

Monetary penalties policy

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The Pensions
Regulator

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1. Introduction

This policy sets out how The Pensions Regulator will generally use its powers to impose monetary penalties under pensions legislation (including section 10 of the Pensions Act 1995 and regulation 28 of the Occupational Pension Schemes (Charges and Governance) Regulations 2015). This document should be read in conjunction with our compliance and enforcement policies at www.tpr.gov.uk/strategy.

2. Scope of this policy

This policy is relevant to any trustee, manager, employer, adviser or other person who we may issue with a monetary penalty for contravening pensions legislation, including those involved with public service pension schemes. In this document the term 'trustees' should also be taken to mean managers in the case of non-trust based schemes and any person who exercises trustee functions (eg directors of a corporate trustee) unless the context suggests otherwise.

Our regulatory remit extends across the three legal jurisdictions of England and Wales, Scotland and Northern Ireland. This policy is applicable to all three jurisdictions. We refer throughout to legislation applicable in England and Wales, which should be read as including references to the equivalents for Scotland and Northern Ireland.

This policy does not cover the following:

- ▶ Penalties imposed by us for non-compliance with the employer duties and safeguards under the Pensions Act 2008.
- ▶ Penalties imposed by us under sections 40(1) and 41(1) of the Pensions Act 2008 for non-compliance with a statutory notice.

3. Review of this policy

We will regularly review this policy and update it as required by legislation, guidance or any other circumstances which may impact on the approach described in this document.

Last review date: none (policy commences August 2017).

4. Approach to monetary penalties

Underlying objective

Our underlying objective in imposing a monetary penalty is to promote compliance with pensions legislation. Penalties punish wrongdoing, deter repetition and act as a warning to others.

Discretionary penalties

Where there is a breach of pensions legislation we have a range of enforcement options, often including the power to impose monetary penalties. In considering whether to impose a monetary penalty and the amount of any such penalty, we will have regard to the approach set out in this policy. We will apply our risk-based approach and take into account the relevant facts of each case and the underlying objective in imposing a penalty.

Most of our penalty powers enable us to impose a penalty on each person who has failed to comply with a legal requirement, for example on each trustee rather than on the trustee board as a whole. In such cases, we would take into account the relevant facts and circumstances relating to each person. However, penalties imposed on trustees under the Occupational Pension Schemes (Charges and Governance) Regulations 2015 must be imposed on a joint and several liability basis.

Our approach to calculating the amount of the penalty for failing to submit the scheme return to us on time is set out in Appendix 2.

Mandatory penalties

The Occupational Pension Schemes (Charges and Governance) Regulations 2015 require us to issue a mandatory penalty where we receive an indication in the scheme return or form the opinion that there has been a failure to prepare a chair's statement. A penalty notice will therefore be issued where we become aware of the breach via the scheme return, or form the opinion that there has been a breach through a whistle blowing report and/or investigatory work.

The penalty must be imposed on a joint and several liability basis. We have no discretion not to issue a penalty notice in these circumstances. The fact the penalty is mandatory reflects the importance and significance of compliance. Our approach to determining the amount of the penalty for a breach of the chair's statement requirement is set out in Appendix 1.

Other enforcement action

In addition to the imposition of a monetary penalty, we expect the underlying breach to be remedied if this has not already been done. Other action may follow (or be taken in conjunction with) the imposition of a monetary penalty, including investigation and exercise of other powers. Such action may also result in further penalties, for example if a person fails to comply with an improvement notice.

Any monies collected from penalties are paid to HM Treasury.

5. Co-operation with The Pensions Regulator and remedying breaches

The people involved in running occupational and personal pension schemes are under a duty to report a breach of the law if they have reasonable cause to believe it is likely to be materially significant to us.¹ Reporting a breach will not automatically result in us imposing a financial penalty (except in relation to the chair's statement requirement). However, a failure to report a breach when required to do so is likely to result in a penalty for the failure to report and a penalty for the underlying breach. There is therefore an incentive for a person who has breached pensions legislation to report it themselves where required.

In calculating the amount of any penalty, we will take account of relevant factors, including the person's engagement and co-operation with us. Those who notify us of issues in advance, report breaches to us quickly, co-operate with us and seek to resolve breaches swiftly and effectively are more likely to receive a lower penalty than those who do not (see section 9.4 below). Deliberate concealment of a breach is likely to result in a higher penalty (see section 9.2 below).

