

<p>The Pensions Regulator</p>	<p>DETERMINATION NOTICE under section 10 of the Pensions Act 1995 Rentokil Initial Pension Trustee Limited in relation to Initial Hospital Services Limited No.1 Pension Scheme</p>	<p>The Pensions Regulator case ref: E64630566</p>
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1. The Determinations Panel (the “**Panel**”) of the Pensions Regulator (the “**Regulator**”) met on 13 April 2018 to consider the issues in a Warning Notice addressed to Rentokil Initial Pension Trustee Limited (the “**Trustee**”) dated 31 January 2018. The Trustee is the trustee of the Initial Hospital Services Limited No.1 Pension Scheme (the “**Scheme**”). The Warning Notice was referred to the Panel on 12 March 2018, following a period for representations.

Matters to be determined

2. The Warning Notice asked the Panel to determine whether to issue a penalty under section 10 Pensions Act 1995 (“**PA 95**”) for the Trustee’s failure to comply with its obligations under Part 3 of the Pensions Act 2004 (“**PA 04**”).
3. The power to issue a penalty under section 10 is a reserved regulatory function and is, therefore, only exercisable by the Panel.

The Decision

4. The Panel determined to issue a penalty notice in the amount of £25,000 to the Trustee. The Panel concluded that a penalty was appropriate as the Trustee had failed to take all reasonable steps to secure compliance with its statutory duties under section 224 PA 04. The Panel determined that a penalty in the amount of £25,000 was appropriate in the circumstances.

Next Steps

5. The penalty notice will not be issued until at least 28 days after the date of this determination in case a reference (or challenge) is made to the Upper Tribunal.
6. The penalty is payable within 28 days from the date of the penalty notice (in accordance with Regulation 21 of SI 1997/794).
7. This Notice gives the Panel’s reasons for its determination.

Directly Affected Parties

8. The Panel considered the Trustee to be the only party directly affected by this determination.

The Scheme

9. The Scheme is a defined benefit pension scheme. It closed to future accrual on 1 May 1999. As at 31 March 2015, there were 61 deferred and 80 pensioner members, making a total of 141. As at 6 April 2012, the assets of the Scheme were £3,011,000.
10. The Scheme has two employers: the Principal Employer, Rentokil Initial Plc (the “**PE**”), and Interserve Hospital Services Ltd (together, the “**Employers**”).
11. The Trustee is the sole trustee of the Scheme.

Background to the determination

12. The Scheme’s last fully completed triennial actuarial valuation under Part 3 PA 04 was as at 6 April 2009 (the “**2009 AV**”), albeit the 2009 AV was notified to the Regulator almost three years after the statutory deadline.
13. The Regulator opened a case intervention in respect of the 2009 AV. As part of this, a conference call was held on 21 February 2012 with the Trustee. On this call, the Trustee informed the Regulator that it intended to transfer the Scheme’s assets and liabilities into a much larger Scheme sponsored by the PE. On 22 February 2012, the Regulator wrote to the Trustee informing it that it should progress the 2012 AV notwithstanding the proposed merger. The Trustee was informed that, “*We will not regard an imminent merger as a reasonable excuse for late completion of that valuation*”.
14. The effective date of the 2012 AV was 6 April 2012, meaning that the 2012 AV had to be obtained by the Trustee by 6 July 2013. Basic financial information was updated on the Regulator’s online portal on 20 October 2016, showing a deficit in the Scheme. However, this was submitted well after 6 July 2013, and most of the required information was not provided at all.
15. The recovery plan prepared following the 2009 AV expired on 5 April 2014.
16. On 20 November 2015, [the Actuary], the then Scheme actuary, sent an email to the Regulator confirming that the 2012 AV had not been completed in time. He explained that the 2012 AV had been deferred in 2013 because the Trustee and Employers were working to implement the merger. A draft timetable of actions to be completed was provided by [the Actuary] but this had not been agreed by the Trustee.
17. There then followed what the Case Team of the Regulator (the “**Case Team**”) described in the Warning Notice as a period of “*Engagement with the Trustees*” from December 2015 to October 2016. During this period, the Regulator made repeated requests to the Trustee to deliver a timetable for completion of the 2012 AV.

- (a) The Panel noted that a number of emails from the Regulator sent to [Scheme contact] (who appears to have been at the material times the group pensions manager for the PE, and who was the contact for the Scheme) went unanswered by the reasonable deadlines included in the correspondence. For example, an email of 2 December 2015 requested a response by 16 December 2015, but none was received and a chaser email was sent; and emails of 23 December 2015 and 18 January 2016 (the latter of which requested a response by 25 January 2016), were not responded to until the Regulator sent a further chasing email on 3 February 2016.
 - (b) The date for completion of the 2012 AV repeatedly was put back. For example, on 21 December 2015, [Scheme contact] stated that the results of the 2012 AV were expected to be available by the end of January 2016. However, on 9 February 2016, [Scheme contact] said that she expected the 2012 AV results to be discussed at a Trustee meeting on 24 March 2016. On 14 April 2016, [Scheme contact] then stated that the results were awaited. On 6 July 2016, following further chasing correspondence, [Scheme contact] informed the Regulator that the Trustee was still awaiting a report from the Scheme actuary. On 22 August 2016, [the Actuary] stated that he was having difficulty completing the 2012 AV because the Scheme was merging. On the same day, [the Actuary] sent draft timetables relating to the 2012 AV and the 2015 AV to the Regulator. On 26 October 2016, the Regulator was informed by [Scheme contact] that funding documents would not be uploaded until 15 January 2017.
 - (c) During this period, [the Actuary] revealed (on 30 September 2016) that the deficit as at 6 April 2012 was £450,000, but it was likely to have increased significantly since that date.
18. There was then a period of further engagement with the Trustee between 27 October 2016 and 15 March 2017. In this period, the Trustee failed to meet even the deadlines agreed with the Regulator in October 2016, and the Trustee failed to notify the Regulator of the delays or the reasons for the delays.
- (a) It is noted that, during this period, [Scheme contact] informed the Regulator that the Employers had suggested deferring contributions until 31 December 2017, so as to allow the merger to take place.
 - (b) On 21 December 2016, [Scheme contact] stated that money would be held in an escrow account to cover the shortfall and that, if the merger did not take place by 30 June 2017, the Trustee expected a contribution equal to the funding deficit to be paid.

- (c) Various emails from the Regulator were not responded to. On 7 February 2017, [Scheme contact] emailed the Regulator saying that she had been absent due to ill health and the valuation paperwork should be completed by the Trustee by the end of the month.
 - (d) However, no update was received and the Regulator was forced to write to the Trustee on 17 March 2017 setting out its concerns and asking for confirmation that the whole Trustee board would be available for an urgent conference call. No reply was received.
- 19. The Regulator therefore sought to engage with the Scheme actuary, who by then was [the Actuary], in April and May 2017. However, [the Actuary], informed the Regulator that he had been having difficulties contacting [Scheme contact], and that he was unaware of any other contact for the Scheme. The Regulator then decided to write directly to the nine directors of the Trustee listed at Companies House, as well as to the PE. Eventually, on 23 May 2017, [Scheme contact] emailed the Regulator suggesting a conference call on 31 May 2017.
- 20. This conference call took place with all of the trustee directors and [Scheme contact]. The Regulator stressed the importance of compliance with the statutory provisions and the possibility of penalties being imposed. The Trustee agreed that the 2012 AV would be submitted to the Regulator by no later than 14 July 2017 and a timetable for the 2015 AV would be provided by 30 June 2017.
- 21. The Regulator sent a notification of failure letter to the Trustee on 5 June 2017, which the chair of the Trustee, [chair Trustee], confirmed he had received. The letter reiterated the deadlines agreed on the conference call and stated that if the 2012 AV was not received by the Regulator by 8 September 2017, the Regulator would consider taking regulatory action. However, the proposed timetable for the 2012 AV was not provided until 10 July 2017 (showing a proposed submission date of 31 December 2017), and the 2012 AV was not received on 14 July 2017.
- 22. Emails were sent on 17 July 2017 and 31 July 2017 to [chair Trustee] and [Scheme contact] asking for updates. No response was received until 3 August 2017, when [Scheme contact] confirmed that she would provide a further update by the end of the week. Following further correspondence, on 31 August 2017, [chair Trustee] confirmed that the 8 September 2017 deadline would not be met.
- 23. On 6 October 2017, [Scheme contact] emailed the Regulator outlining the Scheme's funding position and deficit recovery plan contributions. She stated that the merger was going ahead, with letters due to be sent to members shortly thereafter. She also stated that if the merger did not take place, contributions would commence from 1 January 2018; and that £500,000 presently was held in an escrow account.

