading information to the Board in circumstances in which that person intends or could reasonably be

expected to know that it would be used by the Board for the purposes of exercising its statutory functions, including calculation of the pension protection levies.

### 3           **PROCEDURE FOR RECOGNITION OF NEW CONTINGENT ASSETS**

#### 3.1           **Certification**

- 3.1.1       Once the contingent asset agreement has been completed and executed by all relevant parties, the trustees (or their authorised representative) will need to submit details of the contingent asset electronically using the appropriate certificate accessed on the Pensions Regulator's scheme maintenance system, Exchange, **before 5pm on 31 March 2011** (the last working day before the start of the new levy year). Supporting documents will need to be sent to the **Pension Protection Fund** in hard copy **by the same deadline**. Each certificate requires various details of the contingent asset to be filled in and the trustees have to certify a number of statements which have a bearing on the benefit which may be derived from the contingent assets. It is very important that the trustees give proper consideration to each of the statements they are required to certify and the legal opinion they will have obtained should assist them in doing so. If trustees or their representatives fail to certify correctly one or more of the matters set out in the relevant certificate, that certificate will be rejected by the Board and no credit will be given in the risk based levy calculation. Please refer to the Contingent Asset Appendix to the Board's Determination for details of the information which must be provided.
- 3.1.2       As in 2010/11, for 2011/12 the Board requires certificates to be submitted via Exchange.
- 3.1.3       Please note that the Board will be relying on Exchange for information contained within the scheme return, and schemes will need to ensure Exchange is kept up to date. Details of the Exchange system can be found on the Pensions Regulator's website.
- 3.1.4       The trustees will also need to supply hard copies of various documents to the Board, as specified in the Contingent Asset Appendix and the notes to the relevant certificate, in support of certain declarations made in that certificate. In all cases a certified copy of the executed legal agreement (showing all relevant signatures/ seals etc.) is required, together with a formal legal opinion covering certain matters set out in the certificate, and a document showing the differences from the Pension Protection Fund's required form. If there are no differences from the standard form, this should be confirmed in writing as part of the legal opinion or in a separate letter. If the appropriate documents are not supplied, the certificate will be rejected by the Board and no credit will be given in the risk based levy calculation.
- 3.1.5       It should be noted that, by giving the certificate in the form required, the trustees undertake to notify the Board if any of the

information in the certificate ceases to be true and correct on or before 31 March 2012, i.e. at any time during the levy year. If, for example, the credit rating of the issuer of a Type C contingent asset were to change during the year, or the value of a parent company guarantee were to be reduced by agreement between the parent and the trustees, this must be notified to the Board. Where changes are notified this may result in the levy being recalculated in light of the changes (see Chapter 9).

### 3.2 **Certified copy**

3.2.1 The copy of the agreement submitted to the Board in support of the contingent asset certificate must be a certified copy. A certified copy is a photocopy of the original executed agreement which has been certified as a true copy of the original, usually by lawyers involved in the transaction.

3.2.2 For the purposes of the Board's rules on contingent assets, a trustee may certify a copy of the agreement himself using the wording set out below, followed by his signature, name and capacity (i.e. trustee) in block capitals and the date on which the certificate is given.

*"I certify that this is a true and complete copy of the original document."*

3.2.3 Where the agreement has been executed in counterpart i.e. the parties have signed on separate copies of the agreement, it is acceptable for a certified copy of one counterpart to be provided with the signature pages from each of the additional counterparts attached.

### 3.3 **Legal Opinion(s)**

3.3.1 The Board's rules for the recognition of contingent assets require the trustees of a scheme/section to obtain a formal legal opinion in relation to the contingent asset from an appropriately qualified person, and to provide a copy of that opinion to the Board. Obtaining a formal legal opinion is good practice in relation to such transactions, gives the trustees extra comfort that the contingent asset is enforceable and would provide the expected benefit to the scheme if it were enforced, and alerts the trustees to any limitations in that regard. It is for the trustees and their advisers to satisfy themselves that appropriate legal opinion(s) have been obtained from appropriate lawyers, and that the opinion(s) cover appropriate matters. The Board has specified, in respect of each type of contingent asset, declarations that the Certifier is required to confirm are given on the basis of a legal opinion. For the avoidance of doubt, the Board requires that each of these certifications are contained within the legal opinion. The Board has set out certain further requirements and unacceptable practices below and in Appendix 3 to this guidance; however these are not

intended to be comprehensive. As set out below, for all new contingent assets from 2010/11, the Board requires evidence that the benefit to the guarantor, chargor or purchaser (as appropriate) of entering into the agreement has been considered and established. It is up to the parties involved to decide whether this evidence is to be provided by way of coverage in the legal opinion (for example a confirmation that the legal advisor has seen the relevant documentation and can confirm, as a matter of fact, that the benefit has been considered and established) or by way of other documentary evidence.

- 3.3.2 As all of the standard form documentation provided by the Board, except the standard forms of security over property situated in Scotland and Northern Ireland, is governed by English law (and changes of governing law are not permitted), the appropriately qualified person would usually be a firm of English solicitors with expertise in substantial transactions of this type. The English legal opinion must be provided by a person holding a practising certificate from the Solicitors Regulation Authority and holding professional indemnity insurance in accordance with the Solicitors' Indemnity Insurance Rules. The English legal opinion must be addressed to the trustees and therefore given by a legal adviser formally appointed by the trustees. It should not be provided by an in-house legal adviser, and the trustees should carefully consider issues of conflict before instructing for this purpose any legal adviser who has advised any other party to the agreement.
- 3.3.3 The standard forms of security over property situated in Scotland and Northern Ireland are governed by the respective laws of those jurisdictions. A legal opinion from appropriately qualified Scottish or Northern Ireland lawyers will therefore be needed (instead of an English law opinion) where those documents are used.
- 3.3.4 In the case of Type A and B contingent assets, where the guarantor/chargor is domiciled outside England and Wales, an overseas opinion must be sought covering at least: the capacity of that party to enter into the agreement; recognition by the overseas jurisdiction of the choice of law clause in the agreement; enforceability in that jurisdiction of judgments obtained in England; and the absence of conflict with local law. Where an overseas legal opinion has been obtained, the trustees must still obtain an English legal opinion (or, where paragraph 3.3.3 applies, a Scottish/Northern Ireland opinion). That opinion needs to cover all of the certified matters as described in paragraph 2.4.1 above, albeit that it will need to cross refer to and rely on the accompanying foreign opinion for matters of foreign law (only).
- 3.3.5 In the case of Type C contingent assets issued by overseas banks/insurance companies, no overseas legal opinion is required. Similarly, where the issuer of a Type C asset is a UK bank/insurance company, the Board does not require the lawyers to investigate the capacity of the issuer to enter into the agreement.

An English law opinion is still required in both cases, but appropriate assumptions in relation to capacity and, where applicable, the overseas jurisdiction may be made. This relaxation in respect of Type C assets reflects the additional requirements as to the regulated status and credit rating of Type C issuers. Trustees are of course free to obtain a more comprehensive opinion, and should do so if any aspect of the contingent asset arrangement appears to be in doubt.

3.3.6 Where one of the parties is domiciled outside the jurisdiction of the primary legal opinion, advice from lawyers qualified in the relevant overseas jurisdiction may also be necessary.

3.3.7 Where an overseas legal opinion is obtained, it is acceptable for that opinion to be provided by an in-house adviser or an adviser to a party other than the trustees, provided that adviser is appropriately qualified in the jurisdiction in question. The Board will accept legal opinions from lawyers qualified in one jurisdiction in relation to a party which is domiciled in another jurisdiction where (and only where) the Board is satisfied that that it is standard local practice for lawyers qualified in the former jurisdiction to provide formal legal opinions regarding the laws of latter jurisdiction. For example, the Board will accept overseas legal opinions from lawyers qualified in US states other than Delaware in relation to a party which is incorporated in Delaware.

3.3.8 Where an overseas legal opinion has been obtained, the trustees must also obtain an English legal opinion unless paragraph 3.3.3 applies.

### 3.4 **Comparison to the Standard Form**

3.4.1 A blacklined document showing the differences between the agreement and the Pension Protection Fund's standard form (the **Standard Form**) must be provided in all cases, unless the trustees or their lawyers specifically certify to the Board that the only changes made to the Standard Form are to complete the details required in the agreement (e.g. name and address of guarantor) and to select one of the options (e.g. liability cap) set out in the Standard Form. Such confirmation of no changes could be included in the covering letter submitted with the documents, or in the legal opinion.

3.4.2 The document must be a blacklined document showing the changes, e.g. a comparison generated by "CompareRite™" or similar software.

### 3.5 **Declaration**

3.5.1 The trustees (or their authorised representatives) providing the certificate must declare that they are aware of the "Guidance in relation to contingent assets" published by the Board on its website

and, so far they are aware, that guidance has been followed in putting the contingent asset in place and certifying it to the Board.

### 3.6 **Contingent asset certificate**

3.6.1 For levy year 2011/12 onwards, the Board is now requiring schemes to include with their hard copy contingent asset submissions a printed copy of the contingent asset certificate itself. The majority of schemes already provide print-outs of the certificate with their submissions, so, in the interests of administrative ease, enabling it to benefit all schemes by reducing the administrative levy, the Board has decided to require that all schemes do so. Where a scheme is submitting more than one contingent asset, the submission should identify which documents relate to which certificate.

### 3.7 **Additional Documents**

3.7.1 Where relevant, valuations and other documents may also be needed. These documents will be detailed in the relevant certificate, including requirements as to the effective date of the document.

### 3.8 **Deadline**

3.8.1 For the purposes of the 2011/12 risk based levy calculation, the Board will only take account of contingent asset arrangements in respect of which all required documentation has been supplied before 5pm on 31 March 2011.

### 3.9 **Submissions**

3.9.1 All hard copy documentation must be sent to the address below and marked for the attention of the Director of Legal - Re Contingent Asset.

Director of Legal - Re Contingent Asset  
Ref [*insert pension scheme registration number*]  
The Pension Protection Fund  
Knollys House  
17 Addiscombe Road  
Croydon  
Surrey  
CR0 6SR

3.9.2 A suggested form of covering letter is included at Appendix 2. Please quote the pension scheme registration number (or PSR) on all correspondence.

3.9.3 For the avoidance of doubt, delivery by fax is not permissible. The documents required to be provided to the Board in hard copy will not be accepted by email.

## 4 EXISTING CONTINGENT ASSETS

### 4.1 Re-certification

4.1.1 Where a contingent asset has been recognised for the purpose of the 2010/11 risk based levy, the trustees must re-certify that contingent asset for levy year 2011/12 in order for it to be recognised for the 2011/12 risk based levy.

4.1.2 As for the levy year 2010/11, for 2011/12 Exchange must be used for re-certification of existing contingent assets. The website page will contain a pre-populated form with the existing contingent asset information already set out. If nothing has changed you must simply confirm this. **Do not delete this pre-populated certification unless you are sure you are not going to recertify it.** If the contingent asset has been amended in any way you must supply details of the changes (in the relevant part of the certificate) before submitting the certificate. The deadline for re-certification is no later than **5pm on 31 March 2011**. If you have previously submitted a contingent asset certificate for levy year 2010/11 but there does not appear to be a corresponding prepopulated certificate on Exchange, please contact the Pension Protection Fund stakeholder support team for information on how to proceed.

