

<p>The Pensions Regulator</p>	<p>DETERMINATION NOTICE under section 10 of the Pensions Act 1995 and section 64 of the Pensions Act 2004 M Holleran Ltd Pension Plan (the “Scheme”)</p>	<p>The Pensions Regulator case ref: E70624609</p>
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1. The Determinations Panel (the “Panel”) of the Pensions Regulator (the “Regulator”) met to consider the issues in a Warning Notice dated 12 May 2016.

Matters to be determined

2. The Warning Notice asked the Panel to determine whether to issue a penalty under section 10 of the Pensions Act 1995 (“the 1995 Act”) resulting from the failure to comply with section 64 of the Pensions Act 2004 (“the Act”).
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 civil penalty notice in the amount of £300 to XXXXXXXXXXXXXXXXXXXXXXXXXXXX (“the Trustee”), one of the trustees of the Scheme. The Panel concluded that a penalty was appropriate as the Trustee had failed to take all reasonable steps to secure compliance with the obligation to provide a scheme return. The period prescribed for payment of a penalty under section 10(1) of the 1995 Act is 28 days from the date of the penalty notice (Regulation 21 of SI 1997/794).
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. This Notice gives the Panel’s reasons for its determination.

Directly Affected Parties

7. The Panel considered the Trustee and XXXXXXXXXXXXXXXXXXXXXXXXXXXX of M Holleran Limited (the employer) to be the parties directly affected by its determination.

The Scheme

8. The Warning Notice states that the Scheme is a defined contribution scheme which is open with 8 members. The Scheme has been registered with the Regulator and the Regulator has no information which would indicate that the Scheme has ceased to be a registrable scheme within the meaning of the Act.
9. At the time of issuing the Warning Notice, the Regulator understood the Scheme trustees to be XXXXXXXXXXXX and XXXXXXXXXXXXXXXXXXXX. The Regulator was subsequently advised that XXXXXXXXXXXX changed its name to XXXXXXXXXXXXXXXXXXXXXXXXXXXX. In correspondence following issue of the Warning Notice, the Scheme administrator, XXXXXXXXXXXX, confirmed that XXXXXXXX resigned as trustee on 6 April 2006 and that the Scheme remains active and currently has 6 members, all of whom are trustees. XXXXXXXXXXXX updated the Regulator's register of schemes with changes to the registrable information, including confirming the identities and addresses of the 6 trustees on 6 July 2016.
10. No action has been taken against the remaining trustees other than the Trustee as the Regulator was not aware that there were other trustees until 9 June 2016, after the issue of the Warning Notice, and did not know their identity until 6 July 2016.

Background to the application

11. A scheme return notice was issued by post on 5 August 2015, to the trustees of the Scheme (specifically naming XXXXXXXXXXXX) at the address held by the Regulator for the Scheme. The date for providing the return as specified in the scheme return notice ("the Return Date") was 16 September 2015.
12. The scheme return was not provided to the Regulator on or before the Return Date.
13. An overdue notice was sent to the Trustee at the Scheme address on 23 September 2015.
14. A 'notification of failure' letter informing the Trustee of the breach was sent by recorded delivery to the Trustee at the Scheme address on 15 March 2016, which the Warning Notice states was signed for by a XXXXXXXXXXXX on 16 March 2016. This letter indicated that, unless the scheme return was provided by 1 April 2016, the Trustee may be issued with a penalty. It also invited any person who believed they had taken all reasonable steps to provide the scheme return to the Regulator on or before the Return Date, or any person who believed that the requirement to provide a scheme return did not apply to them, to send the Regulator further details.

15. The Regulator did not receive a response from the Trustee. The scheme return in respect of the Scheme has not been provided to the Regulator on or before the Return Date or at all, the scheme return having been available for completion online until 9 June 2016, at which time it was removed from the Regulator's online service, Exchange.

Warning Notice and Representations

16. In the Warning Notice, the Panel was asked to determine that a financial penalty be issued to the Trustee. The Regulator recommended a penalty of £300. The Regulator stated that it had not previously fined the Trustee and that it was not aware of any aggravating or mitigating factors which might otherwise increase or decrease the proposed penalty.
17. No representations were provided by the Trustee in response to the Warning Notice.
18. In its letter of 19 July 2016 to the Panel, the Regulator confirmed that it was no longer pursuing any civil penalty against Prudential Nominees Ltd as it is not a trustee of the Scheme (see paragraph 9 above).

The Law

19. Section 59 of the Act provides that

“(1) The Regulator must compile and maintain a register of occupational pension schemes and personal pension schemes which are, or have been, registrable schemes (referred to in this Act as “the register”).

“(2) In this section and sections 62 to 65 “registrable scheme” means an occupational pension scheme, or a personal pension scheme, of a prescribed description...”

20. Section 63 of the Act states that:-

“(1) The Regulator must issue scheme return notices in accordance with this section requiring scheme returns to be provided in respect of registrable schemes...”

21. In accordance with section 64 of the 2004 Act:

“(1) The trustees or managers of a registrable scheme in respect of which a scheme return notice is issued must, on or before the return date, provide a scheme return to the Regulator.

“(2) If a scheme return in respect of a scheme is not provided in compliance with subsection (1), section 10 of the Pensions Act 1995 (c. 26) (civil penalties) applies to any trustee or manager of the scheme who has failed to take all reasonable steps to secure compliance.”

22. Section 10 of the 1995 Act provides:

“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 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..."

23. Regulation 21 of The Occupational Pensions Regulatory Authority (Determinations and Review Procedure Regulations 1997 (SI 1997/794)) stipulates that:

“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.”

Reasons for the Decision

24. In making its decision the Panel had regard to the objectives of the Regulator as set out in section 5 of the Act and to the matters listed in Section 100.

25. The Panel was satisfied of the following:-

- (i) The Scheme has been registered with the Regulator and the Regulator has no information which would indicate that the Scheme has ceased to be a registrable scheme. The Panel noted that the Scheme administrator, Xaffinity Consulting updated the Scheme's registrable information on 6 July 2016 suggesting that it is a registrable scheme. The Panel therefore concluded that it was a registrable scheme;
- (ii) A scheme return notice was issued on 5 August 2015 with a Return Date of 16 September 2015. The Scheme return notice was sent by post to the Trustee at the address held by the Regulator for the Scheme;

- (iii) The Trustee was required to provide a scheme return in accordance with section 64(1) of the Act on or before the Return Date and has failed to do so;
- (iv) The Trustee has not provided any evidence to the Regulator of having taken all reasonable (or indeed any) steps to secure compliance;
- (v) In the circumstances, the Regulator has the power to impose a penalty in accordance with section 10 of the 1995 Act; and
- (vi) It is an appropriate exercise of the Regulator's functions to impose a penalty. The Panel concluded that a figure of £300 is appropriate, given the Regulator's objectives, including to promote and improve the understanding of the good administration of work based pension schemes.

Conclusion

- 26. For these reasons the Panel determined to issue a penalty notice in the amount of £300 to the Trustee XXXXXXXXXXXXXXXXXXXX payable 28 days from the date of the notice.
- 27. By virtue of section 96(5) of the Pensions Act 2004 the penalty notice 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.
- 28. **Appendix 1** to this Determination Notice contains important information about the rights of the parties to refer this decision to the Upper Tribunal.

Signed:

Chairman: Elizabeth Neville

Dated: 5 August 2016

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”). Under section 99(7) of the Act 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 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 Rules.

You should note that the Tribunal 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:

<https://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do>