Appendix A

Extract from the Pensions Regulator Code on Funding Defined Benefits Pension Schemes

Reporting material late payments to the regulator

169. Trustees must report a material late payment to the regulator and members within a reasonable period. A material late payment is where:

•contribution payments and other amounts under the schedule of contributions are not paid to the scheme by the due date(s), and

•there is ‘reasonable cause to believe’ that this failure is likely to be of material significance to the regulator in the exercise of its functions[96].

170. Having ‘reasonable cause to believe’ means more than an unsubstantiated suspicion. Trustees should make enquiries and use their judgment when deciding whether to report to the regulator. While they are not expected to undertake a full investigation to establish materiality or investigate whether an employer has committed fraudulent behaviour, the trustees should seek to enquire of the employer:

•the cause and circumstances of the payment failure, and

•what action has been taken by the employer as a result of the payment failure.

171. The trustees may choose to take an employer’s response to their enquiries at face value if they have no reason to believe it to be untrue or where their risk-based process indicates that there is a low risk of continuing payment failure. Where no response is received the trustees may infer that an employer is unwilling to pay the contributions due.

172. Below we set out the circumstances which are likely to be of material significance to the regulator. This list is for illustrative purposes only and is not exhaustive.

Material payment failures that need reporting

173 Trustees must report material late payments to the regulator and members within a reasonable period after the due date[97]. Circumstances which are likely to be material and which the trustees should report include:

•where trustees have reasonable cause to believe that the employer is not willing or able to pay the outstanding contributions

•where the trustees’ reminder and recovery process has been exhausted without response from the employer or without them having obtained the outstanding payment, in which event they may assume this indicates an employer’s unwillingness to pay

•where there is a payment failure involving possible dishonesty or a misuse of assets or contributions. For example, trustees may have concerns that the employer is retaining and using contributions to assist cashflow difficulties or where trustees have become aware that the employer has transferred contributions elsewhere other than to the scheme.

•where the information available to the trustees may indicate that the employer is knowingly concerned in the fraudulent evasion of the obligation to pay employee contributions

•where the trustees become aware that the employer does not have adequate procedures or systems in place to ensure the correct and timely payment of contributions due and the employer appears not to be taking adequate steps to remedy the situation, for example where there are repetitive and regular payment failures

•where there is an immediate risk to members' benefits (such as where pensions in payment are normally met by the employer's contribution), and

•in any event where contributions have been outstanding for ninety days from the due date (unless the payment failure was a one-off or infrequent administrative error, which is discovered after the ninety days and had already been corrected when discovered or is thereafter corrected as soon as reasonably practicable).

174. Trustees should not normally report to the regulator where one of the following circumstances applies:

•Where all the members of the scheme are directors of the employing company or family members of the directors

•Where a claim has been submitted to the Redundancy Payments Service of the Department of Business, Innovation and Skills or the Redundancy Payments Service of the Department for Employment and Learning for the outstanding contributions

•Where trustees have entered into a payment arrangement with the employer for the recovery of the outstanding contributions and the employer is paying in accordance with that arrangement

•Where there are infrequent one-off payment failures or administrative errors (resulting from, for example employees leaving the scheme or employment, new employees joining, or changes in salary not being notified promptly to the trustees), and those occasional failures or errors have been corrected within ninety days of the due date; and

•Where payments are made in excess of the contributions due under the schedule of contributions