4.1.3 The specifics of how each type of contingent asset must be re-certified and the hard copy documentation to be provided to the Board are set out in the Contingent Asset Appendix to the Board's Determination for 2011/12.

4.1.4 The re-certification provisions are intended to minimise the administrative burden on trustees who have already provided full information to the Board, whilst providing the Board with adequate assurance that the contingent asset remains in place and should be given the same recognition in 2011/12 as it was in 2010/11.

### 4.2 Amendments

4.2.1 The information required to be provided to the Board will partly depend on whether the contingent asset in question has been amended since it was previously submitted, and if so in what way.

4.2.2 The submission of a new Type C contingent asset which is on the same terms as, and replaces (pursuant to the "evergreen" provisions), a Type C contingent asset which has previously been accepted by the Board and is due to expire, should be treated as re-certification rather than as a new contingent asset.

### 4.3 Certified copy

4.3.1 Where the contingent asset has been amended or varied in any way, the trustees should supply a new certified copy of the amending document or the amended agreement, as applicable. If

there have been no amendments, there is no need to resubmit a certified copy of the original agreement.

#### 4.4 **Legal opinion**

4.4.1 There is no general requirement to obtain an updated formal legal opinion but the trustees may wish to do so before making the declarations in the contingent asset certificate, and should do so if they have reason to believe that the legal position might have changed since the original opinion was given. For example, if the agreement has not been amended, or has been subject to simple amendments (e.g. change in liability cap) that would not call into question the provider's capacity to enter into the amended agreement, no updated opinion will be required. Conversely if a guarantor in relation to a Type A guarantee is replaced, a new opinion dealing with the capacity of the new guarantor to enter into the agreement will be necessary.

4.4.2 Where a new legal opinion is required, it is acceptable for the new opinion to be in a short form "refreshing" the old opinion, and/or to incorporate the old opinion by reference, rather than a wholly new opinion.

4.4.3 Whether or not a new formal legal opinion is required, trustees should of course satisfy themselves (taking legal advice where appropriate) that any changes to the documentation are valid, have been properly authorised etc.

#### 4.5 **Declaration**

4.5.1 As when submitting a new contingent asset, the trustees (or their authorised representatives) must declare that they are aware of the "Guidance in relation to contingent assets" published by the Board on its website and, so far as they are aware, that guidance has been followed in putting the contingent asset in place and certifying it to the Board.

#### 4.6 **Valuations and Certificates of Title**

4.6.1 In the case of Type B contingent assets, there are certain requirements, as set out in Chapter 7, with regard to updating valuations. **Please note that the requirements in relation to real estate valuations for Type B(ii) contingent assets (security over real estate) were changed for 2010/11 onwards.** Please refer to Chapter 7 below for details.

4.6.2 In the case of Type B(ii) contingent assets (security over real estate) there are certain requirements, as set out in Chapter 7, with regard to reviewing/updating the certificate of title previously submitted to the Board.

## 4.7 **Submissions**

- 4.7.1 The requirements for submission of documentation are as set out in paragraph 3.8 above.

## 5 REQUIREMENTS APPLICABLE TO ALL CONTINGENT ASSETS

### 5.1 General

- 5.1.1 For convenience, the Board has categorised the acceptable types of contingent asset as Type A, B or C. There are certain specific qualifying criteria for each type, as set out in Chapters 6-8. There are also some basic requirements common to all types, as set out below. All of the requirements are designed to ensure that the Board gives equal credit for equivalent protection, and that the credit correctly reflects the value/risk to trustees, and hence to the Pension Protection Fund, of any particular arrangement.
- 5.1.2 All of the types must be created by legal documentation in the Pension Protection Fund's standard form.
- 5.1.3 For recognition in a particular levy year, a contingent asset must come into force on or before 1 April in that levy year. In practice most contingent assets will already be in force at the point of certification (which for the levy year 2011/12 must be no later than 5pm on 31 March 2011) but the Board recognises that in the case of contingent assets of Type C in particular, it may be desirable for cover not to commence until 1 April. However the agreement must be unequivocally in force on 1 April and every successive day through the year. Obviously an agreement executed later in the year but stated to have (retrospective) effect from 1 April cannot satisfy this requirement - quite apart from it being impossible to certify such an agreement by the 31 March deadline.
- 5.1.4 All contingent assets must be granted directly in favour of the trustees in respect of the scheme, not in favour of the relevant employers.
- 5.1.5 If a contingent asset is put in place it must cover the liabilities of all employers in relation to the scheme (within the meaning set out in section 318 of the Pensions Act 2004 and regulations made thereunder) that are "associates" (within the meaning set out in section 435 of the Insolvency Act 1986) of the person providing the asset. These employers are to be listed in Schedule 1 to the standard form document in each case. The person providing the asset is free to guarantee those who are not "associated" if they wish, provided that the asset covers all of the employers with whom they are "associated".
- 5.1.6 One issue that has caused some concern is whether contingent assets (particularly of Type B) fall foul of the statutory restrictions on employer-related investments. Ultimately this is a question of statutory interpretation and trustees should seek their own advice. However the Board's interpretation is that contingent assets of the types it will recognise for levy purposes do not constitute an investment of scheme assets/resources of the scheme by the trustees, and that therefore the restrictions are not relevant.

## 5.2 **EU/OECD domicile and FSA regulation**

- 5.2.1 In certain circumstances, the Board requires that a party is domiciled in the European Union, in an OECD state or in Hong Kong and/or is regulated by the Financial Services Authority (**FSA**) either directly or on the basis of rights in European Union law. As with the standard form legal agreements, these requirements are designed to limit enforceability risk to the trustees and hence the risk to the Pension Protection Fund associated with recognising these contingent assets.
- 5.2.2 For these purposes, membership of the OECD is taken to mean that the jurisdiction in question is one of the full members of the OECD listed on the OECD website (of which there are currently 34).
- 5.2.3 However, from the 2007/08 levy year onwards, the Board has included within the OECD classification the Channel Islands, Isle of Man, Gibraltar and Bermuda, based on the formal statement made by the British government in relation to these territories in 1990.
- 5.2.4 From the 2010/11 levy year onwards, the domicile requirement for certain entities was further extended to include Hong Kong.
- 5.2.5 Where the regulation test applies, the entity in question must be regulated by the United Kingdom FSA or its applicable successor or by an equivalent EU regulator<sup>1</sup>. Regulation by an entity outside the EU, whether or not in fact equivalent to the level of protection that would be afforded by an EU regulator, will not be recognised for these purposes.

## 5.3 **Corporate benefit**

- 5.3.1 For all new contingent assets from 2010/11, the Board requires evidence that the benefit to the guarantor, chargor or purchaser (as appropriate) of entering into the contingent asset agreement has been considered and established. This evidence could be in the form of either specific confirmation from the relevant directors, board minutes, or confirmation in the legal opinion that as a matter of fact the legal advisor can confirm that the relevant evidence exists.
- 5.3.2 If the guarantor is domiciled in a country outside England and Wales where the existence or otherwise of corporate benefit (or a

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<sup>1</sup> Very broadly this means a "competent authority" designated by each Member State of the EU to regulate in that State (a) investment firms (as defined in the Markets in Financial Instruments Directive ("MiFID") (2004/39/EC)) and (b) credit institutions (as defined in the directive relating to the taking up and pursuit of the business of credit institutions (recast) (2006/48/EC)).

similar concept) will not affect the enforceability of the contingent asset, the legal opinion should specifically opine to this effect.

## **6 TYPE A CONTINGENT ASSETS**

### **6.1 Introduction**

6.1.1 A Type A contingent asset is a guarantee given by a group company or other entity (the Guarantor) directly to the trustees of the pension scheme. Where a Type A guarantee is in place, and depending on the amount guaranteed, the risk based levy may be based wholly or partly on the insolvency risk of the guarantor rather than on that of the participating employer(s) (see 6.7 below).

### **6.2 Requirements in relation to Guarantors**

6.2.1 The Guarantor must be an "associate" (within the meaning set out in section 435 of the Insolvency Act 1986) of at least one of the participating employers in the scheme. The Guarantor may, for example, be a parent company or some other company within the same group as one or more of those employers. Where appropriate the Guarantor may also be another type of entity e.g. a partnership. The Guarantor must be domiciled in an OECD country, EU member state or Hong Kong.

6.2.2 In order to be taken into account in the risk based levy calculation for a particular year, the Pension Protection Fund's assumed probability of insolvency for the Guarantor at the start of the year must be lower than the assumed probability of the employers whose obligations are guaranteed. If the Guarantor initially satisfies this condition, but no longer satisfies that condition at the start of a future levy year, then the guarantee will not be taken into account in the risk based levy calculation for that levy year. However, it remains of value to the trustees and moreover will be taken into account again in any levy year after that if the insolvency probability of the Guarantor at the start of that year is once again lower than that of the employer(s).

### **6.3 Multiple Guarantors**

6.3.1 In some circumstances, groups of companies may wish to enter into a single guarantee executed by a number of guarantors, whereby the guarantors are jointly and severally liable up to a single maximum liability amount (see 6.5 below). In these circumstances the Board will, for each levy year, treat the guarantee as if it were a simple guarantee from whichever of the guarantors has the lowest probability of insolvency as at the start of the year.

6.3.2 In other circumstances, a single scheme may benefit from a number of separate guarantees from different guarantors, where each may be liable up to a different amount specified in the relevant guarantee. In these circumstances the Board will calculate a blended effect of the guarantees, as set out in paragraph 6.8 below.

## 6.4 **Specific provisions of the guarantee**

6.4.1 The Pension Protection Fund standard form of group company guarantee imposes various ongoing obligations on the Guarantor, including requirements to notify the trustees of any breach of the provisions of the guarantee and of any event occurring to the Guarantor which would, if the Guarantor were an employer, constitute a "notifiable event" under the Pensions Act 2004. This should serve as an early-warning mechanism for the trustees, who may wish to take into account the event that has occurred in discussions relating to the state of funding of the scheme and, where relevant, any negotiations in relation to the contingent assets available to the trustees.

## 6.5 **Liability caps**

6.5.1 The standard form of Type A guarantee requires the Guarantor's liability to be capped in one of five ways. The Guarantor will therefore have to choose which cap should apply (which will affect the value of the asset credited for the purposes of the risk based levy).

6.5.2 Note that a guarantee granted to the trustees of schemes or sections where the employers are not associated by a permanent community of interest ("non-associated schemes") must have a fixed cap (and not one of the other formulations) to ensure that the credit given for such assets in the levy calculation is fair.

6.5.3 The five potential caps, which form part of the definition of "Guaranteed Obligations", are as follows:

- (a) A fixed monetary amount ('fixed cap');
- (b) The lowest amount which will, when added to the assets of the scheme/section, result in the scheme/section being funded to at least a specified percentage level on a section 179 basis ('full percentage cap');
- (c) The lowest amount which will, when added to the assets of the scheme/section, result in the scheme/section being funded to at least a specified percentage level on a section 179 basis, subject to a fixed maximum liability ('limited percentage cap');
- (d) The full potential section 75 liability of all employers to the scheme/section ('full section 75 cap');
- (e) The full potential section 75 liability of all employers to the scheme/section, subject to a fixed maximum liability ('limited section 75 cap').

6.5.4 In the documentation published before the 2006/07 levy year, only formulations (a), (b) and (d) were permissible. The limited

percentage cap and limited section 75 cap were introduced for 2007/08 and beyond following representations made by schemes and guarantors.