24. However, the 2012 AV still was not submitted.
25. The 2015 AV also has not been submitted.

Representations

26. No representations were received from the Trustee during the representation period.
27. The Case Team has provided an attendance note of telephone calls with [chair Trustee] after the end of the representation period. On 9 March 2018, [chair Trustee] left a voicemail for the Case Team case officer, apologising for the “*considerable and lengthy failures on the Trustee’s part*”, and stating that he would like to discuss what else the Trustee should be doing, as well as discussing the submission of the 2012 and 2015 AVs. On 12 March 2018, the Case Team spoke to [chair Trustee]. He apologised again and asked for further information about the Warning Notice (as well as another warning notice, which is not presently before the Panel).
28. In an email of 3 April 2018, [Scheme contact] stated to the Case Team that it was, “*entirely my fault that the Trustee had not responded to previous communications about the warning notices as I had not made the Trustee aware that these had been submitted by the Regulator.*”
29. On 6 April 2018, [chair Trustee] emailed the Case Team, copied to the Panel, stating that Scheme financial accounts to 2012 had been prepared and were to be audited shortly. [Chair Trustee] stated, “*We expect to complete and file the valuation and associated papers as soon as possible after this. The 2015 valuation will then follow.*” He apologised for the “*extreme delay*”.

Legislative framework

30. Part 3 PA 04 sets out the statutory regime on Scheme Funding. Section 222 provides that each scheme must meet the statutory funding objective of having sufficient and appropriate assets to cover its technical provisions, being the amount required, on an actuarial calculation, to make provision for the scheme’s liabilities.
31. Section 224 PA 04 provides:

“(1) The trustees or managers must obtain actuarial valuations–
(a) at intervals of not more than one year or, if they obtain actuarial reports for the intervening years, at intervals of not more than three years, and
(b) in such circumstances and on such other occasions as may be prescribed.

...

(4) The trustees or managers must ensure that a valuation or report obtained by them is received by them within the prescribed period after its effective date.

...

(7) The trustees or managers must secure that any actuarial valuation or report obtained by them (whether obtained under this section or in pursuance of any other power or duty) is made available to the employer within seven days of their receiving it.

(8) Where subsection (1), (4) or (7) is not complied with, section 10 of the Pensions Act 1995 (c. 26) (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance.”

32. Regulation 7 of the Occupational Pension Schemes (Scheme Funding) Regulations 2005/3377 (the “**Funding Regulations**”), provides that:

“(2) Where the trustees or managers have obtained an actuarial valuation or an actuarial report, they must ensure that it is received by them (a) in the case of a valuation under section 224(1)(a), within 15 months after its effective date”

33. Section 226 PA 04 provides:

“226 Recovery plan

(1) If having obtained an actuarial valuation it appears to the trustees or managers of a scheme that the statutory funding objective was not met on the effective date of the valuation, they must, within the prescribed time—

(a) if there is no existing recovery plan in force, prepare a recovery plan;

(b) if there is an existing recovery plan in force, review and if necessary revise it.

(2) A recovery plan must set out—

(a) the steps to be taken to meet the statutory funding objective, and

(b) the period within which that is to be achieved.

...

(6) The trustees or managers must, except in prescribed circumstances, send a copy of any recovery plan to the Regulator within a reasonable period after it is prepared or, as the case may be, revised.

The copy of any recovery plan sent to the Regulator must be accompanied by the prescribed information.

(7) Where any requirement of this section is not complied with, section 10 of the Pensions Act 1995 (c. 26) (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance.”

34. Regulation 8 of the Funding Regulations provides:

“(1) Where section 226(1) of the 2004 Act applies, and the trustees or managers of a scheme are required, following an actuarial valuation, either to prepare a recovery plan or to review and if necessary revise an existing recovery plan, they must do so—

(a) in the case of the first actuarial valuation obtained by them under section 224 of the Act and each subsequent valuation under section 224(1)(a), within 15 months after the effective date of the valuation.”

35. Section 227 PA 04 provides:

“(1) The trustees or managers must prepare, and from time to time review and if necessary revise, a schedule of contributions.

...

(3) Provision may be made by regulations—

(a) as to the period within which, after the establishment of a scheme, a schedule of contributions must be prepared,

(b) requiring the schedule of contributions to be reviewed, and if necessary revised, at such intervals, and on such occasions, as may be prescribed, and

(c) as to the period for which a schedule of contributions is to be in force.

...

(6) The certificate must state that, in the opinion of the actuary—

(a) the schedule of contributions is consistent with the statement of funding principles, and

(b) the rates shown in the schedule are such that—

(i) where the statutory funding objective was not met on the effective date of the last actuarial valuation, the statutory funding objective can be expected to be met by the end of the period specified in the recovery plan, or

(ii) where the statutory funding objective was met on the effective date of the last actuarial valuation, the statutory funding objective can be expected to continue to be met for the period for which the schedule is to be in force.

(7) Where the statutory funding objective was not met on the effective date of the last actuarial valuation, the trustees or managers must send a copy of the schedule of contributions to the Regulator within a reasonable period after it is prepared or, as the case may be, revised.

(8) Where any requirement of the preceding provisions of this section is not complied with, section 10 of the Pensions Act 1995 (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance...”

36. Regulation 9 of the Funding Regulations provides:

*“(1) A schedule of contributions for a scheme must be prepared within 15 months after the effective date of the first actuarial valuation following the establishment of the scheme.
(2) Where a schedule of contributions has been prepared, it must be reviewed, and if necessary revised—
(a) within 15 months after the effective date of each subsequent actuarial valuation under section 224(1)(a) of the 2004 Act...and
(c) within a reasonable period after any revision of a recovery plan under regulation 8(3) or (5).”*

37. Section 229 PA 04 provides:

*“229 Matters requiring agreement of the employer
(1) The trustees or managers must obtain the agreement of the employer to—
(a) any decision as to the methods and assumptions to be used in calculating the scheme's technical provisions (see section 222(4));
(b) any matter to be included in the statement of funding principles (see section 223);
(c) any provisions of a recovery plan (see section 226);
(d) any matter to be included in the schedule of contributions (see section 227).
...
(5) If the trustees or managers are unable to reach agreement with the employer within the prescribed time on any such matter as is mentioned in subsection (1), they must report the failure in writing to the Regulator within a reasonable period.
(6) Where subsection (1), (4) or (5) is not complied with, section 10 of the Pensions Act 1995 (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance.”*

38. Regulation 13 of the Funding Regulations provides:

“Where, following an actuarial valuation, the trustees or managers of a scheme are required under section 229(1) of the 2004 Act to obtain the agreement of the employer to any of the matters mentioned in paragraphs (a) to (d) of that provision, they must do so within 15 months after the effective date of the valuation.”

