



Compliance and enforcement

Quarterly bulletin: January-March 2019

This quarterly update provides information about our cases and the powers we have used. It is designed to help employers, their advisers, trustees and administrators understand the type of compliance and enforcement interventions we undertake.

Our approach is based on preventing problems developing in the first place by being clear about our expectations, and we have a range of educational materials for all members of our regulated community. These include online resources for employers and their advisers to help them through automatic enrolment (AE), the Trustee toolkit, guidance on scams, and information on other areas including funding and investment, scheme governance and record-keeping.

Compliance

Working with schemes to increase payments and reduce recovery plan lengths

We will take a tough stance on schemes that have not been treated fairly and will continue to take this approach where members' benefits are under pressure. If a defined benefit (DB) pension scheme doesn't meet its statutory funding objective, the trustees will need to work with the employer to put an appropriate recovery plan in place.

Over the past quarter, our supervision team has succeeded in encouraging several employers to increase their deficit repair contributions (DRCs) and decrease the length of their recovery plans. This demonstrates that 'clearer, quicker, tougher' is a real reflection of the way we are holding to account those who fail to do the right thing by their scheme members. It also shows that we are often able to secure good outcomes without the formal use of our powers.

As outlined in our recent Annual Funding Statement, where dividends and other shareholder distributions exceed DRCs, we expect a strong funding target and for recovery plans to be short. If the employer covenant is tending to weak or weak, we expect DRCs to be larger than shareholder distributions unless the recovery plan is short and the funding target is strong.

Case study 1

We identified this scheme as having a funding risk because of the low level of agreed DRCs and the length of the proposed recovery plan (initially more than 13 years). We also believed there was a significant covenant risk (as, over the years, funds had been taken from the employer and transferred to another company in the employer group). Sales and profitability were deteriorating, and the covenant advice had been drafted by an in-house finance expert and not by an independent covenant adviser. The in-house finance expert had rated the covenant as strong.

There were also acute governance risks – the trustee board included the company’s finance director and HR director, and there was evidence of a lack of robust recovery plan negotiations and in-depth understanding of the covenant.

We intervened with a general information request letter, which led to a meeting with the trustees and the scheme actuary and following this, we sent a further letter summarising our concerns, expectations and a set of actions.

Our intervention and challenges led to a suite of improvements for the scheme. The scheme went from having a conflicted trustee board to having a professional chair of trustees in place, a revised covenant rating (the covenant was re-rated from strong to tending to weak), an increased technical provisions deficit, a recovery plan of almost half the original length, and an upfront payment of £10 million, with £3.7 million per annum (up from £2 million per annum) in DRCs thereafter.

The employer also provided the scheme with first ranking security over its properties and a PPF-compliant evergreen s75 guarantee of £18 million. In addition, a negative pledge relating to dividends was provided.

Message to trustees and employers

You should take an integrated approach to risk management. This is an important approach that helps trustees to assess, prioritise and manage the employer covenant, investment and funding risks.

Enforcement

A number of firsts, including our first fraud conviction, an ERI conviction and a custodial sentence

In the last quarter we had a number of successes in a variety of cases and we used some of our powers for the first time. This includes our first fraud conviction, our first employer related investment (ERI) conviction and first custodial sentence (see Case study 2 below for more information).

Case study 2: First time TPR prosecution leads to custodial sentence

An accountant was jailed for more than three years after he fraudulently took more than £290,000 from a pension scheme. He was a trustee and administrator for a scheme but transferred savers' money into struggling new businesses he part-owned, and which were run by himself, his family and his client. We initially worked with the Insolvency Service on their investigation as to how he ran the administration firm and the trustee firm, and they concluded that it was not in the public interest to allow the companies to continue to trade. We appointed an independent trustee to the scheme, and the accountant subsequently accepted a voluntary disqualification from being a director.

The accountant had used more than £120,000 to buy himself and his wife a house to rent out as a personal investment but their daughter lived in it with her partner. Other funds from the scheme were used to pay tax bills for his accountancy business and the business of a client, to subsidise the running costs of a children's nursery run by his daughter, and as start-up investment capital in his son-in-law's physiotherapy business.

