

## The Pensions Regulator Consults on its Monetary Penalties Policy and on the Definition of Professional Trustee

The Pensions Regulator is [consulting](#) on its fining policy in relation to trustees who have breached their duties. This is part of the Regulator's [21<sup>st</sup> century trustee initiative](#) which aims to ensure governance of trust based pension schemes is robust and moves with the times.

It is also consulting on widening its definition of a professional trustee. Professional trustees are expected to work to higher standards than other trustees and will therefore incur heavier financial penalties for wrongdoing.

The Regulator has openly stated that its aim is to send a strong message to trustees that standards of governance and administration must be raised to protect member benefits.

The consultation runs until 9 May 2017.

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### Background

When there is a breach of pensions legislation the Pensions Regulator has a range of enforcement options, often including the power to impose a monetary penalty (fine) on trustees (and other parties connected with a pension scheme). The amount of the fine is subject to statutory limits, and while some breaches have lower limits the upper limit for each breach is generally £5,000 in the case of an individual and £50,000 in any other case.

In recent years the Regulator has generally been reluctant to impose fines, preferring to ensure breaches are rectified and trustees are educated to prevent repetition. Fines have normally been reserved for the worst cases, and situations where those involved have not fully co-operated with the Regulator or have deliberately breached the legislation.

This consultation, and the Regulator's statement that it is designed to send a clear message to trustees about it getting tougher on poor performance, is therefore being seen as a possible sea change in the Regulator's attitude to breaches of pensions legislation.

## How the Regulator Will Impose Fines

The consultation issued with its [draft monetary penalties policy](#) explains how the Regulator intends to use its powers to fine going forward.

The Regulator is proposing three penalty bands with the nature and impact (or potential impact) of a breach determining which band it falls into. (Band 3 penalties would normally represent the most serious breaches.)

Examples of each band are given as follows:

- Band level 1: failing to submit a scheme return.
- Band level 2: failing to provide members with a statutory money purchase illustration.
- Band level 3: failing to process core financial transactions promptly and accurately.

The width of each band then allows the Regulator to take a meaningful account of aggravating and mitigating factors. The Regulator intends to view the middle of the relevant band as being the appropriate starting point for imposing a penalty.

Band Level (Nature and Impact / Potential Impact of Breach)	Type of Person	Range
1	Individual	0 - £1,000
	Any other case	0 - £10,000
2	Individual	0 - £2,500
	Any other case	0 - £25,000
3	Individual	0 - £5,000
	Any other case	0 - £50,000

Factors which are likely to mitigate the financial penalty include:

- Engaging with the Regulator and co-operating with it.
- Notifying the Regulator in advance where issues arise.
- Notifying the Regulator of breaches quickly when required to do so.
- Seeking to resolve breaches quickly and effectively.

Failing to act quickly to resolve issues and deliberately concealing breaches are likely to result in financial penalties at the higher end of the scale.

(The Regulator's draft policy does not apply to penalties levied on employers for non-compliance with their automatic enrolment duties.)

## Joint and Several Liability Penalties

Most of the Regulator's penalty powers allow it to impose a penalty on each person who has failed to comply with the legal requirement, for example on each trustee rather than on the trustee board as a whole. However penalties imposed on trustees under the Occupational Pension Schemes (Charges and Governance) Regulations 2015 (Charges and Governance Regulations) must be imposed on a joint and several liability basis. In these cases, such as where an annual governance statement has not been prepared, the Regulator

will work on the basis that it can apply a penalty of up to the maximum amount on a joint and several liability basis for example to the trustee board as a whole.

## Who is a professional trustee?

Whilst all trustees are required by law to have a knowledge and understanding of their duties to enable them to properly exercise their functions as trustees, professional trustees are expected to have a greater level of knowledge and meet a higher standard of care. Where a professional trustee breaches the law the fine the Regulator will impose is likely to exceed the band range.

The Regulator is looking to move away from the view that a professional trustee is merely those who are remunerated for their work as a trustee, and instead is intending to focus on the level of expertise that they might bring to the role. As such it is proposing to define a professional trustees as any person, whether or not incorporated, who:

- acts as a trustee of the scheme in the course of the business of being a trustee; and/or
- is an expert, or holds themselves out as an expert, in trustee matters generally.

While the Regulator is not proposing to finalise this definition until after the consultation has closed, it is proposing that those who are viewed as “professional trustees” should include the following:

- Corporate trustees with one or more professional trustee directors.
- Any trustee who holds themselves out as having an expertise, in a particular area, whether or not they are remunerated.

Also caught by the higher standard is anyone acting in a professional capacity, providing a service in relation to the scheme (e.g. an accountant, actuary or legal adviser).

The Regulator notes some confusion between the terms “independent trustee” and “professional trustee”. Independence has not been included in the above definition because the Regulator does not see it as determinative of whether a person is a professional trustee.

## Scheme Return Penalties

The Regulator views failing to submit a scheme return as a band 1 breach. The Regulator is, however, intending to treat this breach on a simplified basis imposing generally as a standard fine, £500 for individual trustees and, £1,000 for corporate trustees. However, where a professional trustee is involved the fines would be doubled to £1,000 and £2,000 respectively. These penalties are to be doubled in the case of repeated breaches.

Where the Scheme Return has been completed by the time the penalty is imposed, the Regulator is proposing to apply a discount of 10%.

## Chair’s Statement Penalties

Under the Charges and Governance Regulations the Regulator must impose a mandatory penalty where it is told, or the scheme return shows, there has been a failure to prepare a chair’s statement. The penalty must be imposed on a joint and several liability basis and must be between £500 and £2,000. Where a scheme has a professional trustee the penalty will generally be £2,000

## Comment

For many years the Pensions Regulator has used its power to fine trustees sparingly, preferring to educate trustees and help them to become compliant, where they fully co-operate with the Regulator and openly admit mistakes. This approach is one we have fully supported and still believe is the correct approach to take. However, the Regulator is now talking tough. Whether this is just a shot across the bows of trustees, or actually a fundamental change in approach, remains to be seen. We hope it's the former, as experience suggests trustees don't generally deliberately breach the legislation, and when they do they are as upset as the Regulator and anxious to rectify any breaches. We have also reached a position where trustees are very open with the Regulator; they may become less open if they fear disclosing a breach will result in financial penalties.

If your scheme provides money purchase benefits and is required to provide a chair's statement you must ensure the statement is issued within seven months of each scheme year end or you will incur an automatic fine.

Whilst a chair's statement is an important document, and there is no excuse for not providing it within the appropriate timescale, it is questionable whether a breach of this requirement is so serious as to single it out from other breaches and warrant an automatic fine whatever the extenuating circumstances. This is, of course, a failure of the legislation rather than anything the Regulator is responsible for. That said the Regulator is apparently taking a hard line, especially where a professional trustee is involved.

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