

THE BOARD OF THE PENSION PROTECTION FUND

Guidance in relation to Contingent Assets

Part 1

General Requirements

2019/20

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1 THE GUIDANCE

1.1 Guidance Introduction

1.1.1 The Guidance in relation to Contingent Assets is comprised of four Parts. These are:

Part 1 – General Requirements;

Part 2 – Type A Contingent Assets (group company guarantees);

Part 3 – Type B Contingent Assets (charges over assets); and

Part 4 – Type C Contingent Assets (bank guarantees / letters of credit)

(the “**Contingent Asset Guidance**”).

1.1.2 All four Parts that comprise the Contingent Asset Guidance incorporate (where still relevant to this levy year) the information in the previous guidance that collectively related to Type A, Type B and Type C Contingent Assets in the Contingent Asset Guidance for 2018/2019.

1.1.3 This Part 1 of the Contingent Asset Guidance should be read in conjunction with each of the other three Parts that are relevant to the type of Contingent Asset being certified.

2 RECOGNITION OF CONTINGENT ASSETS – GENERAL

2.1 Pension Protection Fund (“PPF”) recognition of Contingent Assets

2.1.1 In accordance with its statutory objectives under section 175(5) of the Pensions Act 2004, the Board of the Pension Protection Fund (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. Further details are contained in the Contingent Asset Appendix to the Determination.

2.1.2 The Determination for the 2019/20 levy year was published in December 2018 and is available, together with the Appendices on our new website www.ppf.co.uk, in the Levy Payers section.

2.1.3 The Contingent Asset Guidance seeks to assist schemes and their advisors as to how to put in place a Contingent Asset under Part G of the Determination and the Contingent Asset Appendix. It is an accompaniment to the Determination and the Contingent Asset Appendix, **not** a substitute.

2.1.4 A Contingent Asset is an asset that will produce cash for a pension scheme if certain events happen, in particular where the sponsoring employer suffers an insolvency event. They must reduce the risk that an insolvency event results in a claim on the PPF, or reduce the size of a claim if one occurs. The types of Contingent Asset arrangements that are recognised by the Board are:

- (a) Guarantees given by parent/group companies and undertakings (Type A);
- (b) Security over cash, real estate and securities (Type B); and
- (c) Letters of credit or demand guarantees (Type C).

2.1.5 Since the 2015/16 levy year the Board has had in place rules providing for the recognition of asset-backed contribution (“**ABC**”) arrangements in the levy calculation. Our approach to recognising ABC arrangements differs to our approach to Contingent Assets. Schemes should refer to the Board’s published ABC Appendix and Guidance, rather than referring to this Guidance, to confirm our requirements in respect of ABC arrangements.

2.1.6 The definitive rules on calculating the levy are set out in the Determination for that year, and in the event of any conflict between the Contingent Asset Guidance and the Determination, the Determination will prevail. The Contingent Asset Guidance may be further updated and expanded from time to time in the light of, for example, issues arising, or queries received by the PPF.

2.2 Sources of information

2.2.1 The Contingent Asset Guidance should be read alongside the following documents, all of which are available through the pension protection levy section of the PPF’s website at <http://www.ppf.co.uk/>, save for the certificates, which are available via Exchange on the Pensions Regulator’s website <http://www.thepensionsregulator.gov.uk>

(a) Standard form agreements for contingent assets;

(b) Certificates for notifying the PPF;

(c) The 2019/20 Determination and the Appendices;

(d) The Board’s previous Determinations;

(e) Any FAQs in relation to Contingent Assets added to the PPF website; and

(f) The Board’s consultation documents, including the 2019/20 Levy Consultation published in September 2018, the Contingent Asset Consultation published in October 2017 and the 2019/20 Levy Policy Statement published in December 2018.

2.2.2 You should read this information in full before entering into new Contingent Assets or certifying new or existing Contingent Assets to the Board. The person submitting the Contingent Asset certificate on Exchange will be required to declare that they are aware of the Contingent Asset Guidance.

2.2.3 References to trustees in the Contingent Asset Guidance include references to managers, except where the context requires otherwise.

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

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

2.2.6 In the event that there is a discrepancy between the wording on Exchange and the Contingent Asset Appendix of the Determination, the Contingent Asset Appendix should be considered the applicable requirement.

3 RECOGNISING CONTINGENT ASSETS

3.1 Use of standard form documents

3.1.1 Contingent Asset agreements must be in the PPF standard form in force at the date of execution of the agreement. Trustees (or a person authorised by them) must certify

that the Contingent Assets for which they seek credit are in the Board's standard form and are legally valid, binding and enforceable.