6.5.5 Guarantors must choose one of the five formulations set out above, so as to ensure that the Board can value all guarantees on a fair and consistent basis. Alternative formulations for the liability cap are not in general permissible. However, caps of the form "the higher of [Cap1] and [Cap2]", where Cap1 is one of the five caps set out above and Cap2 is an alternative measure, are acceptable. They will be valued by the Board as though only Cap1 applies, and should be certified accordingly.

## 6.6 **Deemed value based on liability cap**

6.6.1 The Determination specifies a deemed value for each Type A guarantee, based on whichever liability cap has been chosen to apply to that contingent asset. This deemed value is relevant for the purposes of the amendment and replacement rules described below. The deemed value of a Type A contingent asset, calculated in this way, is not used directly for the calculation of the risk based levy.

6.6.2 The deemed value is calculated based on asset and liability information (including deficit-reduction contributions) certified to the Board prior to the start of the relevant levy year. Valuations, which will be on a section 179 basis for the vast majority of schemes, are rolled forward to a consistent date on the basis published by the Pension Protection Fund.

6.6.3 The deemed value of the Type A guarantee is then calculated using a formula which broadly reflects the actual limit on the Guarantor's liability that would apply on the date referred to above, based on the asset and liability information referred to in paragraph 6.6.2. A guarantee of the full s.75 debt of the scheme is treated as though it guaranteed 155% funding on a s.179 basis for these purposes (for levy years 2006/07 and 2007/08 the equivalent percentage was 125%, and for 2008/09, 2009/10 and 2010/11 the equivalent percentage was 140%.)

6.6.4 Hence, for example:

- the deemed value of a Type A guarantee with a full percentage cap guaranteeing 110% funding will be taken to be  $(110\% \times L) - S - C$ ; and
- the deemed value of a Type A guarantee with a limited section 75 cap, where the limit is £10m, will be taken to be the lower of
  - (i)  $(155\% \times L) - S - C$ ; and
  - (ii) £10m

where, in each case, L and S represent the liabilities and assets of the scheme respectively, converted/rolled forward to the consistent date referred to above, and C represents deficit-reduction contributions certified to the Board.

6.6.5 In some cases the calculation set out above may result in a negative result. In those circumstances the deemed value of the Type A guarantee is taken to be zero. However the guarantee may nonetheless be taken into account in calculating the risk based levy, as further described in sections 6.7 and 6.8 below.

#### 6.7 **Recognition for levy purposes - single Type A guarantee**

6.7.1 For levy calculation purposes, the insolvency risk of the sponsoring employer(s) will be adjusted to include some credit for the insolvency risk of the guarantor, recognising that it may be the guarantor's insolvency that would lead to a call on the Pension Protection Fund.

6.7.2 It should be noted that, as in previous levy years, a Type A guarantee can only result in a risk switch in the levy calculation. It cannot result in a scheme which is less than 155% funded (taking into account contingent assets of Types B and C) paying zero risk based levy.

6.7.3 As for 2010/11, the formulae for 2011/12 are designed to ensure that an uncapped percentage guarantee of at least 105% funding on a section 179 basis will always result in a complete switch from employer insolvency probability to guarantor insolvency probability.

6.7.4 In all cases the first stage is to calculate the deemed underfunding, applying the 2011/12 taper and including within the assets the full value of any contingent assets of Type B or C (but not Type A) from which the scheme benefits. If the scheme is funded at or above 155% on this basis, the deemed underfunding will be zero and the scheme will pay no risk based levy, regardless of the Type A guarantee. For example, if the scheme has liabilities of £100m, assets of £90m, a Type B contingent asset valued at £10m and a Type C valued at £5m, the deemed underfunding U will be:

$$U = £136m - £90m - £10m - £5m = £31m$$

Depending on the form of the Type A asset, part of the deemed underfunding may then be multiplied by the insolvency probability of the guarantor, while the balance continues to be multiplied by that of the employers.

6.7.5 In the following paragraphs, U is the deemed underfunding calculated in accordance with paragraph 6.7.4. R is the proportion of the levy which is risk based (80% for 2011/12) and c is the levy scaling factor, which is set out in the Determination.

6.7.6 If there is a single guarantee of the scheme's full section 75 debt, this will always result in a complete risk switch and the risk based levy will be:

$$U \times P_{\text{guar}} \times R \times c$$

6.7.7 The same formula will apply if there is a single guarantee of G% of section 179 liabilities, and G is at least equal to 105:

$$U \times P_{\text{guar}} \times R \times c$$

6.7.8 If there is a single percentage based cap guaranteeing G%, where  $G < 105$ , then a "non guaranteed amount" V is calculated equal to the absolute shortfall between the guaranteed level and 105% funding.

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

6.7.9 This non-guaranteed amount is then applied in "first priority" to the deemed underfunding calculated in accordance with 6.7.4, and retains the employer insolvency probability, while the balance of the deemed underfunding is multiplied instead by the guarantor insolvency probability. Hence the risk based levy becomes:

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

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

6.7.10 Where there is a single Type A guarantee for a fixed amount £H, that amount £H of the deemed underfunding is multiplied by the guarantor insolvency probability and the balance retains the employer insolvency probability. Hence the risk based levy becomes:

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

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

6.7.11 For the remaining two liability cap types (lower of s75 and fixed amount £H; lower of G% and fixed amount £H) the risk based levy is determined by calculating the levy which would apply if each of the two limbs of the relevant liability cap applied separately, and then taking the higher result.

### ***Examples***

6.7.12 For each of the following examples, assume the scheme has liabilities of £100m.

6.7.13 If scheme assets = £90m and there is a guarantee of 100% then:

$$U = £46m$$

$$V = \text{£}5\text{m}$$

$$\text{RBL} = [\text{£}5\text{m} \times P + \text{£}41\text{m} \times P_{\text{guar}}] \times R \times c$$

6.7.14 If scheme assets = £90m and there is a guarantee of £10m then:

$$U = \text{£}46\text{m}$$

$$\text{RBL} = [\text{£}36\text{m} \times P + \text{£}10\text{m} \times P_{\text{guar}}] \times R \times c$$

Although the current deemed value of the guarantee calculated as described in section 6.6 above is the same in both cases, the risk based levy is higher in the second case - reflecting the greater value that the percentage guarantee would have if the scheme funding level based on non-contingent assets were subsequently to decrease.

6.7.15 If scheme assets = £125m and there is a guarantee of 100% then:

$$U = \text{£}11\text{m}$$

$$V = \text{£}5\text{m}$$

$$\text{RBL} = [\text{£}5\text{m} \times P + \text{£}6\text{m} \times P_{\text{guar}}] \times R \times c$$

6.7.16 If scheme assets = £125m and there is a guarantee of £10m then:

$$U = \text{£}11\text{m}$$

$$\text{RBL} = [\text{£}1\text{m} \times P + \text{£}10\text{m} \times P_{\text{guar}}] \times R \times c$$

In this case the fixed guarantee gives the lower levy, but the percentage based guarantee still has some effect notwithstanding that as at today's date its deemed value as described in section 6.6 above is zero.

## 6.8 Recognition for levy purposes - multiple Type A guarantees

6.8.1 A single guarantee with two or more guarantors which are jointly and severally liable will be treated as set out in 6.3.1 above. The following applies where there are a number of separate Type A guarantees (possibly for different amounts) given by different guarantors.

6.8.2 Where there are multiple guarantees of the full s75 debt, or multiple guarantees of G% funding where  $G \geq 105$ , then the guarantor with the lowest insolvency probability will be identified and the entire deemed under-funding will be multiplied by the insolvency probability of that "best" guarantor.

6.8.3 Where there are multiple guarantees of fixed amounts, the guarantees will be arranged in ascending order of guarantor insolvency probability (or descending order of guarantor strength)

and then applied in order to the deemed underfunding, using the basic rule set out in paragraph 6.7.10 above, until either all the guarantees or the entire deemed underfunding is exhausted.

6.8.4 Where there are multiple percentage guarantees, and all the percentages guaranteed are less than 105%, then each such guarantee will be treated as though it were a fixed guarantee of an amount equal to  $U - V$  (i.e. the deemed underfunding less the non-guaranteed amount) for that guarantee. The rule for multiple fixed value guarantees set out in paragraph 6.8.3 above will then be applied.

6.8.5 The rules set out in paragraphs 6.8.2 to 6.8.4 above cover virtually all the cases that the Board has seen in practice and, the Board believes, the most likely scenarios for multiple guarantees that guarantors and schemes would decide to put in place. However other combinations are theoretically possible and where such combinations arise in practice, the Board will value them on the basis which the Board believes best reflects the principles illustrated at paragraphs 6.8.2 to 6.8.4.

***Examples***

6.8.6 Assume liabilities of £100m and assets of £90m in each case.

6.8.7 Guarantor 1 guarantees £30m; guarantor 2: £20m. Guarantor 1 is strongest i.e.  $P_{\text{guar1}} < P_{\text{guar2}}$ .

$$U = £46\text{m}$$

$$\text{RBL} = [£30\text{m} \times P_{\text{guar1}} + £16\text{m} \times P_{\text{guar2}}] \times R \times c$$

6.8.8 Two guarantees of 100%; guarantor 1 is strongest.

$$U = £46\text{m}$$

$$V_1 = £5\text{m} \text{ so treat guarantee 1 as fixed } £41\text{m}$$

$$V_2 = £5\text{m} \text{ so treat guarantee 2 as fixed } £41\text{m}$$

$$\text{RBL} = [£41\text{m} \times P_{\text{guar1}} + £5\text{m} \times P_{\text{guar2}}] \times R \times c$$

6.8.9 Guarantor 1 guarantees 104%, guarantor 2: 100%. Guarantor 2 is strongest.

$$U = £46\text{m}$$

$$V_1 = £1 \text{ m so treat guarantee 1 as fixed } £45\text{m}$$

$$V_2 = £5\text{m} \text{ so treat guarantee 2 as fixed } £41\text{m}$$

$$\text{RBL} = [£41\text{m} \times P_{\text{guar2}} + £5\text{m} \times P_{\text{guar1}}] \times R \times c$$

6.8.10 As example 6.8.9, but Guarantor 1 is strongest.

$$\text{RBL} = [\text{£}45\text{m} \times P_{\text{guar1}} + \text{£} 1 \text{ m} \times P_{\text{guar2}}] \times R \times c$$

## 6.9 **Amendment and replacement**

6.9.1 The standard form of Type A contingent asset contains within it a mechanism whereby, subject to defined criteria being met, the value of the contingent asset may be reduced (by reducing the liability cap referred to in 6.5 above), the asset may be replaced by a new guarantee from a different guarantor or by other forms of contingent assets, or the guarantee can be released altogether. These criteria, and the policy behind them, are explained in more detail in Chapter 9.

## 7 TYPE B CONTINGENT ASSETS

### 7.1 Introduction

7.1.1 A Type B contingent asset comprises security granted by a company (the **Chargor**) to the trustees of the pension scheme. The Chargor must be an "associate" (within the meaning set out in section 435 of the Insolvency Act 1986) of at least one of the participating employers in the scheme. The assets must comprise one of:

- sterling cash in a charged bank account;
- land situated in the United Kingdom; or
- debt or equity securities held by an appropriate custodian.