39. Although the Panel did not receive full argument on the point, it concluded that the first task set out in the legislation is for an AV to be obtained, and the other requirements set out in section 224, and in sections 226, 227 and 229 PA 04, are predicated on this first step having been completed.

(a) Section 224 itself provides that an AV (“a valuation or report”) must be obtained at intervals of not more than 3 years and be

received by them within the period set out at regulation 7 of the Funding Regulations, being 15 months after the effective date. However, the requirement at section 224(7) is for “*any actuarial valuation or report*” to be made available to the employer, which indicates that this latter requirement is predicated on the AV having been obtained.

- (b) In the case of section 226, this states explicitly that the requirement arises only “*having obtained an actuarial valuation*”. The Panel therefore considered that, absent an AV having been completed, the requirement to prepare or review the recovery plan cannot arise. The time limit under regulation 8 of the Funding Regulations only applies where section 226(1) applies.
- (c) The position is slightly less clear under section 227. The trustees or managers “*must*” prepare and from time to time and if necessary revise a schedule of contributions. However, regulation 9 of the Funding Regulations provides that the revisions must take place within 15 months of the effective date of the AV, and within a reasonable period of the revision of a recovery plan.
 - i. The difficulty, however, is that it will be hard for a trustee to review and revise a schedule of contributions in a meaningful way absent the provision of an AV.
 - ii. The latter requirement cannot be met where a recovery plan has not been prepared.
 - iii. The Panel’s view was that the obligation under section 227 did not arise until the AVR had been obtained. However, given that the Case Team (and the Trustee) had not directly addressed the issue, it did not feel the need to reach a conclusion on this point.
- (d) As to section 229, the relevant provisions for the current purposes appeared to the Panel to be sections 229(1)(c) and (d). As the requirement to obtain the agreement of the employer is contingent on the preparation of the recovery plan and schedule of contributions, the same position applies as in respect of sections 226 and 227. Moreover, regulation 13 of the Funding Regulations states that section 229 applies only “*following an actuarial valuation*”.

Liability

- 40. The Panel was of the view that, given the legal position explained above, liability could be established only in respect of sections 224(1) and (4) PA 04, but not in respect of sections 226, 227 or 229 PA 04.

41. The Panel concluded that, in respect of sections 224(1) and (4), liability was established in respect of both the 2012 AV and 2015 AV.
- (a) It was clear that an AV had not been obtained within the required time, 15 months from the effective date, either in the case of the 2012 AV or the 2015 AV. Neither AV has yet been submitted.
 - (b) The Scheme is an occupational scheme and so the Panel was satisfied that Part 3 PA 04 applied to it.
 - (c) The Panel was also satisfied that section 10 PA 95 applied to the Trustee due to these breaches, as the Trustee had failed to take all reasonable steps to secure compliance.
 - i. The fact that a Scheme might be about to undergo a merger or transfer was not, in the Panel's view, a good reason to fail to comply with the statutory requirements. It is not for the Trustee to pick and choose whether to comply with the mandatory provisions and timescales. That was particularly so where the Regulator specifically had informed the Trustee that the merger was not a reason to defer the AVs.
 - ii. There was in any case no guarantee that the merger or transfer would go ahead. While the Trustee has said that it has put in place an escrow, it remains of crucial importance that an AV is completed so that the size of the deficit can properly be understood and a schedule of contributions and recovery plan put in place. It was not sufficient for the Trustee to take steps to deal with the deficit without having first established the funding position through completing the AV.
 - iii. The fact that the delay was so long, and that the Trustee had failed to respond adequately or timeously to the Regulator, together with the repeated pushing back of the timetable, further indicated that the Trustee had not taken all reasonable steps to comply.
 - iv. Even if [Scheme contact] was at fault, the Trustee still was required to ensure compliance. It must have realised, or ought reasonably to have realised, that it had not complied with the provisions of Part 3 PA 04 as the 2012 and 2015 AVs were not signed off.
42. In making its decision the Panel had regard to the objectives of the Regulator as set out in section 5 of PA 04 and to the matters listed in section 100 PA 04.

43. The Panel therefore considered it appropriate to impose a penalty on the Trustee under s.10 PA 95. The penalty is in respect of all the breaches identified in the Warning Notice that were found to be breaches by the Panel.

Amount of the Penalty

44. The Regulator published its Monetary Penalty Policy (“MPP”) in August 2017. The Case Team did not refer to the MPP in the Warning Notice, but the Panel was of the view that the MPP applied.

The Case Team’s recommendation

45. In its Warning Notice, the Case Team recommended that a notice requiring payment of a penalty of £25,000 should be issued to the Trustee.
46. The Panel considered the appropriate band level. It was of the view that, while it was arguable that the breaches were sufficiently serious to amount to band 3 breaches, on balance, band 2 was the appropriate band for the failure. The failure appeared to be most closely aligned to the example of “*failing to comply with an improvement notice or third party notice directing a person to take steps to comply with their duties under Part 3 of the Pensions Act 2004*”, which is a band 2 breach. It also appeared to be slightly less serious than the band 3 example of “*Reimbursing a trustee out of the assets of a scheme in breach of legislative requirements*”.
47. The MPP requires that a starting point be chosen within the band range. The starting point within a band is, by paragraph 9.4 of the MPP, to be chosen having regard to proportionality and the likelihood of the Regulator achieving its underlying objective. The range of a band 2 fine is nil to £25,000 for a professional trustee.
48. The Panel’s view was that the starting point should be above the mid-point of the band, given the seriousness of the breach. As stated above, the Panel was of the view that, while it concluded that the breach was a band 2 breach, it was arguable that it was sufficiently serious to amount to a band 3 breach. This indicated that a starting point above the mid-point was appropriate. The potential impact on a Scheme and its members of a failure to obtain an AV is a significant and serious one, particularly given the impact on the other steps required as part of the scheme funding regime. The Panel therefore considered that a starting figure of £20,000, considerably above the mid-point for band 2, was appropriate.
49. The Case Team highlighted a number of aggravating factors:
- (a) Previously late AVs in 2006 and 2009.

- (b) A previously late Scheme return in 2016 and late Scheme accounts in 2010.
 - (c) The failure to report the breach within a reasonable timeframe.
 - (d) The increasing difficulty in obtaining regular progress updates and the lack of proactive contact from the Trustee, as well as the failure to notify the Regulator when an agreed deadline would not be met, and requests for information or updates being ignored.
 - (e) The lack of a reasonable excuse for the delays.
 - (f) The lack of supporting information in relation to the proposed Scheme merger.
 - (g) The increasing deficit (and lack of contributions since 4 April 2014).
 - (h) The persistent failure to submit the AVs resulted in the Employers achieving a pause in contributions to December 2017.
 - (i) The fact that the 2012 and 2015 AVs remain outstanding.
 - (j) The Trustee neglecting its obligations despite the Regulator reminding the Trustee that the AVs were a statutory requirement and urgently required.
 - (k) There being a “*flagrant*” disregard by the Trustee of its obligations and the role of the Regulator, putting members at risk.
 - (l) The Trustee is a corporate trustee.
50. The Panel agreed that all of these factors were aggravating factors, and that they were cumulatively very serious.
51. The Case Team stated that mitigating factors were that the Scheme was expected to transfer to a larger, well-funded Scheme, and that the 2012 AV was partially complete. The Panel accepted that these were mitigating factors but considered them to be of little weight. In particular, the Panel did not consider the fact that there might be a merger to be a material mitigation. Not only was there no guarantee of the merger being completed, but on any view the funding position of the Scheme would not be secured in the meantime. The fact that the Regulator specifically had informed the Trustee that the merger did not provide a good excuse for delaying the 2012 AV was a further reason why this mitigation was not material.