- 3.1.2 A full list of the PPF's standard form agreements in Word format can be found on www.ppf.co.uk, in Levy payers section.
- 3.1.3 The Board's standard form agreements were updated with effect from 17 December 2014, in particular to allow for surety bond arrangements to be recognised as a Type C(ii) contingent asset, and generally to reflect legal developments and changing market practice.
- 3.1.4 The Board's standard form agreements were further updated with effect from 18 January 2018 (and republished in March 2018 to pick up minor and typographical points). This followed on from the Contingent Asset Consultation published in October 2017. The main changes were as follows:
- (a) Updates to the amendment and release criteria. Please see paragraph 7.2 below for more detail.
 - (b) In regard to Type A Contingent Assets, the fixed cap agreements include an option to include a pre-insolvency demand cap (as well as the required post-insolvency demand cap). Please see paragraph 2.1 of Part 2 of the Contingent Asset Guidance (Type As) for more information.
- 3.1.5 The updated version of the standard form must be used for **all new Contingent Asset agreements intended to be certified and entered into on or after 18 January 2018**.
- 3.1.6 For existing Type A or Type B Contingent Assets with a floating cap element intended to be certified, we will not require re-execution in 2019/20.
- 3.1.7 For existing Type A or Type B Contingent Assets with a fixed cap element intended to be certified we require these Contingent Assets to be re-executed onto the new standard forms for the 2019/20 levy year.
- 3.1.8 Type C(i) Contingent Assets are required to be renewed each levy year if they are to be certified.
- (a) Type C(i) Contingent Assets entered into before 18 January 2018 intended to be certified for 2019/20 do not need to be on the new standard form.
 - (b) For Type C(i) Contingent Assets entered into on or after 18 January 2018 intended to be certified for 2019/20 (and that have not already been entered into prior to 18 January 2018), our preference is for re-execution onto the new standard forms if resubmitting the contingent asset for 2019/20.
- 3.1.9 For existing Type C(ii) Contingent Assets, we do not require re-execution in 2019/20, although schemes may wish to consider whether to move onto the new standard forms voluntarily.
- 3.1.10 The agreement should be completed (with legal advice) to include the parties involved, details of any underlying assets charged (including secured creditors) etc. prior to execution by the parties.
- 3.1.11 You should not rely on the Contingent Asset Guidance or other documents provided by the PPF. 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.

3.2 **Changes to standard form documents**

3.2.1 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.

3.2.2 Companies and trustees are free to agree changes 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 3.2.5 below in this regard. The Board will not provide prior confirmation as to the acceptability of any proposed variation to the standard form documentation. Trustees and their legal advisers must 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.

3.2.3 Where changes have been made to the standard form, the trustees must ensure that:

- (a) the Board receives a clear statement of the changes;
- (b) a legal opinion is obtained which confirms why the changes do not have a materially detrimental effect on the rights of the trustees as compared with the standard form; and
- (c) a comparison against the standard form is provided, where any changes have been made beyond selecting options and inserting party details.

3.2.4 The Board will then consider whether the changes are materially detrimental as compared with the standard form. The requirement that any variations from the standard form must not be materially detrimental to the rights of the trustees is a deliberately stringent test in order 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 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.

3.2.5 A single materially detrimental change will generally mean that the Contingent Asset cannot be recognised even if 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 **compared to 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.

3.2.6 Parties cannot "mix and match" provisions from different versions of the same standard form.

4 PROCEDURE FOR RECOGNITION OF NEW CONTINGENT ASSETS

4.1 Submitting documents via Exchange

4.1.1 Trustees (or their authorised representative) must submit, via Exchange, details of the Contingent Asset using the appropriate certificate by no later than **midnight on 31 March 2019 (although note the later deadline for hard copy documents below)**.

4.1.2 Trustees must certify a number of statements relating to the benefit resulting from the agreement. The legal opinion should provide the basis for certification (see paragraph 6 below). Failure to correctly certify each statement will result in the Contingent Asset being rejected.

4.1.3 Detailed guidance on the specific certification requirements for each Contingent Asset type can be found at paragraphs 25 – 43 of the Contingent Asset Appendix.

4.2 Documents to be submitted by post

4.2.1 Trustees (or their authorised representatives) must also send (depending on the type of arrangement being used – see paragraph 4.2.2 below) hard copies of the following documents to the Board (or to any other address specified in accordance with the Determination) by **no later than 5:00pm on 1 April 2019 (this later deadline is for hard copy delivery only, and does not extend the Measurement Time - the certification must still be made, and everything completed in order to make that certification, by no later than midnight on 31 March 2019)**.

- (a) Certified copy of the legal agreement;
- (b) Legal opinion covering certain matters set out in the agreement (with an overseas legal opinion if required – see paragraph 6.1.6 below);
- (c) Comparison document showing changes from the standard form (or, if no changes, confirmation of this via the legal opinion or a letter);
- (d) Copy of the Contingent Asset certificate;
- (e) Where a guarantor strength report has been produced (see paragraph 6 of Part 2 of the Contingent Asset Guidance (Type As)), that report; and
- (f) Evidence that the corporate benefit to the guarantor from entering into the agreement has been established (e.g. confirmation from the relevant directors, board minutes or in the legal opinion); and
- (g) Valuations and other documents (where required by the certificate).

4.2.2 The exact documents to be sent will depend on the form of the Contingent Asset. Further details are set out in the Contingent Asset Appendix at:

- (a) Paragraph 27 – Type A arrangements;
- (b) Paragraph 30 – Type B(i) arrangements;
- (c) Paragraph 34 – Type B(ii) arrangements;
- (d) Paragraph 37 – Type B(iii) arrangements;
- (e) Paragraph 40 – Type C(i) arrangements; and
- (f) Paragraph 43 – Type C(ii) arrangements.