Where a breach has occurred, we expect action to be taken to address any issues and to ensure that legislative requirements are met from then on. If we consider that a person is failing to do so we are more likely to take other action in addition to imposing a penalty for the breach. For example, we may issue an improvement notice and impose a further penalty if it is not complied with.

¹ See 'Code of Practice 1: Reporting breaches of the law' and accompanying guidance, and 'Code of Practice 14: Public service pension schemes' at www.tpr.gov.uk/codes.

6. The statutory threshold for a monetary penalty

We only have the power to impose a monetary penalty if the relevant legislative conditions are satisfied.

Some provisions specify a particular timeframe within which something must be done (for example, the scheme return must be submitted on or before the date specified in the scheme return notice). Other provisions require something to be done within a 'reasonable period' or 'as soon as reasonably practicable'. Our codes of practice explain what is a 'reasonable period' or 'as soon as reasonably practicable' for various provisions of pensions legislation.

A number of legislative provisions refer to a person failing to take 'all reasonable steps'/'all such steps as are reasonable', or failing 'without reasonable excuse' to do something. In such cases, we will consider whether the legislative conditions are met in respect of each person on whom we are considering imposing a penalty.

Ignorance of the law is not an excuse for failing to comply with legal obligations. We will consider on a case by case basis whether the relevant conditions have been satisfied, including what further steps, if any, should reasonably have been taken as well as factors such as:

- ▶ whether adequate internal controls were in place, including identifying and assessing risks, producing and implementing an action plan and monitoring the performance of tasks
- ▶ whether all reasonable efforts were made in advance to ensure compliance with legal obligations (eg to obtain any information needed from a third party)
- ▶ whether we were notified of the issue causing the breach in advance of the statutory deadline for compliance
- ▶ any unforeseeable events or events outside a person's control that have adversely affected their ability to comply with their duties and other relevant circumstances (including the resources and support available to the person to assist them in meeting their duties).

Where the requirement is to do something within a particular timeframe, or on or before a particular date, reasonable steps must have been taken within that timeframe (or in good time before that date).

7. Factors we will take into account when deciding whether to impose a discretionary monetary penalty

In determining whether to impose a discretionary monetary penalty, we will take account of the underlying objective in imposing a penalty, relevant circumstances of the breach and any representations made. Factors will vary from case to case. Broadly, the factors we will take into account include those concerning the nature and impact (or potential impact) of the breach (see section 9.2), as well as the person concerned and their conduct (see section 9.4). Where more than one person is in breach we will consider the relevant factors in respect of each person.

8. Penalty principles

Where we decide to impose a monetary penalty, the following principles will guide us in determining the amount of the penalty:

- ▶ The penalty should be proportionate to the nature of the breach and any harm caused (eg the number of members affected and/or the level/significance of detriment).
- ▶ The amount of the penalty should aim to change the behaviour of the person in breach.
- ▶ The penalty should aim to deter repetition of the breach among the wider regulated community.

Any relevant aggravating or mitigating factors may be taken into account (see section 9.4 below).

9. Penalty framework

9.1 Overview

Our approach to calculating the amount of the penalty:

- ▶ for a breach of the chair's statement requirement, is set out in Appendix 1
- ▶ for failing to submit the scheme return to us on time, is set out in Appendix 2

Where we decide to impose a monetary penalty, we will usually calculate the penalty in accordance with the framework explained in this section 9. The amount of the monetary penalty will generally depend on the person concerned, band level and any aggravating or mitigating factors. We will first consider whether the middle of the relevant band range should be the starting amount (and then adjust the penalty amount to take account of aggravating or mitigating factors), but we may choose a different starting amount if we consider it appropriate, having regard to proportionality and the likelihood of achieving our underlying objective. However, we have discretion to impose a penalty up to the statutory limits, which are generally £5,000 in the case of an individual and £50,000 in any other case (eg a body corporate) (in the case of some requirements, lower amounts have been prescribed).