In the pension scheme's books, he presented the transfers as loans and created false minutes and records of the pension scheme listing other trustees as present at meetings when they were not.

We charged him with fraud by abuse of position and making employer-related investments by way of prohibited loans – the first time we had prosecuted for either of the offences. He pleaded guilty to five counts of fraud and two counts of making employer-related investments when he appeared at Preston Crown Court on 27 February. He also pleaded guilty to acting as a company director while disqualified, in a separate prosecution brought by the Insolvency Service, which was joined up with our case and resulted in an additional prison sentence. It is the first time a TPR prosecution has led to an immediate custodial sentence.

We are now pursuing through the courts the recovery of the money he took.

Case study 2: First time TPR prosecution leads to custodial sentence continued...

Message to trustees and employers

Trustees should be in no doubt that if they abuse their position of power in this way, we will take action – working with other bodies where necessary.

For the first time, we used a power to appoint a trustee primarily because of a lack of competence of the existing trustee board. We replaced the trustees of a defined contribution (DC) company scheme with an independent trustee after a catalogue of governance failures. We were alerted to the governance issues after it was found the trustees had failed to ensure their workers were enrolled into a qualifying automatic enrolment scheme. After a series of other governance issues came to light, the case was referred to the Determinations Panel.

We also used a range of powers for the first time in another DC master trust case (see Case study 3 below). This was our largest fine to date on a DC scheme.

Case study 3: Professional trustee firm fined

A corporate professional trustee firm was fined £103,750 for breaching multiple areas of pension law. We identified the breaches through our engagement with master trusts in preparation for authorisation and supervision.

The firm was fined £73,750 by the Determinations Panel for failing to obtain audited accounts for the scheme for four consecutive years, failing to provide members with Statutory Money Purchase Illustrations (SMPIs) for two consecutive years, and failing to report those six breaches of law to us. It is a statutory requirement for the trustee or manager of a scheme to report breaches of the law as soon as possible if they believe it is likely to be of material significance to us.

In a separate action arising from the same investigation, we also fined the trustee of the scheme £30,000 for failing to have at least three trustees on a master trust board. The collective penalty against the firm in relation to failings on the pension scheme is the largest fine handed to trustees by TPR.

Message to trustees:

The good governance of pension schemes is closely linked to good outcomes for members, so running a scheme well is essential to protect pension savers.

We have reported separately on master trust powers – for example authorisation and extension requests – in our monthly summary of the master trust market. But these are powers that have been used for the first time during this quarter. We have seen an increase in section 72 notices because we are using these to gain information from third parties to support us in making our decision on master trust authorisation.

Selected powers used for frontline regulation

The numbers in the table below include all powers that have been used, regardless of whether they have subsequently been reviewed, revoked, amended or are fines yet to be issued.

Power	Description	Number in period	Number to Mar 2019
Trustee appointments	The power to suspend a trustee either (a) whilst we are considering making a prohibition order against them, or (b) if proceedings have been issued against them for an offence involving dishonesty or deception, or (c) pending consideration being given to the institution of proceedings for an offence involving dishonesty or deception.	6	50
	The power to appoint trustees to schemes to secure that the number of trustees is sufficient for the proper administration of the scheme under section 7(3)(b) of the Pensions Act 1995.	124	2,607
	The power to vest or transfer property as a consequence of appointing or removing a trustee under section 9 of the Pensions Act 1995.	6	26
Trustee suspensions	The power to suspend a trustee while we are considering making a prohibition order against them, or if proceedings have been issued against them for an offence involving dishonesty or deception or pending consideration being given to the institution of proceedings for an offence involving dishonesty or deception.	0	16
	Power to extend the period of suspension.	1	2
Trustee prohibitions	Power to make a prohibition order under section 3 of the Pensions Act 1995.	0	17