4.2.3 All hard copy documents must be sent to:

Director of Legal, Compliance and Ethics Re: Contingent Assets
Ref [insert pension scheme/section registration number]
The Board of the Pension Protection Fund
Renaissance
12 Dingwall Road
Croydon
Surrey
CR0 2NA

(or to any other address that is specified for this purpose on the Board's website at

the point of delivery of the contingent asset).

- 4.2.4 A suggested form of covering letter is included at Appendix 1. If contingent assets in respect of more than one scheme/section are included in the same package, they should be clearly identifiable as such.

4.3 **Certified copies – requirements**

- 4.3.1 A certified copy is a photocopy of the original executed agreement which has been certified as a true copy of the original, usually by the legal advisers.

- 4.3.2 Trustees can certify a copy of the agreement themselves, by stating “I certify that this is a true and complete copy of the original document” followed by their signature, (in block capitals) name and the capacity in which they are signing, and the date on which the certificate is given.

- 4.3.3 If counterpart agreements have been signed, the Board would prefer a certified copy of **one counterpart only** with the additional signature pages attached. Please do not send full copies of all the counterparts.

4.4 **Declaration**

- 4.4.1 The trustees (or their authorised representatives) providing the certificate must declare that they are aware of the Contingent Asset Guidance and, so far as they are aware, the Guidance has been followed in putting the Contingent Asset in place and certifying it to the Board.

4.5 **Next steps**

- 4.5.1 Once the Board receives the relevant documents, it will:

- (a) if requested, provide a receipt of the submission; and
- (b) check whether the submission contains all the required documents and content, and meets the conditions for recognition. This may involve making further enquiries of the scheme; and
- (c) confirm whether the Contingent Asset will be recognised for levy purposes.

- 4.5.2 The Board will not confirm the acceptability or otherwise of any qualifications to opinions or variations to documents. For any Contingent Assets that are rejected, the letter notifying the scheme of the rejection will include the key reasons for rejection but may not be a comprehensive list of all the deficiencies in the Contingent Asset.

- 4.5.3 The fact that a Contingent Asset is recognised does not imply that the Board has reviewed the documents in detail and does not rule out a future review.

- 4.5.4 If you have any queries about your submission please call the PPF Levy Customer Support Team on the number shown on the PPF website.

4.6 **Subsequent changes to information contained in the certificate**

- 4.6.1 Trustees must notify the Board if the information in the certificate changes during the levy year up until 31 March 2020. The levy may then be recalculated in light of the notified changes.

5 PROCEDURE FOR RECOGNITION OF EXISTING CONTINGENT ASSETS

5.1 Introduction

5.1.1 The Board will recognise, for 2019/20:

- (a) Type A or B Contingent Assets with fluctuating caps (i.e. by reference to section 179 or section 75); or
- (b) Type C Contingent Assets

that were accepted in prior levy years, provided the Contingent Asset was originally submitted or last certified no more than five years previously and the certifier can confirm that the agreement has remained in place during the years that it was not certified for levy purposes. All other requirements for a recertified Contingent Asset must be met, including that the Contingent Asset is recertified on Exchange no later than midnight on 31 March 2019 and the other conditions in paragraph G2.5 of the Determination are met.

5.1.2 The information required by the Board on recertification will, in particular, depend on:

- (a) whether the Contingent Asset itself has been amended since the previous submission;
- (b) whether the scheme's Contingent Asset position in general has changed; and
- (c) whether any documents are specified in the Determination and Contingent Asset Appendix as being required on recertification (such as an updated valuation).

5.1.3 If the Contingent Asset is to be amended, trustees should record this in the usual accepted form (namely, a deed of amendment). Re-executing the agreement will be regarded as a new Contingent Asset submission (and, if executed on or after 18 January 2018, will be required to be on the new standard form), not an amendment to the previous Contingent Asset, and all the requirements for a new Contingent Asset will need to be met.

5.1.4 Rules G2.6 and G2.7 of the Determination provide further details about the recognition of existing Contingent Assets for levy year 2018/19. Specific details about the recertification requirements can be found at paragraphs 25 – 43 of the Contingent Asset Appendix.

5.1.5 Where the Contingent Asset has been amended, or where any other documents are being provided to the Board, a certified copy of the amended Contingent Asset agreement along with a copy of the recertification certificate itself and any relevant supporting documents, should be posted to the Board at the address given at paragraph 4.2.3 above. As with new Contingent Assets, the deadline for submission is **no later than 5:00pm on 1 April 2019 (this later deadline is for hard copy delivery only, and does not extend the Measurement Time - the recertification must be made, and everything completed in order to make that certification, by no later than midnight on 31 March 2019).**

5.1.6 Subsequent changes to the matters contained within the certificate should be notified to the Board as per paragraph 4.6.1 above.

5.2 Legal opinion

5.2.1 A new or revised formal legal opinion is not generally necessary, but trustees should provide one if they think the legal position may have changed since the original opinion

was given such as might prevent the trustees from giving the relevant certifications on Exchange unless the opinion is updated. For example, if a Type A guarantor is replaced, a new opinion dealing with the capacity of the new guarantor to enter into the agreement will be necessary.