52. In addition, the Panel considered that, in assessing the seriousness of the breaches, it should take into account the fact that, because the Trustee did not conduct an AV, it was unable to put in place a recovery plan or schedule of contributions, or obtain the agreement of the employer. The result was just as serious as if these obligations (under sections 226, 227 and 229 PA 04) had arisen because an AV had been obtained but were not then complied with. This was a significant aggravating factor.
53. The Panel took into account the fact that Part 3 PA 04 provides a comprehensive funding regime, which is designed to ensure that schemes are funded properly and that remedial measures are put in place timeously and appropriately if the statutory funding objective is not met. The failure to obtain an AV is a very serious breach because it precludes the other measures being taken, which jeopardises scheme funding levels and can put members' benefits at risk. There is a significant public interest in ensuring that the funding of pension schemes is regulated properly.

The Panel's decision on Penalty

54. Overall, the Panel felt that the aggravating factors (both those identified by the Case Team, and the additional aggravating factors identified by the Panel), were extremely serious and far outweighed the mitigating factors. This meant that the penalty should be above the starting point of £20,000. The Panel therefore agreed with the Case Team that a penalty of £25,000, at the very top of band 2, was appropriate.

Conclusion

55. For these reasons the Panel determined to issue a penalty notice in the amount of £25,000 to the Trustee, Rentokil Initial Pension Trustee Limited, payable 28 days from the date of the notice.
56. By virtue of section 96(5) of the Act the penalty will not be issued during the 28-day period within which this determination may be referred to the Upper Tribunal and, if so referred, until the reference and any appeal against the Upper Tribunal's determination has been disposed of. If no referral to the Upper Tribunal is made within 28 days, then a penalty notice will be issued to the Trustee.
57. **Appendix 1** to this Determination Notice contains important information about the rights to refer this decision to the Upper Tribunal.

Signed: 

Chairman: David Latham

Dated: 14 May 2018

Relevant Statutory and Code Provisions

The Pensions Act 1995

Section 10 – Civil penalties

- 1) Where the Authority are satisfied that by reason of any act or omission this section applies to any person, they may by notice in writing require him to pay, within a prescribed period, a penalty in respect of that act or omission not exceeding the maximum amount.
- 2) In this section, "the maximum amount" means:
 - (a) £5,000 in the case of an individual and £50,000 in any other case, or
 - (b) such lower amount as may be prescribed in the case of an individual or in any other case, and
 - (c) the Secretary of State may by order amend paragraph (a) by substituting higher amounts for the amounts for the time being specified in that paragraph.
- 3) Regulations made by virtue of this Part may provide for any person who has contravened any provision of such regulations to pay, within a prescribed period, a penalty under this section not exceeding an amount specified in the regulations; and the regulations must specify different amounts in the case of individuals from those specified in other cases and any amount so specified may not exceed the amount for the time being specified in the case of individuals or, as the case may be, others in subsection (2)(a).
- 4) An order made under subsection (2) or regulations made by virtue of subsection (3) do not affect the amount of any penalty recoverable under this section by reason of an act or omission occurring before the order or, as the case may be, regulations are made.
- 5) Where:
 - (a) apart from this subsection, a penalty under this section is recoverable from a body corporate or Scottish partnership by reason of any act or omission of the body or partnership, and
 - (b) the act or omission was done with the consent or connivance of, or is attributable to any neglect on the part of, any persons mentioned in subsection (6),
 - (c) this section applies to each of those persons who consented to or connived in the act or omission or to whose neglect the act or omission was attributable.
- 6) The persons referred to in subsection (5)(b):
 - (a) in relation to a body corporate, are:

- (i) any director, manager, secretary, or other similar officer of the body, or a person purporting to act in any such capacity, and
 - (ii) where the affairs of a body corporate are managed by its members, any member in connection with his functions of management, and
 - (b) in relation to a Scottish partnership, are the partners.
- 7) Where the Authority requires any person to pay a penalty by virtue of subsection (5), they may not also require the body corporate, or Scottish partnership, in question to pay a penalty in respect of the same act or omission.
- 8) A penalty under this section is recoverable by the Authority.
- 8A) Any penalty recoverable under this section:
- (a) shall, if the county court so orders, be recoverable under section 85 of the County Courts Act 1984 or otherwise as if it were payable under an order of that court; and
 - (b) may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.
- 9) The Authority must pay to the Secretary of State any penalty recovered under this section.

The Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997

Regulation 21 – Time limits for payment of civil penalties under section 10(1) of the 1995 Act

- 1) For the purposes of section 10(1) of the 1995 Act (civil penalties) the period prescribed for the payment of a penalty to the Authority shall be 28 days from the date of the notice in writing sent by the Authority requiring payment of that penalty.

Section 10 of the Pensions Act 2004: Functions exercisable by the Determinations Panel;

- 1) The Determinations Panel is to exercise on behalf of the Regulator –
- (a) the power to determine, in the circumstances described in subsection (2), whether to exercise a reserved regulatory function, and
 - (b) where it so determines to exercise a reserved regulatory function, the power to exercise the function in question.
- 2) Those circumstances are –
- (a) where the Regulator considers that the exercise of the reserved regulatory function may be appropriate, or
 - (b) where an application is made under, or by virtue of, any of the provisions listed in subsection (6) for the Regulator to exercise the reserved regulatory function.

- 3) Where subsection (1) applies, the powers mentioned in that subsection are not otherwise exercisable by or on behalf of the Regulator.
- 4) For the purposes of this Part, a function of the Regulator is a "reserved regulatory function" if it is a function listed in Schedule 2.
- 5) Regulations may amend Schedule 2 by –
 - (a) adding any function of the Regulator conferred by, or by virtue of, this or any other enactment,
 - (b) omitting any such function, or
 - (c) altering the description of any such function contained in that Schedule.
- 6) The provisions referred to in subsection (2)(b) are –
 - (a) section 20(10) (application to permit payments out of an account that is subject to a restraining order);
 - (b) section 26(2) (application for order validating action taken in contravention of freezing order);
 - (c) section 41(7) (application for the issue of a revised contribution notice under section 41(9));
 - (d) section 50(7) (application for the issue of a revised contribution notice under section 50(9));
 - (e) section 3(3) of the Pensions Act 1995 (c. 26) (application for revocation of prohibition order);
 - (ea) section 3A(3) of that Act (application for waiver of prohibition);
 - (f) section 4(5) of that Act (application for revocation of a suspension order);
 - (g) section 7(5A) of that Act (application for appointment of a trustee under section 7(3)(a) or (c) of that Act);
 - (h) section 29(5) of that Act (application for waiver of disqualification);
 - (ha) section 58(7) of that Act (power of the Regulator in prescribed circumstances to extend or further extend the period referred to in section 58(6) of that Act in relation to a schedule of contributions);
 - (hb) section 60(7) of that Act (power of the Regulator in prescribed circumstances to extend or further extend the period applicable under section 60(3) of that Act in relation to securing an increase in value);
 - (i) section 69(1) of that Act (application for order authorising modification or modifying a scheme);
 - (j) section 71A(2) of that Act (application for modifying a scheme to secure winding up);
 - (k) section 99(4A) of the Pension Schemes Act 1993 (c. 48) (application for extension under section 99(4) of that Act of a period for compliance);

- (l) section 101J(6)(a) of that Act (application for extension under section 101J(2) of that Act of a period for compliance)...