Power	Description	Number in period	Number to Mar 2019
Special procedure	Where TPR considers that there would be an immediate risk to members' interests or scheme assets if a warning notice were to be issued.	1	29
Mandatory penalty notice	The Occupational Pension Schemes (Charges and Governance) Regulations 2015 require us to issue a mandatory penalty where no chair's statement has been prepared or we are of the opinion that the statement does not comply with the requirements prescribed for a chair's statement in the Occupational Pension Schemes (Scheme Administration) Regulations 1996.	100	522
Scheme return enforcement	Trustees have a legal obligation to give us information about their pension scheme by completing a scheme return when required, and an ongoing duty to ensure our records are maintained with up-to-date registrable information. A financial penalty under section 10 of the Pensions Act 1995 may be imposed for this failing.	0	195
Audited accounts enforcement	Trustees or scheme managers of most schemes are legally required to obtain audited accounts annually, within seven months of the scheme year end. Failure to do so may result in a financial penalty.	0	4
Information-gathering	Our formal information gathering powers under section 72 of the Pensions Act 2004.	29	657
Regulatory intervention reports	Section 89 of the Pensions Act 2004 gives us the power to publish information on cases where we have exercised or considered exercising our powers.	1	54
Clearance	A statement that we will not use our anti-avoidance powers to issue either contribution notices or financial support directions in relation to a defined benefit occupational pension scheme.	2	53

Power	Description	Number in period	Number to Mar 2019
Inspection and warrants	Statutory inspection powers under Section 73 to 78 of the Pensions Act 2004.	0	6
Production order	A High Court Order under Section 345 of the Proceeds of Crime Act 2002 requiring the production of specified material.	11	27
Restitution order	A High Court Order under Section 16 of the Pensions Act 2004 requiring a person to put right a misuse or misappropriation of pension scheme assets in which they were involved.	0	4
Restraint order	A High Court Order under Section 41(1) of the Proceeds of Crime Act 2002 requiring the restraint of assets.	2	2
Criminal	Fraud by Abuse of Position under Section 4 of the Fraud Act 2006.	5	5
	Restriction on Employer Related Investments under Section 40 of the Pensions Act 1995.	2	2
Improvement/ third party notice	Notices containing directions for a person to take steps to enable compliance with pensions legislation or remedy any non-compliance.	0	16
Regulated apportionment arrangement	The application, subject to conditions, to separate a scheme from its employer. It must be approved by us and the PPF must confirm that they do not object to the RAA.*	0	6
Other	Various other powers.	34	100
Total		324	4,400

*A regulated apportionment arrangement (RAA) is a non-enforcement use of powers and is included in this bulletin for information only.

Review of statutory notices for frontline regulation

If a trustee or other recipient disagrees with the issuing of a Statutory Notice issued under the 2015 Regulations – for example for failing to prepare a chair’s statement or exceeding the charge cap – they can apply for a ‘review’ of that decision. We set out the right of review in all notices, as well as how to apply for a review. An application for a review must be made within 28 days from when the notice was first issued.

We appoint a review officer, who is someone not previously involved with the case, to carry out the review. We will usually complete the review within 10 working days of the written notification that the application has been accepted and that a review will be carried out. If this is not possible, we will contact the applicant(s) and let them know when they can expect us to make a decision.

Reviews	Number in period	Number to March 2019
Requested	15	135
Completed	9	129

Outcome of reviews	Number in period	Number to March 2019
Confirmed	1	30
Revoked, substituted or varied	8	94

Automatic enrolment

A further adviser prosecution

Once again in the last quarter, we successfully prosecuted an accountant – this time an in-house accounts manager – for falsely claiming that staff had been enrolled into a pension (see case study below for more information). This case arose from our ongoing compliance validation work, where we identified a restaurant as being potentially non-compliant. When we investigated further and undertook an inspection, we uncovered nine restaurants in total with similar issues.

A recent analysis of employers where we had identified a duty failure breach showed that the most common themes were employers' lack of understanding of the AE process, accountants or third party advisers causing non-compliance, and general failures to undertake AE duties.

In the last quarter, we have seen a 15% increase in the use of our powers from the previous quarter, reflecting the increase in the number of employers who reached their first re-declaration deadline during the period, and also the continuation of enforcement activity against employers following the implementation of phasing. Of particular note, since August 2018 we have seen a significant increase in the number of penalties issued on late contribution cases.