5.2.2 The Board will accept a "short-form" new opinion which refreshes and refers to the previous opinion.

5.3 **Re-execution Requirement for Type As and Bs with fixed cap elements**

5.3.1 Where the Re-execution Requirement applies (see paragraph 4(16) of the Contingent Asset Appendix), the starting point is that schemes should consider the Contingent Asset afresh – so that trustees along with their advisers can satisfy themselves that the Contingent Asset affords them and the Board with the same protection. For those Contingent Assets where the parties have amended the standard form to include a "higher of" liability cap (where one of the caps is an acceptable cap in the PPF standard form), we do not regard the Re-execution Requirement as applying unless the PPF-compliant cap is a fixed cap.

5.3.2 Where schemes are complying with the Re-execution Requirement and making other changes (e.g. to commercial terms), we expect to require the various requirements in the Contingent Asset Appendix to apply as if it were a new contingent asset. However, we are looking to build functionality into the Exchange system so that these are "*re-certifications for the purposes of the Re-execution Requirements with other changes*". We ask that schemes do this rather than certifying as "*new*" as this will help us track those that have moved onto the new standard forms and made other changes.

5.3.3 Where schemes are moving onto the new standard forms purely for the purposes of the Re-execution Requirement (i.e. with no other changes), we are also looking to build functionality into the Exchange system so that these are "*re-certifications for the purposes of the Re-execution Requirements without other changes*". We ask that schemes do this rather than certifying as "*new*" as this will help us track those that have moved onto the new standard forms and made no other changes, and will also help us to apply the relaxations we touch on below.

5.3.4 We have given thought as to how the Re-execution Requirement interacts with what information and supporting advice we need where schemes are moving onto the new standard forms purely for the purposes of the Re-execution Requirement (i.e. without other changes). Where a wholly new agreement is entered into for the purposes of the Re-execution Requirement, we expect to need all the legal opinions and confirmations, although (as is currently the case) we would accept a new legal opinion that is a "refresh" of an existing one so long as all the required confirmations remain covered.

5.3.5 We have considered relaxations on the value confirmations/advice, and have concluded that we can only sensibly do this for Type As. To explain why:

(a) Type A - parent guarantee. We intend to accept an 'explanation-of-what's-changed' refresh of the guarantor strength report or financial review where there has been a review of the same guarantor in 2018/19 (see paragraph 5.1.18 of Part 2 of the Contingent Asset Guidance). We are pleased to offer this also because Type As are by far the most popular contingent asset. We still expect this to cover the same areas that a fresh guarantor strength report covers – see Part 2 of the Contingent Asset Guidance (Type A).

(b) Type B(i) - security over cash in a bank account. The value confirmation (confirmation of credit balance) is required annually as usual.

(c) Type B(ii) - security over property. The valuation interacts with the (legal)

certificate of title and therefore we need a fresh confirmation of the value.

- (d) Type B(iii) - security over securities. The custodian valuation is required annually as usual.

5.3.6 Where a move onto the new forms for Type A agreements is effected via amendment/restatement, our expectation is that schemes are also likely to need to submit all the legal opinions and confirmations as if the contingent asset were new. For Type B agreements, we are expecting that the Re-execution Requirement can only be met by a full re-execution of the security agreement as it is our understanding that normal business practice is to re-execute security documents rather than amending them. For the avoidance of doubt, regardless of which method of moving onto the new standard form is used, the question of whether the old contingent asset has been properly and fully released (for example, for company accounting purposes), is not a matter for the Board. This is a commercial matter for the provider of the contingent assets.

5.3.7 In terms of the hard copy supporting documents, we do not expect schemes to send in comparison documents (blacklines) of the old contingent asset against the new (18 January 2018 onwards standard forms). We do require comparison documents of the scheme's contingent asset against the standard form in the usual way.

5.4 **Declaration**

5.4.1 Trustees must also:

- (a) declare that they are aware of the Contingent Asset Guidance; and
- (b) provide the form of certification set out in Part 2, 3 or 4 of the Contingent Asset Guidance, as relevant.

6 **LEGAL OPINIONS**

6.1 **Key Requirements**

6.1.1 As the Board's standard form agreements are governed by English law, the appropriately qualified person to give the legal opinion will usually be a solicitor holding a current practising certificate for England and Wales (subject to paragraphs 6.1.5 and 6.1.6 below), and holding professional indemnity insurance in accordance with the Solicitor's Indemnity Insurance Rules.

6.1.2 The legal opinion must be addressed to, and given by a solicitor formally appointed by, the trustees. It should not be provided by an in-house solicitor.

6.1.3 The legal opinion must specifically address certain statements which the trustees are required to give in relation to the benefit to be obtained from the Contingent Asset. These statements vary according to the type of Contingent Asset being used. Full details of these statements can be found at paragraphs 26, 29, 33, 36, 39 and 42 of the Contingent Asset Appendix.

6.1.4 The legal opinion must address whether schedule 1 in each of the Board's standard form agreements lists every undertaking which is both an Associated Party of any guarantor and an "employer" in relation to the relevant scheme within the meaning set out in section 318 of the Pensions Act 2004 and regulations made thereunder. However, the Board will not reject a legal opinion if it does not address this point provided that it receives an officer's certificate confirming that schedule 1 lists all such undertakings.