Section 82 of the Pensions Act 2004: Restricted Information;

- 1) Restricted information must not be disclosed –
 - (a) by the Regulator, or
 - (b) by any person who receives the information directly or indirectly from the Regulator.
- 2) Subsection (1) is subject to –
 - (a) subsection (3), and
 - (b) sections 71(9), 83 to 88 and 235.
- 3) Subject to section 88(5), restricted information may be disclosed with the consent of the person to whom it relates and (if different) the person from whom the Regulator obtained it.
- 4) For the purposes of this section and sections 83 to 87, "restricted information" means any information obtained by the Regulator in the exercise of its functions which relates to the business or other affairs of any person, except for information –
 - (a) which at the time of the disclosure is or has already been made available to the public from other sources, or
 - (b) which is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.
- 5) Any person who discloses information in contravention of this section is guilty of an offence and liable-
 - (a) on summary conviction, to a fine not exceeding the statutory maximum , or imprisonment for a term not exceeding 12 months, or both;
 - (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years, or both.
- 6) In relation to an offence under subsection (5) committed before the commencement of section 282 of the Criminal Justice Act 2003 (short sentences) the reference in subsection (5)(a) to 12 months has effect as if it were a reference to six months.
- 7) Subsection (6) does not extend to Scotland.

Section 89 of the Pensions Act 2004: Publishing reports etc;

- 1) The Regulator may, if it considers it appropriate to do so in any particular case, publish a report of the consideration given by it to the exercise of its functions in relation to that case and the results of that consideration.

- 2) The publication of a report under subsection (1) may be in such form and manner as the Regulator considers appropriate.
- 3) For the purposes of the law of defamation, the publication of any matter by the Regulator is privileged unless the publication is shown to be made with malice.
- 4) Before making a report under this section which relates to a public service pension scheme, the Regulator must notify the scheme manager.

Section 93 of the Pensions Act 2004: The Regulator's procedure in relation to its regulatory functions;

- 1) The Regulator must determine the procedure that it proposes to follow in relation to the exercise of its regulatory functions.
- 2) For the purposes of this Part the "regulatory functions" of the Regulator are -
 - (a) the power to issue an improvement notice under section 13,
 - (b) the power to issue a third party notice under section 14,
 - (ba) the power to appoint a skilled person in relation to a public service pension scheme under section 14A,
 - (c) the reserved regulatory functions (see Schedule 2),
 - (d) the power to issue a clearance statement under section 42,
 - (e) the power to issue a notice under section 45(1) approving the details of arrangements,
 - (f) the power to issue a clearance statement under section 46,
 - (g) the power to vary or revoke under section 101 (to the extent that it does not fall within paragraph (c)),
 - (h) the power to make an order under section 154(8),
 - (i) the power to make an order under section 219(4),
 - (j) the power to grant or revoke authorisation under section 288,
 - (k) the power to grant or revoke approval under section 289,
 - (l) the power to issue a notice under section 293(5),
 - (m) the power by direction under section 2(3)(a) of the Welfare Reform and Pensions Act 1999 (c. 30) to refuse to register a scheme under section 2 of that Act,
 - (n) the power to make an order under section 7 of the Pensions Act 1995 (c. 26) appointing a trustee (to the extent that it does not fall within paragraph (c)),
 - (o) the power to make an order under section 23 of that Act appointing an independent trustee,
 - (p) the power to give directions under section 72B of that Act (directions facilitating winding up), and
 - (q) such other functions of the Regulator as may be prescribed.
- 3) The Determinations Panel must determine the procedure to be followed by it in relation to any exercise by it on behalf of the Regulator of –

- (a) the power to determine whether to exercise a regulatory function, and
 - (b) where the Panel so determines to exercise a regulatory function, the power to exercise the function in question.
- 4) The procedure determined under this section –
 - (a) must provide for the procedure required under -
 - (i) section 96 (standard procedure), and
 - (ii) section 98 (special procedure), and
 - (b) may include such other procedural requirements as the Regulator or, as the case may be, the Panel considers appropriate.
- 5) This section is subject to –
 - (a) sections 99 to 104 (the remaining provisions concerning the procedure in relation to the regulatory functions), and
 - (b) any regulations made by the Secretary of State under paragraph 19 of Schedule 1.

Section 95 of the Pensions Act 2004; Application of standard and special procedure

- 1) The Regulator must comply with the standard procedure (see section 96) or, where section 97 applies, the special procedure (see section 98) in a case where –
 - (a) the Regulator considers that the exercise of one or more of the regulatory functions may be appropriate, or
 - (b) an application is made under or by virtue of –
 - (i) any of the provisions listed in section 10(6), or
 - (ii) any prescribed provision of this or any other enactment, for the Regulator to exercise a regulatory function.
- 2) For the purposes of section 96, references to the regulatory action under consideration in a particular case are –
 - (a) in a case falling within subsection (1)(a), references to the exercise of the one or more regulatory functions which the Regulator considers that it may be appropriate to exercise, and
 - (b) in a case falling within subsection (1)(b), references to the exercise of the regulatory function which is the subject-matter of the application.
- 3) Neither section 96 (standard procedure) nor section 98 (special procedure) apply in relation to a determination whether to exercise a regulatory function on a review under section 99 (compulsory review of regulatory action).

Section 96 of the Pensions Act 2004; Standard procedure

1) The procedure determined under section 93 must make provision for the standard procedure.

(1A) In any case where –

- (a) a warning notice is given to any person in respect of a contribution notice under section 38, and
- (b) the contribution notice under consideration would be issued wholly or partly by reference to the Regulator's opinion that the material detriment test is met in relation to an act or failure, the standard procedure must provide for the following matters.

(1B) The matters are –

- (a) a requirement for the warning notice to explain the general effect of section 38B, and
- (b) a requirement for the person to be given an opportunity before the contribution notice is issued to show the matters mentioned in subsection (2) of that section.

2) The "standard procedure" is a procedure which provides for –

- (a) the giving of notice to such persons as it appears to the Regulator would be directly affected by the regulatory action under consideration (a "warning notice"),
- (b) those persons to have an opportunity to make representations,
- (c) the consideration of any such representations and the determination whether to take the regulatory action under consideration,
- (d) the giving of notice of the determination to such persons as appear to the Regulator to be directly affected by it (a "determination notice"),
- (e) the determination notice to contain details of the right of referral to the Tribunal under subsection (3),
- (f) the form and further content of warning notices and determination notices and the manner in which they are to be given, and
- (g) the time limits to be applied at any stage of the procedure.

3) Where the standard procedure applies, the determination which is the subject-matter of the determination notice may be referred to the Tribunal by –

- (a) any person to whom the determination notice is given as required under subsection (2)(d), and
- (b) any other person who appears to the Tribunal to be directly affected by the determination.

4) Subsection (3) does not apply where the determination which is the subject-matter of the determination notice is a determination to issue a clearance statement under section 42 or 46.

- 5) Where the determination which is the subject-matter of the determination notice is a determination to exercise a regulatory function and subsection (3) applies, the Regulator must not exercise the function –
 - (a) during the period within which the determination may be referred to the Tribunal , and
 - (b) if the determination is so referred, until the reference, and any appeal against the Tribunal's determination, has been finally disposed of.