7.1.2 **A Type B contingent asset will only be taken into account where the trustees have the first priority charge over the asset and there are no prior or pari passu security interests.**

### 7.2 Security over cash

7.2.1 In the case of security over cash, the account must be held at a bank domiciled in an OECD country, EU member state or Hong Kong and regulated by the Financial Services Authority (or an equivalent regulator in the European Union) with a credit rating of at least AA- by Fitch and/or Aa3 by Moody's and/or AA- by Standard and Poor's. As part of the certification process, the trustees will need to provide a copy of a bank statement dated not more than 7 days prior to the certificate, showing the balance on the account. When re-certifying an existing security over cash which has been previously recognised by the Board, trustees must provide a bank statement dated not more than 7 days prior to the new certificate, showing the balance on the account.

### 7.3 Security over land

7.3.1 In the case of security over land, in addition to the legal opinion, certified copy and the blacklined document showing any changes from the standard form, the trustees will need to supply a valuation as at a date not more than three months prior to the date of the certificate and a certificate of title confirming the Chargor's title to the property in question.

7.3.2 There are three different standard forms of security document for use in relation to land in England and Wales, Scotland and Northern Ireland respectively. These documents may be found on the pension protection levy part of the Pension Protection Fund website.

7.3.3 In giving credit for the risk based levy, the Board will use a market value basis, except that land (or any part of it) which is occupied by the Chargor, any of the employers covered by the security, or any

associate of any of them, will be valued on a vacant possession basis. In particular, the vacant possession basis must not include the value of the Chargor's business (if any). The trustees will therefore need to ensure that the valuation they provide is prepared on the appropriate basis, as a valuation on the wrong basis (in whole or in part) will result in the contingent asset being rejected.

- 7.3.4 The trustees will also need to provide a certificate of title dated not more than 7 days prior to the effective date of the security agreement, confirming the Chargor's title to the property in question. The valuation should take into account any material encumbrances disclosed in the certificate of title. When re-certifying an existing security over real estate, the chargor and the trustees will be asked to review the certificate of title previously given and certify that they are not aware of any matters which would require a new certificate of title to be obtained. If there are new title matters to disclose, then an updated valuation taking them into account will be required. If the trustees are in any doubt, and/or the property is particularly valuable, the trustees may choose to re-run some of the key searches and/or obtain a new certificate of title in order to satisfy themselves as to the value of the security.
- 7.3.5 When certifying security over real estate for the first time, the trustees must supply a valuation as at a date which is not more than three months prior to the date of the contingent asset certificate. For 2010/11 onwards, when re-certifying an existing security over real estate which has been previously recognised by the Board, trustees need to provide an updated valuation if the most recent valuation previously supplied to the Board is as at a date more than **15 months** prior to the date of the contingent asset recertification. This is a change from 2009/10 and previous levy years, where the time limit was three years. For the purposes of this paragraph "a valuation" includes a desk-top valuation i.e. a full valuation which has been updated in an e-mail or similar from the valuer, but where the security is certified for the first time, the full valuation must be provided alongside the desk-top valuation.
- 7.3.6 The Board will not be issuing a prescriptive set of rules in relation to valuations and certificates of title. The Board has set out certain requirements in the Contingent Asset Appendix to the Determination. As with legal opinions, the Board will be relying on trustees and their advisers to obtain valuations and/or certificates of title which the trustees believe give them appropriate comfort in the interests of their members and are consistent with the surrounding circumstances, market practice, professional rules, guidance and the declarations made by the trustees in the relevant certificate. In the case of valuations, the basis (market value/vacant possession) on which the trustees instructed for the valuation to be provided, and the basis on which it was in fact provided, should be made clear. In the case of certificates of title, trustees should obtain a document that is consistent with market

practice in relation to the type and size of property in question. In most, but not all, cases the Board would expect to see a certificate based on the then current edition of the City of London Law Society long form standard form, and based on searches that are not more than three months old. The Board would not expect trustees to regard mere disclosure of office copy entries of the title register as adequate evidence of the title position.

7.3.7 The certificates in respect of Type B contingent assets require the trustees (or a person authorised by them) to confirm, amongst other things, that the security has been properly registered as required by the relevant legislation. Whilst the Board acknowledges that there may in practice be a delay between the delivery of documentation to the relevant registry and the actual registration of the security, which is outside the control of the trustees and other involved parties, the Board's requirement for recognition of a Type B contingent asset for 2011/12 levy year continues to be that the security must have been properly registered in accordance with the relevant legislation by the time the contingent asset certificate is submitted. Hence parties will need to ensure that the documentation is delivered to the relevant registry well in advance of the 31 March Pension Protection Fund deadline to ensure that any queries can be resolved and the security formally registered in time for the deadline. The Board enforces this requirement strictly.

#### 7.4 **Security over securities**

7.4.1 In the case of security over securities, the securities must be held by a custodian domiciled in an OECD country, EU member state or Hong Kong and regulated by the Financial Services Authority (or an equivalent regulator in the European Union) with a credit rating of at least AA- by Fitch and/or Aa3 by Moody's and/or AA- by Standard and Poor's.

7.4.2 The securities subject to the charge must be securities in which the trustees would be permitted to invest scheme assets under the relevant trust deed and scheme rules. However restrictions on employer-related investment are ignored for this purpose; securities issued by or by reference to the employer or associated companies may be included in the portfolio subject to the security, but are valued at zero for the purposes of the risk based levy (see below). The standard form agreement for security over securities permits the Chargor to direct the Custodian to dispose of the charged securities only if the proceeds of sale are immediately invested in other securities satisfying the same criteria, and obliges the trustees on demand to keep the Chargor informed as to the investment restrictions in the relevant trust deed and rules.

7.4.3 The trustees will need to supply a valuation of the securities prepared by the custodian as at a date not more than one month prior to the date of the relevant contingent asset certificate. However, to the extent that the portfolio includes unquoted

securities, the custodian may rely on a valuation provided by an appropriately qualified third party (e.g. a merchant bank) and that part of the valuation may be as at a date not more than three months prior to the certificate. When re-certifying an existing security over securities which has been previously recognised by the Board, trustees must provide a new valuation as at a date not more than one month prior to the date of the relevant contingent asset certificate (or in the case of unquoted securities a valuation provided by an appropriately qualified third party as at a date not more than three months prior to the certificate).

7.4.4 Note that securities issued by or by reference to companies which are associates of the Chargor, any of the employers covered by the security, or an associate of any of them will be valued at zero for levy purposes.

## 7.5 **Specific provisions of the security agreements**

7.5.1 In all three cases the standard form documentation includes ongoing covenants which must be observed by the Chargor, including an obligation to inform the trustees upon the occurrence of a "notifiable event" in relation to any of the employers covered by the security.

## 7.6 **Liability caps**

7.6.1 The standard form of Type B security agreements each require the Chargor's aggregate liability to be capped in one of five ways. The Chargor will therefore have to choose which cap should apply. The liability caps are the same as apply for a Type A guarantee. However, the actual recovery upon enforcement of the Type B security will, of course, also be limited by the value of the underlying assets over which the security is granted. Both the liability cap and the value of the underlying assets will affect the value of the contingent asset credited for the purposes of the risk based levy.

7.6.2 Note that security over assets granted in favour of the trustees of schemes or sections where the employers are not associated by a permanent community of interest ("non-associated schemes") must have a fixed cap (and not one of the other formulations) to ensure that the credit given for such assets in the levy calculation is fair.

7.6.3 The five potential caps, which form part of the definition of "Secured Obligations", are as follows:

- (a) A fixed monetary amount ('fixed cap')
- (b) The lowest amount (non-negative) which will, when added to the assets of the scheme/section, result in the scheme/section being funded to at least a specified percentage level on a section 179 basis ('full percentage cap')

- (c) lowest amount (non-negative) which will, when added to the assets of the scheme/section, result in the scheme/section being funded to at least a specified percentage level on a section 179 basis, subject to a fixed maximum liability ('limited percentage cap')
- (d) The full potential section 75 liability of all employers to the scheme/section ('full section 75 cap')
- (e) The full potential section 75 liability of all employers to the scheme/section, subject to a fixed maximum liability ('limited section 75 cap').

7.6.4 In the documentation published before the 2006/07 levy year, only formulations (a), (b) and (d) were permissible. The limited percentage cap and limited section 75 cap were introduced for 2007/08 and beyond.

7.6.5 Chargors must choose one of the five formulations set out above, so as to ensure that the Board can value all Type B security agreements on a fair and consistent basis. Alternative formulations for the liability cap are not in general permissible. However, caps of the form "the higher of [Cap1] and [Cap2]", where Cap1 is one of the five caps set out above and Cap2 is an alternative measure, are acceptable. They will be valued by the Board as though only Cap1 applies, and should be certified accordingly.

## 7.7 **Deemed value based on liability cap**

7.7.1 The value of a Type B contingent asset for the purposes of the levy calculation is based on the liability cap and the value of the underlying assets - see section 7.8 below. However, the starting point for this calculation is a calculation of the maximum theoretical liability under the security agreement, based on whichever liability cap has been chosen to apply to that contingent asset.

7.7.2 The deemed maximum liability is calculated based on asset and liability information (including deficit-reduction contributions) certified to the Board prior to the start of the relevant levy year. Valuations, which will be on a section 179 basis for the vast majority of schemes, are rolled forward to a consistent date, on the basis published by the Pension Protection Fund.

7.7.3 The deemed maximum liability under the Type B security is then calculated as the actual limit on the Chargor's liability that would apply on the date referred to above, based on the asset and liability information referred to in the preceding paragraph. A limit equal to the full section 75 debt of the scheme is converted to a deemed percentage funding level on a s.179 basis for these purposes. Hence for the levy year 2011/12, any such limit based on the full s.75 debt is treated as though it was based on 155% funding on a s.179 basis; for levy years 2006/07 and 2007/08 the equivalent

percentage was 125% and for levy years 2008/09, 2009/10 and 2010/11 the equivalent percentage was 140%.

7.7.4 Hence, for example:

- the deemed maximum liability under a Type B security with a full percentage cap based on 110% funding will be taken to be  $(110\% \times L) - S - C$ ; and
- the deemed maximum liability under a Type B security with a limited section 75 cap, where the limit is £10m, will be taken to be  $\min\{(155\% \times L) - S - C, £10m\}$

where, in each case, L and S represent the liabilities and assets of the scheme respectively, converted/rolled forward to the consistent date referred to above, and C represents deficit-reduction contributions certified to the Board.

7.7.5 Note that, consistent with the wording of the actual liability caps in the agreements, the deemed liability limit under an individual Type B contingent asset is not affected by the existence of any other contingent assets.

#### 7.8 **Deemed value based on liability cap and value of underlying assets**

7.8.1 The value of the Type B contingent asset taken into account for the purposes of the levy will be the lower of (a) the deemed value of the liability cap, calculated in accordance with 7.7, and (b) the actual value of the underlying charged assets, based on the bank statement/valuation (as appropriate) provided to the Board. No adjustment is made to the value as per the bank statement or valuation to take account of any accrual of interest or fluctuations in value since the valuation date.

#### 7.9 **Recognition for levy purposes**

7.9.1 A Type B contingent asset is taken into account by adding the value of the contingent asset calculated in accordance with 7.7 and 7.8 above to the amount of scheme assets. No discount is applied, i.e. the scheme is treated as if the actual assets have been increased by the full amount which the trustees might recover under the Type B asset, ignoring any costs of recovery.