- 6.1.5 Where the Contingent Asset involves security over property situated in Scotland and Wales or Northern Ireland, a legal opinion from appropriately qualified lawyers from those jurisdictions is needed.
- 6.1.6 Where a Type A or B guarantor is domiciled outside England and Wales or Scotland or Northern Ireland, an overseas legal opinion is needed, covering:
- (a) the guarantor's capacity to enter into the agreement;
 - (b) recognition by the overseas jurisdiction of the choice of law clause in the agreement;
 - (c) enforceability of English judgments in that jurisdiction; and
 - (d) the absence of conflict with local law.
- 6.1.7 Trustees must obtain an English legal opinion (or an opinion under paragraph 6.1.5) alongside the overseas opinion under paragraph 6.1.6. The English opinion must cover the certifications required in the Contingent Asset Appendix and must cross-refer to and rely on the overseas opinion for matters of foreign law that cannot be covered within the English legal opinion.
- 6.1.8 Where a Type C Contingent Asset is issued by overseas banks/insurance companies, no overseas legal opinion is required. An English legal opinion is still required, although appropriate assumptions in relation to the overseas jurisdiction can be made.
- 6.1.9 Where a Type C Contingent Asset is issued by a UK bank/insurance company, the Board does not require the legal advisers to investigate its capacity to enter into the agreement. A legal opinion is still required, although appropriate assumptions about capacity can be made.
- 6.1.10 Where a party to the agreement is domiciled overseas, advice from lawyers qualified in the relevant jurisdiction may be necessary.
- 6.1.11 Overseas opinions can be provided by an appropriately qualified in-house lawyer or an adviser to a party other than the trustees. Where an overseas opinion is provided by a lawyer regarding a party domiciled overseas in a jurisdiction other than the one in which the lawyer is domiciled, the Board must see evidence that it is standard local practice for lawyers qualified in the former jurisdiction to provide formal legal opinions regarding the laws of the latter jurisdiction.
- 6.2 Limiting liability in legal opinions**
- 6.2.1 The Board will not reject a legal opinion simply on the basis that liability is limited, and does not undertake to review all or any legal opinions supplied to it in detail.
- 6.2.2 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 discuss with the trustees as to whether the trustees' certification should properly have been given based on the opinion.
- 6.2.3 The Board will reject an English legal opinion if, in breach of the SRA Indemnity Insurance Rules and rule 1.8 of the SRA Code of Conduct, the firm giving the opinion tries to limit its liability below the minimum level of cover required by the Solicitors' Indemnity Rules (as at the date of writing this is currently £2 million for partnerships and £3 million for LLPs and other bodies corporate).

- 6.2.4 An overall financial cap on liability is otherwise acceptable, if consistent with paragraphs 6.2.2 and 6.2.3 above.
- 6.2.5 Legal opinions should not be expressed to be limited in purpose to the risk based levy calculation. The point of the opinion is to provide the trustees with comfort as to the binding nature of the Contingent Asset agreement.
- 6.2.6 The opinion should be addressed to the trustees, and may seek to exclude third parties. Liability to the Board cannot be excluded, however, although it may be subject to the same limitations (e.g. financial cap) as liability to the trustees.

6.3 **Legal opinions – sample wording**

- 6.3.1 Please note that the Board will not provide a standard legal opinion template. The following examples should not be seen as standard wording but are simply intended to clarify some of the Board's requirements. They are in no way exhaustive or intended to cover all contingencies.

6.3.2 **Limitation of liability clauses in legal opinions**

The following examples of liability exclusion in legal opinions are acceptable as they do not try to exclude liability to the Board:

"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."

The following examples of liability exclusion are unacceptable in legal opinions as they aim to exclude disclosure and/or liability to the Board:

"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 as it is restricted solely to reducing the risk based levy and excludes liability, and prohibits disclosure, to the Board without separate written consent from the legal advisers.

"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."

This excludes liability, and prohibits disclosure, to the Board.

"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."

Disclosure to the Board is granted but liability is excluded without separate written consent from the legal advisers.

6.3.3 **Certificate confirmation**

This wording is 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 single Type A guarantee provided by a single guarantor. 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, the legal opinion must state why each change is not considered 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:

- (a) is a legally binding, valid and enforceable obligation of the Guarantor;
- (b) 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 changes are not materially detrimental compared with required form*];
- (c) 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 Associated Party 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
- (d) on its terms, will be unconditionally available to the Plan for so long as any actual or contingent liability of any such employers to the Plan subsists."

6.3.4 **Employer's Clause**

This example can be used with the officer's certificate at paragraph 6.3.5 below:

"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 Guarantee lists every undertaking which is both an Associated Party of the Guarantor 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."

6.3.5 **Officer's Certificate with Employer's Clause**

This example can be used with the employer's clause at paragraph 6.3.4 above:

"I confirm that the attached schedule of employers for the Scheme lists every undertaking which is both an Associated Party of the Guarantor 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."

6.3.6 **Officer's Certificate**

The following is an example officer's certificate.

"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."

6.3.7 **Unconditionally available**

The following wording is acceptable to the Board:

"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 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."

6.3.8 **Assumptions**

The Board will not accept assumptions contained in the legal opinion regarding the guarantor's capacity to enter into the Contingent Asset agreement, unless the guarantor is domiciled overseas and there is an overseas legal opinion which addresses

the capacity of the party to execute the agreement. The Board requires the legal opinion to address, amongst other things:

- (a) whether schedule 1 in each of the Board's standard form Contingent Asset agreements lists every company which is an Associated Party of the guarantor and an "Employer's Associate" (defined in the Board's 2018/19 Contingent Asset Appendix); and
- (b) whether the guarantor itself has capacity to enter into the Contingent Asset agreement.