We want to reinforce the message that we will be tough on those who avoid their legal duties and this may result in court action and a fine.

Case study 4

An accounts manager submitted false declarations of workplace pensions compliance to us, claiming that nine restaurants were giving eligible employees a pension. When we investigated the individual businesses, we found that the scheme accounts manager had actually failed to automatically enrol 103 staff into a workplace pension at the restaurants for which he was the payroll adviser. He had tried to cover this up using false declarations between September 2014 and May 2017.

The accounts manager appeared at Brighton Magistrates' Court on 9 January 2019 and pleaded guilty to nine charges of knowingly or recklessly providing us with information which was false or misleading, contrary to section 80 of the Pensions Act 2004. This charge carries a maximum sentence in a magistrates' court of an unlimited fine, and two years' imprisonment in the Crown Court. At a sentencing hearing on 6 February 2019, the accounts manager was ordered to pay a fine and costs totalling £5,000.

Following the investigation, the companies became compliant, had enrolled eligible employees into a scheme and had backdated the relevant scheme contributions.

Message to advisers

Providing TPR with false or misleading information may land you with a criminal conviction and a fine – or even a prison sentence.

Cases closed**Automatic enrolment cases closed in the period**

Cases closed in this quarter: 21,732
 Cases closed to date¹: 283,804

Selected powers² used in the period

Power	Number in period	Number to March 2019
Information Notice	69	875
Inspection	64	1,631
Warrant	0	4
Compliance Notice	9,274	153,080
Unpaid Contributions Notice	6,319	26,235
Fixed Penalty Notice	6,571	80,385
Escalating Penalty Notice	2,901	21,520
Total	25,198	283,730

¹ We define 'to date' as the period commencing from the outset of our compliance and enforcement activity for automatic enrolment (July 2012), and continuing all the way to the end of this reporting period (ie 31 March 2019). We occasionally identify a small number of cases which have been incorrectly marked as relating to automatic enrolment. When this occurs, an adjustment to the numbers from the previous quarter will have been made.

² This report only provides data on the main powers that we anticipate using. Our annual commentary and analysis publication on automatic enrolment will provide data on any other powers we have used over the period.

Review of statutory notices for automatic enrolment

A review is where an employer who is the recipient of a statutory notice (such as a Compliance Notice, Fixed Penalty Notice or Escalating Penalty Notice) disagrees with our decision and requests a review.

Confirmed reviews are where we have carried out a review and decided that the statutory notice was issued correctly and appropriately, and will continue to be applied to the employer. In some cases, we revoke the statutory notice following the review. Where a notice is substituted, this may mean that a different breach has been uncovered and a different statutory power is used instead.

Reviews ³	Number in period	Number to March 2019
Requested	2,551	29,171
Completed	1,943	23,840

Outcome of reviews	Number in period	Number to March 2019
Confirmed	695	6,528
Revoked, substituted or varied	1,248	17,312

³

Note that the above numbers represent the number of statutory notices that have been subject to a review request from an employer. The reviews completed in the period may not have been requested in the period. The numbers are subject to change over time as powers issued in a previous period are subsequently replaced as part of ongoing enforcement activity.

Tribunals for automatic enrolment

Employers who receive a penalty notice and disagree with our decision to issue it must first ask us for a review. If they disagree with the outcome of that review they can then appeal the decision to the Tribunal Service. Employers have 28 days after the review decision is issued in which to appeal.

Tribunals	Number in period	Number to March 2019
Requested	184	1,389
Defended	87	886
Not defended	85	491

Outcome of defended tribunals	Number in period	Number to March 2019
Confirmed	80	728
Revoked, substituted or varied	5	38
Total	85	766

Confirmed includes struck out and dismissed.

Ongoing tribunals where the decision has yet to be made on how to respond: 0

Defended tribunals still ongoing at the end of March 2019: 120

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www.trusteetoolkit.com

Free online learning for trustees

www.pensionseducationportal.com

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