- 6) Subsection (5) does not apply where the determination is a determination to exercise any of the following functions –
 - (a) the power to make a direction under section 76(8) extending the retention period for documents taken into possession under section 75;
 - (b) the power to make a direction under section 78(10) extending the retention period for documents taken into possession under that section;
 - (c) the power to make an order under section 154(8);
 - (d) the power to make an order under section 219(4);
 - (e) the power to grant or revoke authorisation under section 288;
 - (f) the power to grant or revoke approval under section 289;
 - (g) the power to issue a notice under section 293(5);
 - (h) the power to make an order under section 3(1) of the Pensions Act 1995 (c. 26) prohibiting a person from being a trustee;
 - (i) the power to make an order under section 3(3) of that Act revoking such an order;
 - (ia) the power under section 3A(3) of that Act to give a notice waiving a prohibition;
 - (j) the power to make an order under section 4(1) of that Act suspending a trustee;
 - (k) the power to make an order under section 4(2) of that Act extending the period for which an order under section 4(1) of that Act has effect;
 - (l) the power to make an order under section 4(5) of that Act revoking an order under section 4(1) of that Act suspending a trustee;
 - (m) the power to make an order under section 7 of that Act appointing a trustee;
 - (n) the power under section 9 of that Act to exercise by order the same jurisdiction and powers as the High Court or the Court of Session for vesting property in, or transferring property to, trustees in consequence of the appointment or removal of a trustee;
 - (o) the power to make an order under section 23 of that Act appointing an independent trustee;

- (p) the power under section 29(5) of that Act to give a notice waiving a disqualification under section 29 of that Act;
- (q) the power under section 30(2) of that Act to exercise by order the same jurisdiction and powers as the High Court or the Court of Session for vesting property in, or transferring property to, the trustees where a trustee becomes disqualified under section 29 of that Act;
- (r) the power to give directions under section 72B of that Act facilitating a winding up;
- (s) the power by direction under section 99(4) of the Pension Schemes Act 1993 (c. 48) to grant an extension of the period within which the trustees or managers of a scheme are to carry out certain duties;
- (t) the power by direction under section 101J(2) of that Act to extend the period for compliance with a transfer notice;
- (u) such other regulatory functions as may be prescribed;
- (v) the power under section 101(1)(b) to vary or revoke in relation to the exercise of any of the regulatory functions mentioned in paragraphs (a) to (u) other than those mentioned in paragraph (i) or (l).

(6A) Subsection (6B) applies in relation to a warning notice given to a person -

- (a) in respect of a contribution notice under section 38, or
- (b) in respect of a financial support direction under section 43.

(6B) Regulations may provide that no determination notice in respect of the contribution notice or the financial support direction may be given after the end of the prescribed period beginning with the day on which the warning notice is given.

- 7) In this section "the Tribunal", in relation to any reference under subsection (3), means –
- (a) the First-tier Tribunal, in any case where it is determined by or under Tribunal Procedure Rules that the First-tier Tribunal is to hear the reference;
 - (b) the Upper Tribunal, in any other case.

Section 100 of the Pensions Act 2004; Duty to have regard to the Interests of members etc.;

- 1) The Regulator must have regard to the matters mentioned in subsection (2) –
- (a) when determining whether to exercise a regulatory function
 - (i) in a case where the requirements of the standard or special procedure apply, or
 - (ii) on a review under section 99, and
 - (b) when exercising the regulatory function in question.

- 2) Those matters are –
 - (a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and
 - (b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.

Part 3 of the Pensions Act 2004: Scheme funding; and

221 Pension schemes to which this Part applies

- 1) The provisions of this Part apply to every occupational pension scheme other than –
 - (a) a money purchase scheme, or
 - (b) a prescribed scheme or a scheme of a prescribed description.
- 2) Regulations under subsection (1)(b) may provide for exemptions from all or any of the provisions of this Part.

Scheme funding

222 The statutory funding objective

- 1) Every scheme is subject to a requirement ("the statutory funding objective") that it must have sufficient and appropriate assets to cover its technical provisions.
- 2) A scheme's "technical provisions" means the amount required, on an actuarial calculation, to make provision for the scheme's liabilities.
- 3) For the purposes of this Part –
 - (a) the assets to be taken into account and their value shall be determined, calculated and verified in a prescribed manner, and
 - (b) the liabilities to be taken into account shall be determined in a prescribed manner and the scheme's technical provisions shall be calculated in accordance with any prescribed methods and assumptions.
- 4) Regulations may –
 - (a) provide for alternative prescribed methods and assumptions,
 - (b) provide that it is for the trustees or managers to determine which methods and assumptions are to be used in calculating a scheme's technical provisions, and
 - (c) require the trustees or managers, in making their determination, to take into account prescribed matters and follow prescribed principles.
- 5) Any provision of the scheme rules that limits the amount of the scheme's liabilities by reference to the value of its assets shall be disregarded.

223 Statement of funding principles

- 1) The trustees or managers must prepare, and from time to time review and if necessary revise, a written statement of –
 - (a) their policy for securing that the statutory funding objective is met, and
 - (b) such other matters as may be prescribed.

This is referred to in this Part as a "statement of funding principles".

- 2) The statement must, in particular, record any decisions by the trustees or managers as to –
 - (a) the methods and assumptions to be used in calculating the scheme's technical provisions, and
 - (b) the period within which, and manner in which, any failure to meet the statutory funding objective is to be remedied.
- 3) Provision may be made by regulations –
 - (a) as to the period within which a statement of funding principles must be prepared, and
 - (b) requiring it to be reviewed, and if necessary revised, at such intervals, and on such occasions, as may be prescribed.
- 4) Where any requirement of this section is not complied with, section 10 of the Pensions Act 1995 (c. 26) (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance.

224 Actuarial valuations and reports

- 1) The trustees or managers must obtain actuarial valuations –
 - (a) at intervals of not more than one year or, if they obtain actuarial reports for the intervening years, at intervals of not more than three years, and
 - (b) in such circumstances and on such other occasions as may be prescribed.
- 2) In this Part –
 - (a) an "actuarial valuation" means a written report, prepared and signed by the actuary, valuing the scheme's assets and calculating its technical provisions,
 - (b) the effective date of an actuarial valuation is the date by reference to which the assets are valued and the technical provisions calculated,
 - (c) an "actuarial report" means a written report, prepared and signed by the actuary, on developments affecting the scheme's technical provisions since the last actuarial valuation was prepared, and
 - (d) the effective date of an actuarial report is the date by reference to which the information in the report is stated.

- 3) The intervals referred to in subsection (1)(a) are between effective dates of the valuations, and –
 - (a) the effective date of the first actuarial valuation must be not more than one year after the establishment of the scheme, and
 - (b) the effective date of any actuarial report must be not more than one year after the effective date of the last actuarial valuation, or, if more recent, the last actuarial report.
- 4) The trustees or managers must ensure that a valuation or report obtained by them is received by them within the prescribed period after its effective date.
- 5) Nothing in this section affects any power or duty of the trustees or managers to obtain actuarial valuations or reports at more frequent intervals or in other circumstances or on other occasions.
- 6) An actuarial valuation or report (whether obtained under this section or in pursuance of any other power or duty) must be prepared in such a manner, give such information, contain such statements and satisfy such other requirements as may be prescribed.
- 7) The trustees or managers must secure that any actuarial valuation or report obtained by them (whether obtained under this section or in pursuance of any other power or duty) is made available to the employer within seven days of their receiving it.
- 8) Where subsection (1), (4) or (7) is not complied with, section 10 of the Pensions Act 1995 (c. 26) (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance.

225 Certification of technical provisions

- 1) When an actuarial valuation is carried out, the calculation of the technical provisions must be certified by the actuary.
- 2) The certificate must state that in the opinion of the actuary the calculation is made in accordance with regulations under section 222.
- 3) If the actuary cannot give the certificate required by subsection (2) he must report the matter in writing to the Regulator within a reasonable period after the end of the period within which the valuation must be received by the trustees or managers.

Section 10 of the Pensions Act 1995 (civil penalties) applies to the actuary if he fails without reasonable excuse to comply with this subsection.