Given that these may be regarded as factual matters in respect of which the legal advisor may be unable to opine, the Board will not reject a legal opinion if it does not directly address these points, provided that the Board receives an Officer's Certificate(s) confirming points (a) and (b) above.

6.4 **Caveats in the legal opinion**

6.4.1 The following qualifications, in relation to property, are also unacceptable to the Board:

"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 confirms the security agreement has been properly registered under 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 is unacceptable.

"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 confirms the security agreement has been properly registered under 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 is unacceptable.

"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 confirms the security agreement has been properly registered and creates a first priority legal mortgage or fixed charge, this qualification is unacceptable.

7 **AMENDMENT AND REPLACEMENT OF CONTINGENT ASSETS**

7.1 **Policy background – PPF position**

7.1.1 The PPF encourages behaviour that removes long-term risk from the system, to the benefit of the wider community of eligible schemes. As pension liabilities are a long-

term risk for the Board, the standard form Type A and B agreements are indefinite in duration. Although letters of credit and bank guarantees usually have a fixed term, the standard form Type C(i) agreement contains provisions intended to achieve an “evergreen” effect by stipulating that the agreement may be called on if not renewed or replaced (which in practice leads to the parties agreeing to renew/replace the agreement and maintain the scheme’s contingent asset cover). Equally Type C (ii) agreements need only last for as long as the schedule of deficit recovery contributions they guarantee.

7.1.2 In each of the above cases, the overall long term funding enhancement associated with the arrangement will be (very broadly) constant, whether because the Contingent Asset remains in place itself or it has been replaced by another Contingent Asset or cash in the scheme.

7.1.3 Although the levy for individual schemes is calculated based on measures of short term underfunding and insolvency risk, that measure is scaled so that each scheme makes a contribution in respect of future years’ risk as well. The PPF therefore considers it is fair within the current system only to include, in the calculation of assets at the measurement date, Contingent Assets that are expected to be in place for the long term (as, of course, are the assets in the scheme already). To take a simple example, consider a scheme which has a weak employer, but benefits from a fixed term guarantee from a strong parent. If, shortly after the expiry of the guarantee, the employer becomes insolvent, is abandoned by the parent and the PPF takes over the scheme, then the scheme will have substantially underpaid for the risk it posed to the PPF over the preceding years.

7.1.4 The Contingent Asset regime therefore contains some elements to ensure that contingent assets are in place for the long term in order to ensure that levy credit is fair. The standard forms themselves are not permitted to be limited in time (other than in respect of the Type C as outlined above), and although parties may amend their agreements, changes should be notified to the PPF so that we can consider whether the changes meet the Levy Rules for continued recognition of the contingent asset.

7.2 **Reduction and replacement – options within the standard form agreements**

7.2.1 As to the nature of the amendments that the parties may make to the agreements, Contingent Asset agreements are arrangements between the providers and trustees and the PPF is not a party. As noted above, the providers and trustees are therefore able to cancel or amend the agreements at any time, where this is consistent with the trustees’ duties to the scheme beneficiaries. Whether any given amendment will (in practice) be an acceptable change for the purposes of PPF levy recognition will depend on the nature and substance of the proposed amendment in question. See paragraph 7.3 below in relation to the Board’s approach.

7.2.2 Following the October 2017 Contingent Asset Consultation, the amendment provisions of the new standard forms have been streamlined to provide greater flexibility for the contracting parties. The Type A and Type B standard forms prior to January 2018 contained long form amendment/release criteria. The purpose of this provision was to give providers a clear mechanism to make a proposal in order for the provider’s obligations to be amended or released. The trustees would then have to consider this. It was always open to schemes to delete this provision in its entirety and then to consider amendment proposals as they arose. The new drafting is aimed at making this flexibility clear on the face on the standard form.

7.2.3 The new default amendment provision is simpler as it no longer specifies the proposals that may be made by the provider, but it continues to allow the trustees to withhold consent to any proposals made, if reasonable for them to do so.

7.2.4 The long form amendment/release criteria are still set out as a rider to the standard form Type A and Type B agreements, for any parties that wish to adopt the specified formulae. The Type A and Type B agreements also include an option for the parties to pre-agree, as an overlay to the primary new amendment provision, factors to be considered, although it should remain open to the trustees to decline an amendment if they consider it reasonable to do so. An example of where the test in the specified formulae might be met, but where it might still be reasonable for the trustees to refuse the proposal, is where a guarantor requests release of a guarantee for a scheme's full section 75 debt on the basis that the section 179 funding test in the specified formulae is met.

7.3 **Reduction and replacement – the Board's approach**

7.3.1 Removal, reduction or replacement of Contingent Assets may in some cases be entirely appropriate and not lead to any, or any significant, increase in risk. A broad outline of such "acceptable changes" is set out at paragraph 7.4.3 below. However, other changes by voluntary actions of the parties are regarded as "unacceptable changes".