7.9.2 Where there is more than one Type B contingent asset, the values are simply added together for the purposes of the levy.

7.9.3 The start of the "taper" (the funding level at which deemed underfunding starts to be a fixed percentage of liabilities for levy purposes) was the same (120%) for each of the 2008/09 to 2010/11 levy years. However, **the change to the taper for 2011/12 (now starting at 135%) could have an effect on schemes which benefit from Type B contingent assets in**

**particular. This should be borne in mind when setting the liability cap, especially if that cap is or might become less than the value of the underlying asset.**

## **7.10 Amendment and replacement**

7.10.1 Each of the standard forms of Type B contingent asset contains within it a mechanism whereby, subject to defined criteria being met, the value of the contingent asset may be reduced (by reducing the liability cap referred to in 7.6 above), the asset may be replaced by a replacement security or by other forms of contingent assets, or the security can be released altogether. These criteria, and the policy behind them, are explained in more detail in Chapter 9. The standard form security agreement for a Type B(ii) contingent asset published by the Board in December 2009 also includes a clause which explicitly allows the trustees and the chargor to release the property subject to the charge provided that a substitute property of not materially less value is charged in its place. There are certain conditions precedent to the substitution specified in the standard form security agreement and the parties should review the standard form security agreement in this regard.

## **7.11 Release of underlying assets where oversecured**

7.11.1 Each of the standard forms of security agreement also contains a provision permitting the chargor to request that some of the assets are released from the security. Following such a request, the trustees are obliged to release assets to the extent their value exceeds the assumed value of the liability cap calculated in accordance with 7.7 above. Clearly it will be more feasible to release assets that are easily divisible, such as a proportion of the cash in a charged bank account or part of a portfolio of securities, than indivisible assets such as real estate.

7.11.2 The standard form documents do not require the chargor to "top up" the assets if their value falls or if the actual funding situation deteriorates (even if some of the assets have previously been released under the provision described above). However trustees are free to negotiate such "top-up" arrangements in addition to the standard terms. If the contingent asset arrangement is not "topped-up" the next year's levy will reflect the deterioration in the funding position. If a "top-up" arrangement is put in place, the next year's levy will reflect this "topped-up" position.

## 8 TYPE C CONTINGENT ASSETS

### 8.1 Introduction

- 8.1.1 A Type C contingent asset comprises a letter of credit or bank guarantee issued to the trustees of the pension scheme by a financial institution (the **Counterparty**). A Type C contingent asset must be denominated in sterling.
- 8.1.2 The Board has published two acceptable forms of Type C contingent asset document, referred to as Types C(i) and C(ii). Each of the types can be used as the basis of a letter of credit or a bank guarantee, depending on which set of ICC standard terms is selected in the standard form.
- 8.1.3 The Type C(i) document contains "evergreen" provisions whereby a demand may be made under the instrument if it is not renewed or replaced. The Type C(ii) contingent asset, first published in September 2006 (and updated in December 2009) based on early experiences with contingent assets and industry feedback, has a fixed term (without evergreen provisions) but must support a defined schedule of deficit-reduction contributions.
- 8.1.4 Both forms are based on the same principle of ensuring that the funding level of the scheme does not deteriorate but they operate in different ways. The evergreen Type C(i) will, via renewal, remain in place indefinitely unless replaced by cash in the scheme. However the value of the letter of credit may be reduced if and when the funding position of the scheme improves. There is no obligation on the employer to make deficit-reduction contributions. By contrast, the Type C(ii) form has a fixed term which can be chosen by the parties and is not subject to any evergreen provisions. However over that term the employer must make deficit-reduction contributions in accordance with a schedule set out in advance (in addition to regular contributions required under the scheme's schedule of contributions). Each such contribution will reduce the value of the Type C asset by an equivalent amount so that at the end of the term the total deficit-reduction contributions made will equal the initial value of the Type C(ii) contingent asset. Moreover a demand may be made under the Type C(ii) contingent asset if any planned contribution is missed, as well as upon insolvency events.
- 8.1.5 All Type C contingent assets put in place from September 2006 onwards must be in either the Type C(i) form or the Type C(ii) form - it is not possible to "mix and match" elements of the two. For example a letter of credit with a fixed term (no evergreen) but without an obligation for deficit-reduction contributions to be made will not be acceptable for risk based levy purposes.

## 8.2 **Acceptable Counterparties**

8.2.1 The Counterparty would typically be a bank or insurance company; it must be domiciled in an OECD country, EU member state or Hong Kong and regulated by the Financial Services Authority or its applicable successor or an equivalent EU regulator<sup>2</sup>; it must also have a credit rating of at least AA- by Fitch and/or Aa3 by Moody's and/or AA- by Standard and Poor's. The purchaser of the letter of credit or bank guarantee must be an "associate" (within the meaning set out in section 435 of the Insolvency Act 1986) of at least one of the participating employers in the scheme.

## 8.3 **Format**

8.3.1 The Board recognises that, in some circumstances, the issuers of Type C contingent assets may be more comfortable re-distributing the provisions of the Standard Form between more than one document- e.g. there might be separate bilateral agreements between the issuer of the asset and the purchaser, between the issuer and the scheme trustees and between the purchaser and the trustees. This will be acceptable provided the combination of documents genuinely has an equivalent effect to the Standard Form, and any variations do not have a materially detrimental effect on the rights of the trustees. In particular but without limitation:

- In relation to the Type C(i) evergreen form, it is key that the trustees will always be able to make a demand against the *issuer* of the instrument (which is subject to minimum credit rating and regulatory requirements) if the instrument is not renewed or replaced. A mere obligation on the *purchaser* of the instrument to renew or replace the contingent asset is not enough on its own.
- In relation to the Type C(ii) form, it is key that all the deficit-reduction contributions must be made before the instrument expires, that the trustees can always make a demand against the issuer of the instrument for the full amount of any deficit-reduction contributions promised but not paid, and that the total of the deficit-reduction contributions promised is at least equal to the face value of the instrument.

In both cases, the principle is that, except to the extent the scheme is or becomes funded over 104% on a s.179 basis, the trustees

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<sup>2</sup> Very broadly this means a "competent authority" designated by each Member State of the EU to regulate in that State (a) investment firms (as defined in the Markets in Financial Instruments Directive ("MiFID") (2004/39/EC)) and (b) credit institutions (as defined in the directive relating to the taking up and pursuit of the business of credit institutions (recast) (2006/48/EC)).

must in all scenarios have the ability either to receive cash from the employer(s) or make a claim under the instrument and it is not possible for the instrument to expire with neither possibility having arisen nor with insufficient time for the proper exercise of the trustees' rights.

#### **8.4 Recognition for levy purposes**

8.4.1 A Type C contingent asset is taken into account by adding the face value as at the start of the levy year to the amount of scheme assets. No discount is applied, i.e. the scheme is treated as if the actual assets have been increased by the full amount which the trustees might recover under the Type C asset, ignoring any costs of recovery.

8.4.2 Where there is more than one Type C contingent asset, the values are simply added together for the purposes of the levy.

#### **8.5 Amendment and replacement**

8.5.1 The form of Type C(i) evergreen letter of credit/bank guarantee contains within it a mechanism whereby, subject to defined criteria being met, the value of the contingent asset may be reduced over time. These criteria, and the policy behind them, are explained in more detail in Chapter 9. Reduction in this case will be effected either by the trustees certifying to the issuer that the "Minimum Replacement Amount" is less than the face value of the current Type C(i) asset, or by a new Type C(i) asset of a lower amount being put in place on renewal.

8.5.2 The form of Type C(ii) contingent asset steps down automatically as the promised deficit-reduction contributions are made. No further provisions for amendment or replacement are included.

## 9 AMENDMENT AND REPLACEMENT OF CONTINGENT ASSETS

### 9.1 Introduction/policy background

9.1.1 The Board will only recognise contingent assets that will remain in place for the long term, reflecting the long-term nature of pensions liabilities and hence of the risk to the Pension Protection Fund. Schemes should not be able to put in place a short-term contingent asset, and hence gain a reduced levy rate, if that contingent asset cover will then disappear and the long term risk represented by that scheme will correspondingly increase. It is for this reason that the standard forms of Type A and B contingent assets are all expressed to be indefinite in duration. Letters of credit and bank guarantees typically have a short fixed term, which is why the standard form Type C(i) contingent asset contains "evergreen" provisions whereby it may be called if not renewed or replaced.

9.1.2 However, the Board recognises that, where a scheme's actual funding position improves, the provider of the contingent asset should usually be free to reduce the contingent asset cover by the same amount, as the funding situation, and hence the risk to the Pension Protection Fund, does not deteriorate. Similarly where the scheme exceeds a particular funding level, taking into account the contingent asset cover, the excess contingent assets could reasonably be removed.

9.1.3 The Type C(ii) form of contingent asset deals with this in the simplest way. As each "Planned Contribution" is made, the amount of the letter of credit/bank guarantee reduces by the same amount; the scheme actuary is required to certify in advance that the Planned Contributions are expected to constitute deficit-reduction contributions. If any Planned Contribution is not paid when due, the trustees can make a claim under the letter of credit/bank guarantee for the unpaid amount. Hence by the time the Type C(ii) asset expires, contributions should have been paid in respect of the scheme deficit of an amount equal to the face value of the Type C(ii) asset.

9.1.4 All of the other forms of contingent asset document contain rather more complex provisions designed to allow the provider of the contingent asset to reduce the cover so long as the conditions referred to in 9.1.2 above are satisfied.

### 9.2 Reduction and replacement within the standard form documents

9.2.1 All of the formulae in the amendment and replacement provisions set out in the Type A, B and C(i) standard forms compare the percentage funding level on a s.179 basis as at the previous 1 April (the **Reference Date**) with the position as it will be on and after the date on which a proposed change is made (the **Implementation Date**). The December 2009 forms also

separately compare the actual value of the contingent assets themselves immediately before and after the Implementation Date.

- 9.2.2 The first funding condition is that the percentage funding level, including deficit-reduction contributions and contingent assets of Types B and C (but not A) must either be at least as good after the Implementation Date as it was on the Reference Date, or must be at least 104%. This test reflects the fact that Type B and C contingent assets are treated for levy purposes as though they constitute cash in the scheme. Once a scheme reaches 104% funding on this basis, any excess Type B and C(i) contingent asset cover can be removed.
- 9.2.3 The second funding condition is that, where there is a Type A guarantee, the funding level including deficit-reduction contributions and all contingent assets (including Type A guarantees) must either be at least as good after the Implementation Date as it was on the Reference Date, or must be at least 105%. Once the funding level guaranteed by the Type A asset exceeds 105%, the guarantee can be reduced to 105%. Note that this test applies in addition to the test set out in 9.2.2 which means that, whilst Type A contingent assets may be replaced with Type B and C contingent assets, Type B and C contingent assets cannot be replaced with Type A (where the funding level is below 104%). This accords with the commercial situation, that trustees should be willing to accept the replacement of a group company guarantee with a stronger form of cover (security over assets, letter of credit etc.) but not vice versa.
- 9.2.4 Having specifically sought comments on this issue in the September 2009 consultation, the Board has concluded that the 104% and 105% thresholds set out in the standard form agreements continue to be appropriate notwithstanding that the underfunding 'taper' in the levy formula has moved – in 2011/12 the taper starts at 135% – with schemes paying zero risk based levy only at 155% funding or above. The Board continues to believe that adopting this approach in the standard form agreements offers reasonable flexibility without compromising the long-term security afforded. However, please see 9.3 below.
- 9.2.5 As an alternative to the funding tests, the December 2009 standard forms also compare the value of the contingent assets themselves immediately before and after the Implementation Date of a proposed change. These tests are intended to make clear that *increasing* the value of contingent assets will always be acceptable, regardless of changes to the funding position in the meantime.
- 9.2.6 Where a Type A guarantor is to be replaced, the replacement guarantor must also have the same or lower probability of insolvency than the existing guarantor, based on the PPF measure of insolvency (i.e. D&B failure scores/risk indicators). The D&B failure score/risk indicator of the existing and replacement

guarantors will, for these purposes, be measured as a date within five days either side of the date of change.