226 Recovery plan

- 1) If having obtained an actuarial valuation it appears to the trustees or managers of a scheme that the statutory funding objective was not met on the effective date of the valuation, they must, within the prescribed time –
 - (a) if there is no existing recovery plan in force, prepare a recovery plan;
 - (b) if there is an existing recovery plan in force, review and if necessary revise it.
- 2) A recovery plan must set out –
 - (a) the steps to be taken to meet the statutory funding objective, and
 - (b) the period within which that is to be achieved.
- 3) A recovery plan must comply with any prescribed requirements and must be appropriate having regard to the nature and circumstances of the scheme.
- 4) In preparing or revising a recovery plan the trustees or managers must take account of prescribed matters.
- 5) Provision may be made by regulations as to other circumstances in which a recovery plan may or must be reviewed and if necessary revised.
- 6) The trustees or managers must, except in prescribed circumstances, send a copy of any recovery plan to the Regulator within a reasonable period after it is prepared or, as the case may be, revised.

The copy of any recovery plan sent to the Regulator must be accompanied by the prescribed information.

- 7) Where any requirement of this section is not complied with, section 10 of the Pensions Act 1995 (c. 26) (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance.

227 Schedule of contributions

- 1) The trustees or managers must prepare, and from time to time review and if necessary revise, a schedule of contributions.
- 2) A "schedule of contributions" means a statement showing –
 - (a) the rates of contributions payable towards the scheme by or on behalf of the employer and the active members of the scheme, and

- (b) the dates on or before which such contributions are to be paid.
- 3) Provision may be made by regulations –
 - (a) as to the period within which, after the establishment of a scheme, a schedule of contributions must be prepared,
 - (b) requiring the schedule of contributions to be reviewed, and if necessary revised, at such intervals, and on such occasions, as may be prescribed, and
 - (c) as to the period for which a schedule of contributions is to be in force.
- 4) The schedule of contributions must satisfy prescribed requirements.
- 5) The schedule of contributions must be certified by the actuary and –
 - (a) the duty to prepare or revise the schedule is not fulfilled, and
 - (b) the schedule shall not come into force, until it has been so certified.
- 6) The certificate must state that, in the opinion of the actuary –
 - (a) the schedule of contributions is consistent with the statement of funding principles, and
 - (b) the rates shown in the schedule are such that –
 - (i) where the statutory funding objective was not met on the effective date of the last actuarial valuation, the statutory funding objective can be expected to be met by the end of the period specified in the recovery plan, or
 - (ii) where the statutory funding objective was met on the effective date of the last actuarial valuation, the statutory funding objective can be expected to continue to be met for the period for which the schedule is to be in force.
- 7) Where the statutory funding objective was not met on the effective date of the last actuarial valuation, the trustees or managers must send a copy of the schedule of contributions to the Regulator within a reasonable period after it is prepared or, as the case may be, revised.
- 8) Where any requirement of the preceding provisions of this section is not complied with, section 10 of the Pensions Act 1995 (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance.
- 9) If the actuary is unable to give the certificate required by subsection (6), he must report the matter in writing to the Regulator within a reasonable period after the end of the period within which the schedule is required to be prepared or, as the case may be, revised.

Section 10 of the Pensions Act 1995 (c. 26) (civil penalties) applies to the actuary if he fails without reasonable excuse to comply with this subsection.

- 10) The provisions of subsections (1), (3) and (5) to (9) above do not apply in relation to a schedule of contributions imposed by the Regulator under section 231 or, as the case may be, where such a schedule of contributions is in force.

228 Failure to make payments

- 1) This section applies where an amount payable in accordance with the schedule of contributions by or on behalf of the employer or an active member of a scheme is not paid on or before the due date.
- 2) If the trustees or managers have reasonable cause to believe that the failure is likely to be of material significance in the exercise by the Regulator of any of its functions, they must, except in prescribed circumstances, give notice of the failure to the Regulator and to the members within a reasonable period.
- 3) The amount unpaid (whether payable by the employer or not), if not a debt due from the employer to the trustees or managers apart from this subsection, shall be treated as such a debt.
- 4) Section 10 of the Pensions Act 1995 (civil penalties) applies –
 - (a) where subsection (2) above is not complied with, to a trustee or manager who has failed to take all reasonable steps to secure compliance with that subsection;
 - (b) to the employer if he fails without reasonable excuse to make a payment required of him –
 - (i) in accordance with the schedule of contributions, or
 - by virtue of subsection (3) above.
- 5) This section applies in relation to a schedule of contributions imposed by the Regulator under section 231 as in relation to one agreed between the trustees or managers and the employer.

229 Matters requiring agreement of the employer

- 1) The trustees or managers must obtain the agreement of the employer to –
 - (a) any decision as to the methods and assumptions to be used in calculating the scheme's technical provisions (see section 222(4));
 - (b) any matter to be included in the statement of funding principles (see section 223);
 - (c) any provisions of a recovery plan (see section 226);
 - (d) any matter to be included in the schedule of contributions (see section 227).

- 2) If it appears to the trustees or managers that it is not otherwise possible to obtain the employer's agreement within the prescribed time to any such matter, they may (if the employer agrees) by resolution modify the scheme as regards the future accrual of benefits.
- 3) No modification may be made under subsection (2) that on taking effect would or might adversely affect any subsisting right of –
 - (a) any member of the scheme, or
 - (b) any survivor of a member of the scheme.

For this purpose "subsisting right" and "survivor" have the meanings given by section 67A of the Pensions Act 1995 (c. 26).

- 4) Any such modification must be –
 - (a) recorded in writing by the trustees or managers, and
 - (b) notified to the active members within one month of the modification taking effect.
- 5) If the trustees or managers are unable to reach agreement with the employer within the prescribed time on any such matter as is mentioned in subsection (1), they must report the failure in writing to the Regulator within a reasonable period.
- 6) Where subsection (1), (4) or (5) is not complied with, section 10 of the Pensions Act 1995 (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance.

230 Matters on which advice of actuary must be obtained

- 1) The trustees or managers must obtain the advice of the actuary before doing any of the following –
 - (a) making any decision as to the methods and assumptions to be used in calculating the scheme's technical provisions (see section 222(4));
 - (b) preparing or revising the statement of funding principles (see section 223);
 - (c) preparing or revising a recovery plan (see section 226);
 - (d) preparing or revising the schedule of contributions (see section 227);
 - (e) modifying the scheme as regards the future accrual of benefits under section 229(2).
- 2) Regulations may require the actuary to comply with any prescribed requirements when advising the trustees or managers of a scheme on any such matter.
- 3) The regulations may require the actuary to have regard to prescribed guidance. "Prescribed guidance" means guidance that is prepared and from time to time revised by a prescribed body.

- 4) Where subsection (1) is not complied with, section 10 of the Pensions Act 1995 (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance.

The Occupational Pension Scheme (Scheme Funding) Regulations 2005/3377 (the “Scheme Funding Regulations”);

7.