Band level (nature and impact/ potential impact of breach)	Examples ²	Type of person	Range (£) (subject to statutory maximum)
1	<ul style="list-style-type: none"> ▶ Failing to submit the scheme return on or before the return date (see Appendix 2) ▶ Failing to notify us as soon as reasonably practicable that a scheme has ceased to be a registrable scheme or has been wound up ▶ Failing to notify us that a registrable scheme has been established, or that an occupational or personal pension scheme has become a registrable scheme, within the required timeframe 	Individual	0 - 1,000
		Any other case	0 - 10,000
2	<ul style="list-style-type: none"> ▶ Failing to provide members with a statutory money purchase illustration within the required timeframe. ▶ 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. 	Individual	0 - 2,500
		Any other case	0 - 25,000
3	<ul style="list-style-type: none"> ▶ Reimbursing a trustee out of the assets of a scheme in breach of legislative restrictions ▶ Trustees of a 'relevant scheme'³ failing to secure that core financial transactions are processed promptly and accurately (this is a joint and several liability penalty – see section 10) 	Individual	0 - 5,000
		Any other case	0 - 50,000

² These are examples of requirements which are likely to fall within each of the three band levels, subject to consideration on a case by case basis.

³ As defined in Regulation 1(2) of the Occupational Pension Schemes (Scheme Administration) Regulations 1996

9.2 Assessing the band level

We will assess the nature and impact (or potential impact) of the breach in order to determine what band level it falls into (1 is the least severe; 3 is the most severe). We are guided by our statutory objectives and may take account of any consideration which is relevant in a particular case. These may include:

- ▶ the likelihood that and/or extent to which a breach may have a detrimental impact on members (including the number of members affected)
- ▶ the likelihood that and/or extent to which a breach may result in an increased reliance on the employer covenant
- ▶ the likelihood that and/or extent to which a breach may lead to compensation being payable from the Pension Protection Fund
- ▶ whether there is evidence of dishonesty, lack of integrity, fraud, deliberate concealment or intentional or reckless breach
- ▶ the likelihood that and/or extent to which a breach may impact our ability to carry out our regulatory activities effectively
- ▶ the likelihood that and/or extent to which a breach may pose a significant or systemic risk to our statutory objectives
- ▶ the likelihood that and/or extent to which a breach may undermine public confidence in pensions

The particular circumstances of a breach will be taken into account when determining the appropriate band level. This means a breach of the same requirement could fall under different band levels depending on the particular circumstances of each breach. Some examples of requirements which are likely to fall within the three band levels, subject to consideration on a case by case basis, are shown in the table in section 9.1.

9.3 Band assessments based on the underlying breach

Certain requirements arise where there has been a breach of another duty (for example, the duty to report a breach of the law to us or to comply with an improvement notice or compliance notice). In assessing the secondary breach we will take into account the nature and impact (or potential impact) of the underlying breach.

9.4 Calculating the penalty

In calculating the penalty amount, we will choose a starting amount (within the relevant band range) which is appropriate, having regard to proportionality and the likelihood of achieving our underlying objective. We will first consider whether the middle of the relevant band range should be the starting amount but we may depart from this if we consider it appropriate.

We may then adjust the starting amount to take account of relevant factors, primarily relating to the person concerned (or anyone exercising functions on behalf of that person eg directors of a corporate entity) and their conduct. Examples of factors we may take into account include:

- ▶ The track record of the person in complying with their duties and obligations.
- ▶ Whether the breach could have easily been prevented.
- ▶ The extent to which the breach was caused or exacerbated by circumstances outside the person's control.
- ▶ Where the person is a trustee or pension board member, whether they are able to demonstrate that they possess adequate knowledge and understanding and have a training schedule in place.
- ▶ The conduct of the person once issues have been identified, for example:
 - whether they notify us in advance of an issue which may cause a breach
 - the speed and co-operation shown to address any issues effectively, including both remedying any detrimental impact on members and preventing future breaches
 - whether they accept responsibility for the non-compliance or demonstrate entrenched behaviours
 - their willingness to engage and co-operate with us
- ▶ Whether the person has expertise, or represents or promotes themselves as having expertise, in an area relevant to the breach.
- ▶ Where the person is a trustee, whether they receive remuneration beyond their necessary expenses and the circumstances of any such remuneration (including the amount).
- ▶ Whether the trustee or pension board member(s) acts in relation to multiple schemes.

- ▶ Whether a person is a professional trustee, or where the trustee is not an individual, whether any person who exercises any trustee function (eg a director of a corporate trustee) is a professional trustee (in these circumstances if there are other aggravating factors the penalty is likely to exceed the band range, subject to statutory limits).
- ▶ Whether a person is acting in a professional capacity, providing a service in relation to the scheme (eg an accountant, actuary or legal adviser) (in these circumstances if there are other aggravating factors the penalty is likely to exceed the band range, subject to statutory limits).