7.3.2 Where a Contingent Asset intended to be in place for the long term is subject to an unacceptable change, the PPF should "claw back" at least part of the levy reductions related to that Contingent Asset for every year since the asset was put in place. However this would be an extreme approach, as well as being administratively difficult to achieve. Instead, our approach (very broadly) is as follows:

- (a) Where an unacceptable change occurs in the middle of a levy year, the levy for that year will be recalculated as if the Contingent Asset in question had never been in place during that year;
- (b) Where an unacceptable change occurs between levy years, no credit at all will be given for any Contingent Assets in the latter year (even if there remain some Contingent Assets with value which would otherwise satisfy the recognition requirements); and
- (c) Where an unacceptable change takes place, the scheme may not be given credit for any Contingent Assets in future years until the position has at least been restored to that which prevailed before the unacceptable change occurred.

The Board's approach to reduction and replacement where a scheme decides not to recertify an existing Contingent Asset

7.3.3 For levy year 2019/20 the Board will allow schemes to recertify (rather than requiring them to resubmit as a new Contingent Asset) a previously submitted Contingent Asset that is not subject to the Re-execution Requirement (see paragraph 4(16) of the Contingent Asset Appendix) where it had been accepted in a previous levy year but was not certified for the 2018/19 levy year (see paragraph 5.3 above for the relaxations and permitted ways forward in regard to recertification for Contingent Assets to which the Re-execution Requirement applies). When considering whether a scheme has removed or reduced Contingent Asset cover, the Board will also have regard to the previously certified PPF-compliant Contingent Asset to which a scheme continues to be a party, rather than only considering the position with regard to a Contingent Asset that has been certified (or recertified) for the levy year in question. Therefore, if (for example) a scheme with two certified Contingent Assets decided not to recertify one of those Contingent Assets for a successive year, the Board will in the first instance apply Rule G3.4 to consider whether the certified Contingent Asset should be accepted, but may make further enquiries of the scheme in order to ascertain whether the uncertified Contingent Asset remains in existence.

7.3.4 Schemes should note that it is the Board's discretion as to whether or not (and to what extent) an existing but uncertified Contingent Asset should be taken into account when considering whether a scheme's Contingent Asset cover remains at an acceptable level.

7.3.5 Full details of the Board's approach can be found at Rules G3.1 – G3.5 of the Determination.

7.4 **Reduction and replacement – exercise of the Board's discretion**

7.4.1 It is very difficult to specify in advance all of the possible circumstances in which parties might legitimately want to make changes to their Contingent Asset arrangements, and the impact which such changes ought to have on the levy, when considered against the requirements of the Determination.

7.4.2 The Board has discretion however to give full or partial recognition, even if the Determination's conditions are not satisfied. Broadly, the Board may do so if it considers the trustees acted reasonably, and there was no materially detrimental effect on the scheme. The basic non-recognition rule continues to apply to unacceptable changes.

7.4.3 Full details about this discretion are at Rule G2.3(3) of the Determination. However the broad principles on which the PPF intends to exercise this discretion are as follows:

- (a) Any change made within the standard form agreements is likely to be acceptable. So, in circumstances where the guarantor in respect of a Type A Contingent Asset puts forward a "Proposal" as defined in the standard form guarantee, and under the terms of the agreement the trustees may not unreasonably withhold their consent to the Proposal, then the Proposal is very likely to be an acceptable change. The fact that the trustees may have been content to do this on shorter notice than the standard form anticipates would not generally affect this analysis.
- (b) A fall in the market value of a piece of land charged in a Type B(ii) asset or the securities charged in a Type B(iii) asset, taken alone, does not trigger specific action under Rule G3 of the Determination (though of course it may result in a direct reduction in the levy credit each time the Contingent Asset value is used in the levy). Analogous changes in value resulting from actions entirely outside the control of the parties to the Contingent Asset agreement are very likely to be acceptable changes. However, the PPF regards the following as being within the control of the parties and therefore potentially unacceptable changes:
 - (i) a decision by a Contingent Asset provider not to continue to provide the asset on grounds of cost – e.g. where a Type C(i) asset is not renewed on expiry, or a charge is released in order to improve the balance sheet of the chargor; or
 - (ii) a decision by trustees not to enforce rights available to them – e.g. where a Type C(i) asset is not renewed and the trustees elect not to claim under the "evergreen" provisions.
- (c) Where there are multiple Contingent Assets, the PPF will look at all the assets together, comparing the overall position after the change with that before.
- (d) Replacing a Type A guarantor will usually be an acceptable change if the new guarantor is at least as strong as the old one. Strength will primarily be assessed based on the likely ability of the guarantor to meet the guaranteed obligations (as compared with the old guarantor) but may where appropriate have regard to Pension Protection scores provided by Experian, as at a date within five days on either side of the date of replacement.