- 1) In addition to the regular valuations provided for in section 224(1)(a) of the 2004 Act, the trustees or managers of a scheme must obtain an actuarial valuation where the Regulator has given directions under section 231(2)(b)(i) of that Act as to the manner in which the scheme’s technical provisions are to be calculated.
- 2) Where the trustees or managers have obtained an actuarial valuation or an actuarial report, they must ensure that it is received by them –
 - (a) in the case of a valuation under section 224(1)(a), within 15 months after its effective date;
 - (b) in the case of a valuation where the Regulator has given directions under section 231(2)(b)(i) –
 - (i) within three months after the date of the directions if the effective date of the valuation is before the date of the directions, and
 - (ii) within six months after the effective date of the valuation if that date is the same as or later than the date of the directions;
 - (c) in the case of a report, within 12 months after its effective date.
- 3) Where the assets taken into account in an actuarial valuation include rights under an insurance policy, the valuation must state the reason why the value given to such rights is considered appropriate in the circumstances of the case.
- 4) An actuarial valuation must include –
 - (a) the actuary’s certification of the calculation of the technical provisions, in the relevant form set out in Schedule 1, and
 - (b) the actuary’s estimate of the solvency of the scheme.
- 5) An actuarial report must include an assessment by the actuary of changes in the value of the scheme’s assets since the last actuarial valuation was prepared.
- 6) In paragraph (4), “the actuary’s estimate of the solvency of the scheme” means –
 - (a) except in the case referred to in sub-paragraph (b), an estimate by the actuary of whether, on the effective date of a valuation, the value of assets of the scheme to be taken into account under paragraph (1) of regulation 3 exceeded or fell short of the sum of –

- (i) the cost of purchasing annuities, of the type described in section 74(3)(c) of the 1995 Act(a) (discharge of liabilities by purchase of annuities satisfying prescribed requirements) and on terms consistent with those in the available market, which would be sufficient to satisfy the liabilities taken into account under paragraph (2) of regulation 3, and
 - (ii) the other expenses which, in the opinion of the actuary, would be likely to be incurred in connection with a winding up of the scheme, and the amount of the excess or, as the case may be, the shortfall;
 - (b) where the actuary considers that it is not practicable to make an estimate in accordance with sub-paragraph (a), an estimate of the solvency of the scheme on the effective date of the valuation made in such manner as the actuary considers appropriate in the circumstances of the case.
- 7) Where the actuary's estimate of solvency is made under paragraph (6)(b), the valuation must include a brief account of the principles adopted in making the estimate.

Recovery plan

8.

- 1) Where section 226(1) of the 2004 Act applies, and the trustees or managers of a scheme are required, following an actuarial valuation, either to prepare a recovery plan or to review and if necessary revise an existing recovery plan, they must do so –
 - (a) in the case of the first actuarial valuation obtained by them under section 224 of the Act and each subsequent valuation under section 224(1)(a), within 15 months after the effective date of the valuation;
 - (b) in the case of a valuation under section 224(1)(b) and regulation 7(1), within whichever period is applicable under regulation 7(2)(b).
- 2) In preparing or revising a recovery plan, the trustees or managers must take account of the following matters –
 - (a) the asset and liability structure of the scheme;
 - (b) its risk profile;
 - (c) its liquidity requirements;
 - (d) the age profile of the members, and
 - (e) in the case of a scheme under which the rates of contributions payable by the employer are determined –
 - (i) by or in accordance with the advice of a person other than the trustees or managers, and
 - (ii) without the agreement of the employer, the recommendations of that person.

- 3) A recovery plan must be reviewed, and if necessary revised, where the Regulator has given directions under section 231(2)(b)(ii) of the 2004 Act as to the period within which, and manner in which, a failure to meet the statutory funding objective is to be remedied.
- 4) Where paragraph (3) applies, the review and any necessary revision must be completed within a reasonable period after the date of the Regulator's directions.
- 5) A recovery plan may be reviewed, and if necessary revised, where the trustees or managers consider that there are reasons that may justify a variation to it.
- 6) A recovery plan must specify the date on which it was prepared, or, if it has been revised, the date on which it was last revised.
- 7) A copy of any recovery plan sent to the Regulator by the trustees or managers of a scheme must be accompanied –
 - (a) in a case where the plan has been prepared or revised following an actuarial valuation, by a summary of the information contained in the valuation, and
 - (b) in a case where the plan has been revised in the circumstances described in paragraph (5), by an explanation of the reasons for the revision.

Schedule of contributions

9.

- 1) A schedule of contributions for a scheme must be prepared within 15 months after the effective date of the first actuarial valuation following the establishment of the scheme.
- 2) Where a schedule of contributions has been prepared, it must be reviewed, and if necessary revised –
 - (a) within 15 months after the effective date of each subsequent actuarial valuation under section 224(1)(a) of the 2004 Act;
 - (b) within whichever period is applicable under regulation 7(2)(b) after any valuation under section 224(1)(b) and regulation 7(1), and
 - (c) within a reasonable period after any revision of a recovery plan under regulation 8(3) or (5).

Content and certification of schedules of contributions

10.

- 1) A schedule of contributions must show the rates and due dates of all contributions (other than voluntary contributions) payable towards the scheme by or on behalf of the employer and the active members during the relevant period.

- 2) In this regulation, “the relevant period” means the period of five years after the date on which the schedule is certified, or, in a case where
 - (a) a recovery plan is in force, and
 - (b) the period set out in the recovery plan as the period within which the statutory funding objective is to be met is longer than five years after the date on which the schedule is certified, that longer period.
- 3) The schedule must show separately –
 - (a) the rates and due dates of contributions payable by or on behalf of active members of the scheme;
 - (b) the rates and due dates of the contributions payable by or on behalf of the employer, and
 - (c) if separate contributions to satisfy liabilities other than those referred to in regulation 3(2) which are likely to fall due for payment by the trustees or managers during the relevant period are made to the scheme, the rates and due dates of those contributions.
- 4) Where additional contributions are required in order to give effect to a recovery plan, the rates and dates of those contributions must be shown separately from the rates and dates of contributions otherwise payable.
- 5) The schedule must be signed by the trustees or managers of the scheme, and make provision for signature by the employer in order to signify his agreement to the matters included in it.
- 6) The schedule must incorporate the actuary’s certification, in the relevant form set out in Schedule 1.

Records

11.

- 1) The trustees or managers of a scheme to which Part 3 of the 2004 Act applies must keep records of all contributions made to the scheme by any person, showing separately –
 - (a) the aggregate amounts of contributions paid by or on behalf of active members of the scheme (whether by deductions from their earnings or otherwise) and the dates on which they are paid, distinguishing voluntary contributions from other contributions, and showing the amounts of voluntary contributions paid by each member, and
 - (b) the aggregate amounts of contributions paid by or on behalf of each person who is an employer in relation to the scheme and the dates on which they are paid.
- 2) The trustees or managers must also keep records of any action taken by them to recover –

- (a) the amount of any contributions which are not paid on the date on which they are due, and
- (b) the amount of any debt which has arisen under section 75(2) or (4) of the 1995 Act (deficiencies in the assets).

Failure to make payments

12.

The trustees or managers of a scheme are not required to give notice, under section 228(2) of the 2004 Act (requirement to notify Regulator of failure likely to be of material significance), of a failure to make a payment in accordance with the schedule of contributions where they have given the Regulator notice of the failure under –

- (a) section 49(9)(b) of the 1995 Act (failure to remit deductions from members' earnings), or
- (b) section 30(7)(c) of the 2004 Act (failure to pay employer's contributions in accordance with Regulator's order).

Period for obtaining employer's agreement

13.

Where, following an actuarial valuation, the trustees or managers of a scheme are required under section 229(1) of the 2004 Act to obtain the agreement of the employer to any of the matters mentioned in paragraphs (a) to (d) of that provision, they must do so within 15 months after the effective date of the valuation.

Referral to the Tax and Chancery Chamber of the Upper Tribunal

You have the right to refer the matter to which this Determination Notice relates to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”). You have 28 days from the date this Determination Notice is sent to you to refer the matter to the Tribunal or such other period as specified in the Tribunal procedure rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Determination Notice.

The Tribunal’s address is:

Upper Tribunal
(Tax and Chancery Chamber)
Fifth Floor
Rolls Building
Fetter Lane
London
EC4A 1NL

Tel: 020 7612 9700

The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act and the Tribunal procedure rules.

You should note that the Tribunal procedure rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the reference notice to the Pensions Regulator. Any copy reference notice should be sent to:

Determinations Panel Support
The Pensions Regulator
Napier House
Trafalgar Place
Brighton
BN1 4DW.

Tel: 01273 811852

A copy of the form for making a reference, FTC3 ‘Reference Notice (Financial Services)’, can be found at:

http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=3043