We retain discretion to depart from the band range where we consider it appropriate. We will seek to ensure that the penalty amount is proportionate overall and likely to achieve the underlying objective in imposing a penalty (see section 4).

10. Joint and several liability penalties

Penalty notices issued to trustees under regulation 28 of the Occupational Pension Schemes (Charges and Governance) Regulations 2015 are on a joint and several liability basis. This means we can enforce the penalty in full against all or any of the parties.

The penalty amount will be calculated in accordance with the framework set out above, but on the basis that the bands apply to the trustee board as a whole, subject to statutory maximums. The maximum penalty is £5,000 if some or all of the recipients are individuals or £50,000 in any other case (unless a lower amount has been prescribed by legislation). Our approach to determining the amount of the penalty for a breach of the chair's statement requirement is set out in Appendix 1.

Where a penalty notice is issued on the basis of joint and several liability, it is for the relevant parties on whom the penalty has been imposed to agree among themselves how the penalty will be apportioned between them. We would generally expect the penalty to be paid in a single payment.

11. Bodies corporate, Scottish partnerships and individual officers

Where a body corporate or Scottish partnership is in breach of pensions legislation it will be usual practice to impose the penalty on that entity where the breach resulted from its activities. However, where a breach is attributable to the consent, connivance or neglect of one or more officers³ we may instead impose the penalty on those officers where we have power to do so.

³
'Officer' means:

- in relation to a body corporate, (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
- in relation to a Scottish partnership, the partners

Where we have evidence that individual officers are culpable, we will impose the penalty on whoever we consider to be the most appropriate person (ie the body corporate/Scottish partnership or individual officers).

A penalty will only be imposed where there has been a failure to comply with statutory requirements. We recognise that some corporate trustees may be structured in such a way that they do not have any assets and may not wish to alter this position (for example, to remain dormant for corporation tax purposes). The fact that a corporate trustee has no funds does not exempt it from paying penalties imposed under pensions (or indeed other) legislation where it has failed to comply with statutory requirements. Penalties imposed on a corporate trustee must be met by or on behalf of the corporate trustee.

12. Restriction on use of scheme assets to provide indemnification for certain penalties

In some circumstances legislation prohibits scheme assets being used to reimburse, or provide for the reimbursement of, a penalty imposed on a trustee. Providing for the reimbursement of a trustee in respect of a penalty includes (among other things) payment for insurance where the risk includes the requirement to pay such a penalty. Where any amount is paid out of the assets of a pension scheme in contravention of a restriction, trustees may be required to pay an additional penalty and/or be guilty of an offence.

13. Procedure

In deciding whether to impose a monetary penalty, and in exercising our power to impose a monetary penalty, our teams and the Determinations Panel will follow the relevant procedure:

- ▶ In relation to cases under the Occupational Pension Schemes (Charges and Governance) Regulations 2015 we will follow the procedure set out in our compliance and enforcement policy for occupational pension schemes providing money purchase benefits, which can be found at www.tpr.gov.uk/strategy.
- ▶ In all other cases, we will follow the Staff Determination or Case Team Procedures, and the Determination Panel will follow the Determinations Panel Procedure, which can be found at www.tpr.gov.uk/procedures.

The procedures describe how decisions on cases are made, and when and how they can be referred to the appropriate tribunal.

14. Hardship

We may take into account representations made by a person in relation to a monetary penalty that payment of the penalty amount within the period specified would result in undue financial hardship. Where the penalty notice has been issued to more than one person on a joint and several liability basis, hardship will generally only be considered where it is claimed by all the recipients of the notice. It will be the responsibility of the person(s) claiming hardship to provide supporting evidence for their claim.

15. Civil recovery

We are responsible for collecting all penalties. When we issue a penalty notice we give a reasonable timeframe to pay (at least 28 days). Penalty notices in respect of certain penalties must specify that payment must be made within 28 days from the date of the penalty notice. There are a number of ways to pay penalties, including by cheque or BACS/CHAPS. We expect full payment within the specified timeframe but, depending on the circumstances, may exceptionally agree to a payment plan. We will issue a receipt in all cases.

If the debt remains outstanding and no payment plan is in place or an agreed payment plan is not being adhered to, we may initiate civil proceedings through the courts to recover any unpaid penalty debt. This may include instruction of bailiffs. Where possible, we may seek to recover the costs and interest in addition to the unpaid penalty debt.