9.2.7 The standard form Type A and Type B documents all contain a mechanism incorporating the formulae described above, which permit the guarantor or chargor to present a "Proposal" to the trustees to amend or replace the existing contingent asset arrangements. If the Proposal satisfies the conditions described in 9.2.2 - 9.2.6 above, then the trustees cannot unreasonably withhold their consent to the change. This mechanism is designed to give guarantors and chargors comfort that they will not be bound indefinitely where the funding situation is improving, whilst allowing the trustees flexibility to deal with Proposals on a case by case basis. The September 2006 and December 2009 versions of the agreements allow Proposals to be made at any time, and permit the asset and liability figures to be based on formal statements from the Scheme Actuary to the trustees, without a full s.179 valuation having necessarily been performed and certified to the Pension Protection Fund.

9.2.8 In the case of the Type C(i) document, the same formulae are used to derive a "Minimum Replacement Amount" which is the minimum face value of the letter of credit or bank guarantee which must be put in place upon renewal or replacement.

9.2.9 It should be noted that in no circumstances do the amendment and replacement provisions require the parties to amend the documentation so as to *increase* contingent asset cover (even though, for example, the value of the assets in the scheme might decrease), although for Type A and B contingent assets with section 179 or section 75 liability caps, the maximum liability will automatically vary as the funding position changes.

### 9.3 **Reduction and replacement within the Determination**

9.3.1 The amendment mechanism and formulae described in 9.2 above will automatically be available to providers of contingent assets when they enter into an agreement in the standard form. However, the Board recognises that trustees and the providers of contingent assets may amend or cancel contingent asset cover by agreement at any time, irrespective of the terms of the agreement, if such an action is consistent with the duties which the trustees owe to the beneficiaries of the scheme.

9.3.2 For levy years up to and including 2009/10, funding tests equivalent to those described above were therefore included within the levy determination itself, prescribing the levy effect of changes to contingent asset cover that were made otherwise than in accordance with the rules built into the standard form agreements.

9.3.3 In light of the complexities in this area, from 2010/11 onwards the Board has adopted a more discretionary approach, set out in Rule

D3 of the Determination. This approach is not meant to replace the funding tests in the agreements themselves but, rather, provides the Board with the ability to apply a more discretionary approach in circumstances where the funding tests are not necessarily met.

9.3.4 Rule D3 is necessarily complicated, but broadly (and subject to the discretions described below):

- For any scheme, no contingent assets will be recognised in 2011/12 unless each contingent asset that was recognised for 2010/11 is still in force and has not been subject to any value-reducing amendments.
- If a contingent asset is cancelled or has its value reduced during the 2011/12 levy year, the risk based levy for 2011/12 will be recalculated disregarding that contingent asset for the entire year.

9.3.5 The “value” of a Type A contingent asset for these purposes includes the covenant strength of the guarantor.

9.3.6 However, the Board has retained discretion within the determination still to give full or partial levy recognition, notwithstanding the rules described above, if in the Board’s opinion any action or inaction of the trustees in relation to the relevant contingent asset (e.g. in agreeing to a reduction in value or termination) was reasonable and did not have a materially detrimental effect on the position of the scheme in all the circumstances.

9.3.7 The Board has published information on how it expects to exercise this and other discretions within the Determination in its “Levy Practice Guidance”, also available in the levy section of the PPF website. Readers of this part of the Contingent Asset Guidance are therefore strongly recommended to refer to the Levy Practice Guidance for more details. Importantly, the Board has indicated that any change that is made strictly in accordance with rules set out in the standard form agreements is very likely to be an acceptable change for the purposes of exercising this discretion. Other examples of changes that are likely to be regarded as acceptable or unacceptable are also listed in the Levy Practice Guidance.

9.3.8 If a scheme has contingent asset cover in place, and then levy recognition is withdrawn because of the operation of the rules described in 9.3.4 above or their equivalent in any previous levy determination, then the Board will not give any recognition of contingent assets in any future levy year unless and until, in the opinion of the Board, the position of the scheme (including any continuing contingent assets) is no worse than it was prior to the unacceptable event that triggered the withdrawal of levy

recognition. Again, this rule is further described in the Levy Practice Guidance.

9.3.9 Readers are reminded that, when certifying a contingent asset to the PPF, scheme trustees undertake to notify the PPF promptly if anything in the certificate ceases to be true and correct over the course of the year – meaning that amendments to contingent asset agreements must be notified to the PPF.

#### 9.4 **List of employers/corporate transactions**

9.4.1 It is a basic requirement for any contingent asset that the list of "Companies" covered by the contingent asset includes all undertakings which are both employers (within the Pensions Act 2004 definition) in relation to the scheme and associates of the person providing the contingent asset.

9.4.2 The effect of this is that, where an employer ceases to be an associate of the guarantor, chargor etc. during the course of a levy year, the guarantor/chargor can put forward a "Proposal" to amend or replace the contingent asset so as to delete the relevant employer from the schedule of Companies.

9.4.3 However, the trustees are only required to consent to a Proposal if it is reasonable. They may therefore wish to consider the overall effect on the scheme of the removal of that employer. Hence in the case of corporate M&A transactions etc., the Board envisages a negotiation between the trustees and the providers of any contingent assets in the normal way.

9.4.4 If, at the time a contingent asset is entered into, specific future transactions are envisaged, then the parties are free to include more detailed provisions as to what will happen to the contingent asset in those circumstances. Parties are also permitted to agree in advance specific examples or circumstances where it would not be reasonable for the trustees to withhold consent (for example where the employer leaving does not have a material effect on the overall covenant supporting the scheme). So long as these provisions do not represent a materially detrimental change to the rights of the trustees, and the trustees are willing to certify that this is the case, based on appropriate professional advice, the contingent asset will still be recognised.

9.4.5 Note, however, that where the removal of employers causes, or is accompanied by, a reduction in the value of the contingent asset, then Rule D3 will apply (subject to the Board's discretion to give full or partial levy credit nonetheless).

#### 9.5 **Substitution of property assets**

9.5.1 As mentioned above, the standard form security agreement for a Type B(ii) contingent asset published by the Board in December 2009 includes a clause which specifically allows the chargor to

require the release of the property subject to the charge provided that a substitute property of not materially less value is charged in its place. There are certain conditions precedent to the substitution specified in the standard form security agreement and the parties should review the standard form security agreement in this regard.

## 10 WHAT HAPPENS NEXT.....?

- 10.1.1 Once the Board has received the documentation it will acknowledge receipt in writing. At this stage the acknowledgment will merely confirm that a submission has been received without making any comments on the acceptability or otherwise of the arrangement.
- 10.1.2 The Board will undertake such review and checks as it deems appropriate to ensure both that all the required documents have been submitted and that their content is acceptable.
- 10.1.3 The Board will write to the trustees and/or advisers of each scheme to confirm whether the contingent asset(s) is acceptable and will be taken into account in calculating the risk based levy.
- 10.1.4 The Board retains the right to disregard any information supplied to it (in relation to contingent assets or otherwise) which is believed to be incorrect, or any certificate which the Board believes has been improperly given. This could occur for example where the Board believes that variations to the standard documentation have a materially detrimental effect on the rights of trustees, or where an opinion is qualified to such a degree that it would be materially misleading to say that it supported the required declarations, so that it was not proper to give the certificate. In such circumstances, the scheme's levy would be calculated without reference to the contingent asset (if the deficiency had already been identified), or the calculation might be reviewed if the deficiency came to light subsequently.
- 10.1.5 In practice where trustees and legal advisers act professionally and responsibly such measures should not be necessary. It is emphasised that it is the responsibility of trustees to satisfy themselves that certificates are correct and properly given. Please note that it is a criminal offence under section 195 of the Pensions Act 2004 for a person knowingly or recklessly to provide materially false or misleading information to the Board in circumstances in which that person intends or could reasonably be expected to know that it would be used by the Board for the purposes of exercising its statutory functions, including calculation of the pension protection levies.
- 10.1.6 The Board will not provide confirmation on an individual basis of the acceptability or otherwise of any particular qualifications to opinions or variations to documentation. Nor will the fact that the contingent asset is taken into account in the calculation of a scheme's levy necessarily imply that the Board has reviewed the documentation in detail and is satisfied with it so as to rule out any future review, since the extent to which the Board can in practice scrutinise certificates and documentation in advance of making levy calculations will depend upon the level of take-up of contingent assets by employers and schemes.

- 10.1.7 The Board does not undertake to review such documentation in detail or indeed at all; it will rely upon the trustees to require from their legal advisers appropriate explanation of the effect of the documentation (including the legal opinion) and to satisfy themselves of its effectiveness, and the qualifications of legal advisers, valuers etc., in the interests of their members.
- 10.1.8 It is a requirement for recognition that the trustees undertake to notify the Board if any of the information in the certificate ceases to be true and correct on or before 31 March 2012, i.e. at any time during the levy year. If, for example, the credit rating of the issuer of a Type C contingent asset were to change during the year, or the value of a parent company guarantee were to be reduced by agreement between the parent and the trustees, this must be notified to the Board. Where changes are notified this may result in the levy being recalculated in light of the changes.

## APPENDIX 1: CHECKLISTS

### I. New Contingent Assets

You must submit the correct certificate to the Pensions Regulator via Exchange no later than 5pm on 31 March 2011.

All supporting documents must be filed with the Board of the Pension Protection Fund no later than 5pm on 31 March 2011. Please check against the lists below that your contingent asset submission includes all the documents required by the Board for that type of contingent asset. Failure to submit all the required documents by 5pm on 31 March 2011 will result in the contingent asset not being recognised for the purposes of the 2011/12 risk based levy.

Please note that no documents may be submitted by fax, and that only the electronic certificate can be submitted online via Exchange - other supporting documents must be supplied to the Pension Protection Fund in hard copy.

If you have any queries about what should be submitted which are not answered by this guidance please call the Pension Protection Fund Stakeholder Support Team on 08456002541.