- (e) If a liability cap is amended upwards within the same cap type (e.g. a guarantee of a 100% funding level on a s179 basis is changed to a guarantee of 105%) this will usually be acceptable.
- (f) If a liability cap type is changed (e.g. a £10m cap is converted to a cap guaranteeing 100% funding on a s179 basis), the actual monetary value of the cap as at the point of the change will be calculated and if the monetary value remains the same or increases the change will usually be acceptable. Examples of acceptable and unacceptable changes are detailed at 7.6 and 7.7 below.
- (g) Replacing a Type A guarantee with a Type B or C Contingent Asset of equal monetary value will usually be an acceptable change; changes in the opposite direction will usually not be.
- (h) Where the actual funding level (including Type B and C Contingent Assets) of the scheme reaches a specified level, it will usually be acceptable to release any Type B or C contingent assets to the extent they bring the funding level above that point. This test is more stringent than that set out in the standard form agreements themselves; where a change is made outside the terms of the agreement the PPF will take into account all the circumstances of the case – including the other factors set out in this section – when determining whether the change is acceptable.
- (i) Where the aggregate funding level is not so high as to satisfy the test in (h) above, it will usually only be acceptable to reduce Type B and C cover if and to the extent there has been an at least equal improvement in the actual funding level of the scheme since the Contingent Asset was put in place.
- (j) The value associated with any liability cap as at a particular date will be estimated by the PPF based on whatever funding data appears to it most appropriate – typically the type of asset and liability data used for the levy.
- (k) Extending the list of companies whose pensions obligations are secured by the Contingent Asset to include new employers will usually be acceptable (and will be necessary to enable the trustees to give the required certification each year). Removal of a company from coverage will only be acceptable if it has ceased to be an employer within the statutory definition set out in section 318 of the Pensions Act 2004.

7.5 **Advance notification of proposed changes to the Board**

7.5.1 The PPF recognises that in unusual cases the parties involved may want to seek an advance indication as to how it would treat a specific transaction for levy purposes. Whilst the PPF cannot provide confirmation in advance, we will endeavour to provide an indication, provided that comprehensive information about the anticipated transaction and the trustees' rationale for agreeing to it are provided in good time. The PPF will aim to respond to such requests within 20 working days, meaning that requests will need to be received by the end of February 2019 in respect of transactions planned to take place before the March submission deadline.

7.6 **Examples of acceptable changes**

7.6.1 **Example 1.** A guarantee of the full s75 debt given by Supermarket Ltd is released and replaced by a guarantee in the same terms given by Supermarché S.A. On the date of the change, the s75 is estimated at £500m. For levy purposes the PPF uses 105% funding on a transformed s179 basis as a proxy, for levy purposes, since this is the point of a full risk switch. Supermarket Ltd has a Levy Band for which the Levy

Rate is 0.40% and net assets of £400m, whilst Supermarché S.A. has a Levy Band for which the associated PPF Levy Rate is 0.23% and net assets of £2billion.

7.6.2 **Example 2.** A Type C(i) letter of credit for £10m issued by Bank A expires and is replaced by a Type C(i) demand guarantee for £20m issued by Bank B (Banks A and B must of course both satisfy the recognition requirements as to credit rating, domicile, regulation etc).

7.6.3 **Example 3.** Based on the most recent s179 valuation (dated 31 January 2019 and as at 31 July 2018) and applying the PPF roll-forward methodology, the scheme is 150% funded (without taking into account any Contingent Assets) as at 31 March 2019. All existing Type B and C Contingent Assets are released with effect from 31 March 2019.

7.6.4 **Example 4.** As at 31 March 2018, the scheme has liabilities of £100m and assets of £80m on a s179 basis. A Type C(i) Contingent Asset valued at £10m is put in place. As at 31 March 2019 the scheme's assets have increased to £95m and the liabilities to £105m, meaning the scheme is now over 90% funded. The Type C(i) Contingent Asset is released.

7.6.5 **Example 5.** A Type B Contingent Asset (charge over property/cash/securities) is released but the underlying asset that was subject to the charge is then transferred into the scheme (i.e. the underlying asset changes from being a Contingent Asset to a tangible asset).

7.7 **Examples of unacceptable changes**

7.7.1 Supermarché S.A. guarantees the obligations of three UK subsidiaries, all of which participate in the scheme. One of the subsidiaries is in financial difficulties and Supermarché S.A. persuades the trustees to release the guarantee in relation to that subsidiary while continuing to cover the other two. In fact, assuming the subsidiary that is in financial difficulties is an associate of the guarantor and remains an employer in relation to the scheme, the guarantee will have ceased to satisfy the requirements for recognition in any case.

7.7.2 As for paragraph Example 2 above, but the sponsor can only afford a demand guarantee for £5m from Bank B (unless the funding level has improved sufficiently in the meantime).

7.7.3 As for paragraph Example 3 above, but the scheme is only 100% funded as at 31 March 2019 and the Type B and C contingent assets are released and replaced with parent company guarantees.

7.8 **Impact of future transactions on the Contingent Asset**

7.8.1 The parties, when entering into a Contingent Asset arrangement, can agree what will happen if planned future transactions take effect. They can also agree a list of circumstances in which it would be unreasonable for the trustees to withhold their consent.

7.8.2 Provided that such agreements do not have a materially detrimental effect on the scheme (compared to the standard form agreements) and the trustees take professional advice, the Contingent Asset will still be recognised.

APPENDIX 1: SUGGESTED FORM OF COVERING LETTER

Type A example (New Contingent Asset)

FAO: Director of Legal, Compliance and Ethics - Re Contingent Asset

Our Ref:

Date:

Dear Sirs

Name of scheme:

[Name of section:]

PSR No:

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;
- [A copy of the Guarantor strength report]; and
- A copy of the Contingent Asset certificate.

[Note that this list is provided for the purposes of this example letter only, and is not a checklist]

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