Appendix 1

Chair's statement breaches

The Occupational Pension Schemes (Charges and Governance) Regulations 2015 require us to issue a mandatory penalty where we receive an indication in the scheme return or otherwise form the opinion that there has been a failure to prepare a chair's statement.

The amount of a penalty for a breach of the chair's statement requirement is set in legislation and must be between £500 and £2,000. Where there is more than one trustee, the penalty notice must be issued to all trustees and must state that they are jointly and severally liable for the penalty.

The amount of the penalty will generally be calculated as follows:

- ▶ All schemes receive the minimum penalty of £500.
- ▶ The minimum penalty of £500 will increase by 10p per member with money purchase benefits (where a scheme has different sections or a mixed benefit structure), up to the maximum of £2,000.
- ▶ Where a scheme has previously breached the requirement to prepare a chair's statement within the last three years, the per member penalty element will be doubled, up to the statutory maximum.
- ▶ Where the scheme has a professional trustee in place the penalty will generally be £2,000.

We will use the last membership data provided by the trustees on Exchange in determining the amount of penalty.

There may be cases where there are extenuating circumstances, meaning that we need to consider whether the penalty amount determined in accordance with these factors is reasonable. However the penalty will always be a minimum of £500, as required by legislation. When we are notified of extenuating circumstances we will consider them on a case by case basis.

Appendix 2

Scheme return breaches

We view submission of the scheme return on or before the return date specified in the scheme return notice as an essential administrative requirement.⁴ Failure to submit the scheme return means that we do not have key information about the scheme and therefore prevents us from carrying out our regulatory activities effectively.

The trustees or managers of a scheme are responsible for submitting the scheme return to us. Where any trustee or manager fails to take all reasonable steps to submit the scheme return on or before the return date, our usual approach will be to impose a penalty on that person.

As mentioned in section 5, in addition to imposing a penalty for a failure to submit the scheme return we may also consider taking other regulatory action, including investigation and exercising other powers. Such action may also result in further penalties.

Where we decide to impose a penalty, if the scheme return has by then been submitted we will reduce the penalty amount by 25%. This discount aims to encourage the behaviour we expect, namely swift completion of the scheme return. If the scheme return has not by then been submitted we will take other action to enforce this if necessary.

Typically, we would consider a scheme return breach to be a band 1 breach, although we may depart from this where we consider it appropriate, depending on the facts of a case. Where, for example, the scheme has a large number of members, or a trustee or manager has intentionally failed to submit the scheme return, we may treat it as a band level 2 or 3 breach.

We intend for penalties for scheme return breaches to be easy to communicate and simple for us to apply. Our usual approach for determining the penalty which applies to each person is set out in the following table. We would not usually take into account the structure of the trustee or manager (ie whether it is an individual or not) or its resources in calculating the penalty amount.

4
As required by section 64(1) of the Pensions Act 2004.

Type of trustee/manager	Penalty amount per trustee/manager	Consecutive penalty amount ⁵
Individual or any other case (eg corporate trustee)	£500	£1,000
Individual who is a professional trustee, or any other case where the person is a professional trustee, or any person who exercises trustee functions is a professional trustee (eg a professional trustee director of a corporate trustee)	£1,000	£2,000

We will not impose a penalty on a trustee or manager if the scheme return is either submitted on or before the return date or they took all reasonable steps to secure compliance on or before the return date. As mentioned above, where this is not the case we would usually impose a penalty which is calculated in accordance with the table above.

However we may exercise our discretion to depart from the usual penalty amounts in exceptional circumstances or if we consider that calculating the penalty amount in accordance with the above table would, in all the circumstances, produce an outcome that is not reasonable and proportionate. For example, the penalty we impose on a trustee or manager of a small scheme may be lower than the amount set out in the table above.

Examples of circumstances we do not consider to be exceptional include:

- ▶ Already completing a pension scheme return (PSR) for HMRC.
- ▶ Lack of awareness that a scheme return needed to be completed.
- ▶ Lack of awareness of where to find the relevant scheme information.
- ▶ Lack of awareness of being a trustee or manager.
- ▶ Thinking that a third party had submitted the scheme return (in circumstances where there were inadequate internal controls).
- ▶ Failing to request information from a third party in sufficient time to be able to submit the scheme return on or before the return date.

⁵ Where a consecutive penalty is imposed on a trustee/manager for a consecutive breach in respect of the same scheme.

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