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#### **Type A - guarantee from a group company or other acceptable entity**

Have you submitted via Exchange:

- A completed Type A certificate

Have you supplied the Board with the following hard copy documents:

- A certified copy of the guarantee
- A blacklined document showing the differences from the Pension Protection Fund's required form for such documentation as published on its website or a confirmation that there are no differences (see paragraph 3.4.1 of this Guidance)
- A copy of the legal opinion(s) and any officer's certificate.
- Unless covered in the legal opinion, a document providing satisfactory evidence that the benefit to the guarantor of entering into the guarantee has been considered and established
- A copy of the contingent asset certificate

### **Type B(i) - security over cash in bank account**

Have you submitted via Exchange:

- A completed Type B(i) certificate

Have you supplied the Board with the following hard copy documents:

- A certified copy of the security agreement
- A blacklined document showing the differences from the Pension Protection Fund's required form for such documentation as published on its website or a confirmation that there are no differences (see paragraph 3.4.1 of this Guidance)
- A copy of the legal opinion(s) and any officer's certificate
- A copy of a bank statement of the charged account dated not more than 7 days prior to the date of the completed certificate which verifies the credit balance
- Unless covered in the legal opinion, a document providing satisfactory evidence that the benefit to the chargor of entering into the security agreement has been considered and established
- A copy of the contingent asset certificate

### **Type B(ii)EW - Security over real estate in England and Wales**

Have you submitted via Exchange:

- A completed Type B(ii)EW certificate

Have you supplied the Board with the following hard copy documents:

- A certified copy of the security agreement
  - A blacklined document showing the differences from the Pension Protection Fund's required form for such documentation as published on its website or a confirmation that there are no differences (see paragraph 3.4.1 of this Guidance)
  - A copy of the legal opinion(s) and any officer's certificate
  - A copy of the valuation in accordance with the Contingent Asset Appendix to the Determination dated not more than 3 months prior to the date of the completed certificate
  - A copy of the certificate of title dated not more than 7 days prior to the effective date of the security agreement
  - Unless covered in the legal opinion, a document providing satisfactory evidence that the benefit to the chargor of entering into the security agreement has been considered and established
  - A copy of the contingent asset certificate
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## **Type B(ii)S - Security over real estate in Scotland**

Have you submitted via Exchange:

- A completed Type B(ii)S certificate

Have you supplied the Board with the following hard copy documents:

- A certified copy of the security agreement
- A blacklined document showing the differences from the Pension Protection Fund's required form for such documentation as published on its website or a confirmation that there are no differences (see paragraph 3.4.1 of this Guidance)
- A copy of the legal opinion(s) and any officer's certificate
- A copy of the valuation in accordance with the Contingent Asset Appendix to the Determination dated not more than 3 months prior to the date of the completed certificate
- A copy of the certificate of title dated not more than 7 days prior to the effective date of the security agreement
- Unless covered in the legal opinion, a document providing satisfactory evidence that the benefit to the chargor of entering into the security agreement has been considered and established
- A copy of the contingent asset certificate

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## **Type B(ii)NI - Security over real estate in Northern Ireland**

Have you submitted via Exchange:

- A completed Type B(ii)NI certificate

Have you supplied the Board with the following hard copy documents:

- A certified copy of the security agreement
- A blacklined document showing the differences from the Pension Protection Fund's required form for such documentation as published on its website or a confirmation that there are no differences (see paragraph 3.4.1 of this Guidance)
- A copy of the legal opinion(s) and any officer's certificate
- A copy of the valuation in accordance with the Contingent Asset Appendix to the Determination dated not more than 3 months prior to the date of the completed certificate
- A copy of the certificate of title dated not more than 7 days prior to the effective date of the security agreement
- Unless covered in the legal opinion, a document providing satisfactory evidence that the benefit to the chargor of entering into the security agreement has been considered and established
- A copy of the contingent asset certificate

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### **Type B(iii) - Security over securities**

Have you submitted via Exchange:

- A completed Type B(iii) certificate

Have you supplied the Board with the following hard copy documents:

- A certified copy of the security agreement
- A blacklined document showing the differences from the Pension Protection Fund's required form for such documentation as published on its website or a confirmation that there are no differences (see paragraph 3.4.1 of this Guidance)
- A copy of the legal opinion(s) and any officer's certificate
- A copy of the valuation of the securities in accordance with the Contingent Asset Appendix to the Determination
- Unless covered in the legal opinion, a document providing satisfactory evidence that the benefit to the chargor of entering into the security agreement has been considered and established
- A copy of the contingent asset certificate

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### **Type C(i) - evergreen letter of credit/bank guarantee**

Have you submitted via Exchange:

- A completed Type C(i) certificate

Have you supplied the Board with the following hard copy documents:

- A certified copy of the bank guarantee/letter of credit
  - A blacklined document showing the differences from the Pension Protection Fund's required form for such documentation as published on its website or a confirmation that there are no differences (see paragraph 3.4.1 of this Guidance)
  - A copy of the legal opinion and any officer's certificate
  - Unless covered in the legal opinion, a document providing satisfactory evidence that the benefit to the purchaser of entering into the letter of credit/bank guarantee has been considered and established
  - A copy of the contingent asset certificate
-

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## **Type C(ii) - letter of credit/bank guarantee to support a schedule of deficit-reduction contributions**

Have you submitted via Exchange:

- A completed Type C(ii) certificate

Have you supplied the Board with the following hard copy documents:

- A certified copy of the bank guarantee/letter of credit
- A blacklined document showing the differences from the Pension Protection Fund's required form for such documentation as published on its website or a confirmation that there are no differences (see paragraph 3.4.1 of this Guidance)
- A copy of the legal opinion and any officer's certificate
- A copy of the actuary's confirmation in relation to the deficit-reduction contributions
- Unless covered in the legal opinion, a document providing satisfactory evidence that the benefit to the purchaser of entering into the letter of credit/bank guarantee has been considered and established
- A copy of the contingent asset certificate

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## **Multiple Contingent Assets**

Please refer to the individual checklists above for what must be included in respect of each contingent asset.

## **II. Re-certifying existing contingent assets**

Where a contingent asset was recognised for the purposes of the risk based levy in levy year 2009/10, Exchange's website page will contain a pre-populated form with the existing contingent asset information already set out. If nothing has changed you must simply confirm this. If the contingent asset has been amended in any way you must supply details of the changes before submitting the certificate. The deadline for re-certification is no later than **5pm on 31 March 2011**. If you have previously submitted a contingent asset certificate for levy year 2010/11 but there does not appear to be a corresponding prepopulated certificate on Exchange, please contact the Pension Protection Fund stakeholder support team for information on how to proceed.

All supporting documents must be filed with the Board of the Pension Protection no later than **5 pm on 31 March 2011**.

## APPENDIX 2: SUGGESTED FORM OF COVERING LETTER

### Type A example (New Contingent Asset)

FAO: Director of Legal - Re Contingent Asset  
The Board of the Pension Protection Fund  
Knollys House  
17 Addiscombe Road  
Croydon  
CRO 6SR

Our Ref:  
Date:

Dear Sirs

Name of scheme:  
[Name of section:]  
Pension Schemes Registry Number:  
Contingent asset type:       Type A guarantee

We enclose the following:

- a certified copy of the Guarantee
- [A blacklined document showing the differences from the Pension Protection Fund's required form for such documentation as published on its website] or [confirmation that there are no differences from the Pension Protection Fund's required form for such documentation as published on its website except for the necessary selection of options and the insertion of details of the parties];
- a copy of the legal opinion(s) [and officer's certificate];
- Evidence that the corporate benefit of entering into the Guarantee has been considered and established by the Guarantor; and
- A copy of the contingent asset certificate.

We confirm that the Type A contingent asset certificate has been submitted online to the Pensions Regulator via Exchange on [date].

In the case of any queries regarding this submission, please contact:

[name]  
[postal address]  
[Tel:     ]  
[Email:                             ]

Yours faithfully

## APPENDIX 3: NOTES AND QUERIES ON LEGAL OPINIONS

The Board's rules for the recognition of contingent assets require the trustees of a scheme/section to obtain a formal legal opinion from an appropriately qualified person as to certain matters, and to provide a copy of that opinion to the Board. This Appendix provides further guidance in relation to the form and content of legal opinions. The format is a series of questions and answers followed by some exemplar clauses.

### 1 QUESTIONS AND ANSWERS

#### 1.1 Do I need a legal opinion?

1.1.1 The Board's rules for the recognition of contingent assets require the trustees of a scheme/section to obtain a formal legal opinion from an appropriately qualified person as to certain matters, and to provide a copy of that opinion to the Board. If no such opinion is supplied, the contingent asset concerned will be rejected and no credit given in the risk based levy calculation.

1.1.2 Obtaining a formal legal opinion is good practice in relation to such transactions, gives the trustees extra comfort that the contingent asset is enforceable and would provide the expected benefit to the scheme if it were enforced, and alerts the trustees to any limitations in that regard. It is for the trustees and their advisers to satisfy themselves that appropriate legal opinion(s) have been obtained from appropriate lawyers, and that the opinion(s) cover appropriate matters. The Board has set out certain requirements and unacceptable practices below and in paragraph 3.3 of this guidance; however these are not intended to be comprehensive.

#### 1.2 Do I need a foreign legal opinion?

1.2.1 Where one of the parties is domiciled outside the jurisdiction of the primary legal opinion (usually England and Wales), advice from lawyers qualified in the relevant overseas jurisdiction may also be necessary. See paragraphs 3.3.2 to 3.3.6 of the Guidance and 1.4.2 of this Appendix. Where required a foreign legal opinion is provided in addition to the primary legal opinion (usually an English legal opinion).

#### 1.3 Do I need to send the foreign legal opinion to the Board, provided my English legal advisers have seen the advice and confirmed receipt to the Board?

1.3.1 Yes. You must provide a copy of the foreign legal opinion when you submit the documents in respect of the contingent asset. Failure to provide a copy of a foreign legal opinion to the Board by the 31 March deadline will result in the Board rejecting the contingent asset for the levy year in question.

#### 1.4 Who can give a legal opinion?

##### *England*

1.4.1 See paragraph 3.3.2 of the Guidance.

***Scotland and Northern Ireland***

1.4.2 Where the transaction is for security over real estate situated in Scotland and Northern Ireland, those documents are governed by the respective laws of those jurisdictions. A legal opinion from appropriately qualified Scottish or Northern Ireland lawyers (as applicable) will therefore be needed (instead of an English law opinion) where those documents are used. In respect of all other contingent assets see paragraphs 3.3.2 to 3.3.4 of the Guidance.

***Non-UK***

1.4.3 See paragraphs 3.3.2 to 3.3.4 of the Guidance

1.5 **Will the Board accept legal opinions in which the liability of the law firm is expressed to be limited?**

1.5.1 As noted in the guidance, the Board will be relying on trustees and their advisers to satisfy themselves as to all matters surrounding contingent assets, including obtaining a legal opinion which the trustees believe gives them appropriate comfort in the interests of their members.

1.5.2 The Board recognises that law firms may, as a matter of market practice, seek to limit their liability under such opinions in various ways. The Board will not reject a legal opinion it receives simply on the basis that liability is limited, and does not undertake to review all or any legal opinions supplied to it in detail. However, if the Board believes that a particular limitation is inconsistent with market practice or professional rules and guidance, or is otherwise unreasonable, then the Board may enter into discussions and investigation with the trustees as to whether the trustees' certification should properly have been given based on the opinion.

1.5.3 In relation to some specific types of limitation:

- (a) An overall financial cap on liability is acceptable if consistent with the principles described above.
- (b) The principal purpose of the opinion is to provide comfort to the trustees as to the binding, valid and enforceable nature of the contingent asset, and the other matters set out in the opinion, which go to the potential value to the scheme of that contingent asset. Hence the opinion should not be expressed to be limited in its purpose to the risk based levy calculation.
- (c) The opinion should be addressed to the trustees, and may contain standard language intended to exclude or limit liability to third parties. However the opinion should not purport to exclude liability to the Board, whether arising pursuant to section 161 of the Pensions Act 2004, where

the Board takes over responsibility for the relevant scheme, or otherwise. Liability to the Board may, however, be expressed to be subject to the same limitations (e.g. financial cap) as the liability to the trustees.

1.5.4 Examples of clauses which are and are not acceptable to the Board are set out below.

## 1.6 **Can my firm cap its liability under the opinion?**

1.6.1 As stated above, the Board will not reject a legal opinion it receives simply on the basis that liability is limited. However any limitation should be reasonable and consistent with market practice and/or professional rules and guidance.

1.6.2 For example, the Board will reject an English legal opinion if, in breach of the Solicitors' Indemnity Insurance Rules and rule 2.07 of the Solicitors' Code of Conduct, the firm giving the opinion sought to limit its liability below the minimum level of cover required by the Solicitors' Indemnity Rules (as at date of writing this is currently £2 million for partnerships, £3 million for LLPs and other bodies corporate)<sup>3</sup>.

1.7 **Under the terms of the certificate, the legal opinion is asked to confirm that the schedule to the agreement includes "all undertakings which are both "an associate" of the guarantor within the meaning set out in section 435 of the Insolvency Act 1986, and (B) an "employer" in relation to that Scheme/Section within the meaning set out in section 318 of the Pensions Act 2004 and regulations made thereunder". In our view this is a matter of fact and not law and as such we cannot give an opinion on this, so how should we address this in the opinion?**

1.7.1 Whilst this may be considered a matter of fact, the Board requires the legal opinion to address in some form whether schedule 1 to the agreement lists every such undertaking. The Board will not reject an opinion for not opining on this issue provided that:

- there is an officers' certificate which confirms that schedule 1 lists all such undertakings; and
- that certificate is provided in conjunction with the legal opinion.

1.7.2 Similarly a legal opinion may also be accompanied by an officer's certificate which confirms the company has the power to enter into the contingent asset, that it has not breached any undertaking by doing so and the necessary authority to enter into the contingent asset has been given.

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<sup>3</sup> Solicitors' Indemnity Rules 2007.

1.8 **Will the Pension Protection Fund be publishing standard form wording in relation to the legal opinions required to be provided in support of contingent asset certificates?**

1.8.1 No. It would be impracticable to produce standard forms of legal opinion to cover the many potential situations in which contingent assets might be put in place. In this appendix, there are examples of wording which would be acceptable to the Board together with those which are considered unacceptable by the Board. These are not intended to be used as standard wording but rather are intended to clarify some of the Board's requirements, for example what unconditionally available requires. These examples are in no way exhaustive or intended to cover all contingencies.

## 2 **EXAMPLES OF LEGAL OPINION CLAUSES**

### 2.1 **RELIANCE**

2.1.1 **Here are two examples of wording that CAN be used in conjunction with a firm's exclusion of liability wording:**

"Notwithstanding the previous paragraph a copy of this opinion may be delivered to the PPF Board for its own use in connection with the assessment of the Scheme's PPF levy. For the avoidance of doubt, this opinion does not purport to exclude liability to the PPF Board, whether arising pursuant to section 161 of the Pensions Act 2004 or otherwise."

"Our opinion is given for the benefit of the trustees and may be relied on by the PPF Board but may not be relied on by any other person. This opinion may not be disclosed to any person other than the PPF Board and those persons (such as auditors or regulatory authorities) who, in the ordinary course of business of the trustees have access to their papers or records or are entitled by law to see them and on the basis that those persons will make no further disclosure."

2.1.2 **Here are three examples of wording that would NOT be acceptable:**

"This opinion is addressed to you solely for your own benefit in relation to the Guarantee given by the Guarantor for the purpose of reducing the risk based levy payable by the Plan, and except with our prior written consent, is not to be transmitted or disclosed to or used or relied upon by any other person or used or relied upon by you for any other purpose."

***This fails for two reasons: first it is restricted solely to reducing the risk based levy and secondly, although it may be disclosed to the Board, liability to the Board is still excluded.***

"This opinion is given for the benefit of the persons to whom it is addressed in their respective capacities as stated. It may not be relied on by or distributed or disclosed to any other person nor may it be relied on, in any other context, nor is it to be quoted or made public in any way without our prior written consent."

***Clearly liability to the Board is excluded here but even disclosure to the Board is prohibited.***

"This opinion is addressed to you personally. It may not be relied upon by anyone else without our prior written consent. Without prejudice to the foregoing, we acknowledge that a copy of this letter will be sent to the Board of the Pension Protection Fund."

***Here disclosure to the Board is granted but liability is excluded in the absence of separate written consent from the legal advisers.***

## 2.2 CAVEATS AND MARKET STANDARD QUALIFICATIONS

### 2.2.1 Limitation of Liability

"The aggregate of our liability in respect of all claims hereunder arising in relation to this opinion shall be limited to £1,500,000.00."

***This fails as the limit on liability is in breach of Solicitors' Code of Conduct rule 2.07 because it is below the minimum level of cover required by the Solicitors' Indemnity Rules.***

### 2.2.2 Limit on scope of Opinion

"We do not see any reason why the trustees cannot properly execute such an agreement for the purposes of reducing the PPF levy payable."

***This fails as it restricts the opinion solely to reducing the risk based levy.***

### 2.2.3 Assumptions

"The Security Agreement is within the capacity and powers of, and has been validly executed and signed by the Guarantor."

***This would fail, unless the party is domiciled overseas and there is an overseas legal opinion which addresses the capacity of the party to execute the agreement.***

## 2.3 CERTIFICATE CONFIRMATION

### 2.3.1 This wording is perhaps the simplest way of meeting the Board's requirements as it includes the statements that the trustees are required to certify in relation to a Type A guarantee. Obviously the wording must be adapted by anyone giving a legal opinion for another type of contingent

**asset to reflect the matters which must be certified for other contingent asset types. Where there are material changes, we expect the legal opinion to opine specifically on why each of those changes are not thought to be materially detrimental.**

"On the basis of, and subject to, the foregoing and the matters set out in [X] below and any matters not disclosed to us, and having regard to such considerations of English law in force as at the date of this letter as we consider relevant, we are of the opinion that the Guarantee:

- (i) is a legally binding, valid and enforceable obligation of the Guarantor;
- (ii) is in the Pension Protection Fund's required form for such documents (as published on its website as at the date of this letter), subject only to [*example of difference*], which does not have a materially detrimental effect on the rights of the trustees of the Plan as compared with the required form [for the following reasons] [*insert reasons why the changes are not materially detrimental as compared with the required form*];
- (iii) can be drawn against the liabilities to the Plan of any of the employers listed in Schedule 1 to the Guarantee, which schedule lists every undertaking which is identified by the company secretary as both an "associate" of the Guarantor within the meaning set out in section 435 of the Insolvency Act 1986, and an "employer" in relation to the Plan within the meaning set out in section 318 of the Pensions Act 2004 and regulations made thereunder; and
- (iv) on its terms, will be unconditionally available to the Plan for so long as any actual or contingent liability of any such employers to Plan subsists."

## 2.4 EMPLOYERS CLAUSE

### 2.4.1 *The following formulation together with the officer's certificate for employer clause may be used:*

"We are of the opinion that the Guarantee can be drawn against the liabilities to the Plan of any of the employers listed in Schedule 1 to the Guarantee. We express no opinion as to whether Schedule 1 to the Agreement lists every undertaking which is both an "associate" of the Guarantor within the meaning set out in section 435 of the Insolvency Act 1986, and an "employer" in relation to the Plan within the meaning set out in section 318 of the Pensions Act 2004 and regulations made thereunder but refer you to the certificate signed by [ ] of [ ] [director/company secretary] dated [ ] which confirms the same."

## 2.5 OFFICER'S CERTIFICATE FOR EMPLOYERS CLAUSE

### 2.5.1 The following formulation together with the employers clause above may be used:

"I confirm that the attached schedule of employers for the Scheme lists every undertaking which is both an "associate" of the Guarantor within the meaning set out in section 435 of the Insolvency Act 1986, and an "employer" in relation to the Plan within the meaning set out in section 318 of the Pensions Act 2004 and regulations made thereunder."

### OFFICER'S CERTIFICATE

### 2.5.2 The following is an example of the form of officer's certificate which may be used as referred to in paragraph 1.7.2 of this Appendix.

"I, [ ] Company Secretary and Director of the Company certify that:

1. I am duly authorised to give this certificate;
2. the Company has the necessary power to guarantee and to incur the liabilities specified in the Guarantee;
3. no borrowing limit of the Company will be exceeded by entering into the Guarantee;
4. the board of directors of the Company have duly authorised [ ] and [ ] to execute the Guarantee and all other documentation to be entered into by the Company pursuant to the terms of the Guarantee;
5. the individuals specified in 4 above were at the time of execution of the documentation referred to above and remain duly appointed directors of the Company;
6. both (1) the board of directors and (2) the shareholders of the Company have resolved that the granting of the Guarantee is for the commercial benefit of the Company; and
7. the resolutions giving the authorisations referred to above were validly passed at a properly convened meeting of the board of directors of the Company and at a properly convened meeting of the shareholders of the Company respectively, such resolutions contain declarations of interest by the directors of the Company sufficient to comply with section 177 of the Companies Act 2006 and the articles of association of the Company and all such board and shareholder resolutions are in full force and

effect at the date hereof and have not been amended, varied or altered."

## 2.6 UNCONDITIONALLY AVAILABLE

### 2.6.1 The following is an example of wording that can be used as referred to in paragraph 1.8.1 of this Appendix:

"On its terms the Guarantee does not:

- contain any express condition, other than a failure by one or more Companies to pursue the Guaranteed Obligations, which are required to be satisfied prior to a demand being made on the Company under the terms of the Guarantee; or
- impose any time limits for the duration of the terms of the Guarantee and the obligations of the company thereunder."

## 2.7 PROPERTY

### 2.7.1 Qualifications which may be considered inappropriate

"The Security Interest constituted by the Security Agreement will be void against a purchaser for value insofar as the security comprises security over registered land or a second or subsequent security over unregistered land unless the Security Agreement is registered pursuant to the Land Registration Act or as the case may be the Land Charges Act 1972."

***Where the opinion has confirmed that the security agreement has been properly registered as required by the Land Registration Acts 1925-1986, the Land Registration Act 2002, the Companies Acts 1985 and/or 2006 and/or any other applicable legislation, subject to the qualifications in respect of the opinion, this qualification may be considered inappropriate.***

"The Security Interest constituted by the Security Agreement will be void against a purchaser for value unless the Security Agreement together with the prescribed particulars as detailed in sections 395-397 of the Companies Act 1985 are filed at Companies House against the Chargor within the prescribed period."

***Where the opinion has confirmed that the security agreement has been properly registered as required by the Land Registration Acts 1925-1986, the Land Registration Act 2002, the Companies Acts 1985 and/or 2006 and/or any other applicable legislation, subject to the qualifications in respect of the opinion, this qualification may be considered inappropriate.***

"We express no opinion in respect of... the priority of any Security Interest created by the Security Agreement, as to the nature of the

Security Interest created thereby (whether fixed or floating), as to the registration requirements in respect of the Security Assets....”

***Where the opinion has confirmed that the security agreement has been properly registered and creates a first priority legal mortgage or fixed charge, this qualification may be considered inappropriate.***