

The Pensions Regulator seeks to provide clarity on its approach to enforcement



What you **need to know**

- The Pensions Regulator (TPR) is consulting on a consolidated and simpler enforcement policy, and on an updated prosecution policy.
- These draft policies take into account TPR's increased powers under the Pension Schemes Act 2021 and explain what those affected by enforcement action should expect from the point TPR starts an investigation through to the end of any enforcement action.
- At the same time, TPR has published its response to last year's consultation on three draft policies covering the use of its new powers and the interaction with existing powers. The parts of this consultation which related to use of overlapping powers and use of TPR's information gathering powers are incorporated into the new draft enforcement policy (and are not being consulted on again).
- TPR has also published two policies in relation to its monetary penalty powers, which set out its approach to issuing high fines.



Actions you can take

- **Understand TPR's approach to enforcement** and how this might impact decision-making and corporate activity.
- Trustees and scheme sponsors should **ensure their governance and decision-making framework** is up to date and robust to be able to identify and respond to events covered by TPR's powers.

A recap of TPR's **enforcement options and outcomes**

Types of enforcement powers		Enforcement outcomes	
Regulatory	Powers set out in statute which enable regulatory action, for example issuing contribution notices or financial support directions.	Prevention	In certain situations TPR might aim to prevent a future breach, e.g. via an improvement notice.
Penalty	Regulatory powers that can be used to impose a fine on a person in circumstances where they have breached pensions legislation.	Remedy	Certain breaches/conduct can potentially be remedied e.g. a non-compliant funding valuation or failure to issue benefit statements. The responsible party might need to put things right or provide funding/financial support to the scheme.
Civil	Powers that can be used in the civil courts, such as ordering an injunction or that assets are restored to a scheme.	Restoration	For certain breaches e.g. where the employer has failed to pay contributions, TPR's aim would be for members' benefits to be put back to the expected position had the breach/conduct not occurred.
Criminal	Powers that can be used in the criminal courts where TPR acts as prosecutor.	Deterrence	A sanction may be appropriate to punish the responsible party and act as a deterrent.



The finer detail:

Enforcement policy

Policy intent

The policy intent behind TPR's new powers was to strengthen the regulatory framework to introduce deterrents against conduct that could put members' benefits at risk and to help TPR be more aware of events that could increase risk, as well as more efficient evidence gathering. The draft enforcement policy and the revised prosecution policy that are both being consulted on aim to give transparency over how the enforcement process will work.

Scope

TPR is proposing to consolidate the existing regulatory/enforcement policies for DB, DC and public service schemes into the new draft policy. The existing auto-enrolment and master trust policies are not changing. The new consolidated policy is aimed at anyone who could be subject to TPR's statutory powers of investigation or enforcement, including trustees, employers and advisers.

TPR's approach

Key to TPR's approach is how it identifies and responds to risks and harm. The policy sets out that TPR will take into account the level of risk to its statutory objectives when identifying cases which justify the use of enforcement. In taking a view on appropriate intervention and/or enforcement action, a broad range of factors are considered, including the level of harm/risk of future harm, the size of the scheme liabilities/number of members affected, the type of breach, compliance history, previous interactions with TPR, intervention by other regulators/agencies and the potential complexity/resource intensity of TPR's engagement compared to the impact/value added through enforcement action.

Prosecution policy

The draft prosecution policy sets out TPR's general approach to prosecution of workplace criminal offences and other related offences. TPR can prosecute cases in certain situations, and the decision to prosecute will be risk-based and each case will be considered on its particular facts.

In particular, the two tests for prosecutors will have to be satisfied; firstly that the evidence is such that conviction on the criminal standard of proof is likely and secondly that the prosecution is in the public interest.

Monetary penalty powers

TPR has issued two policies on its approach to issuing high fines (up to £1m). TPR's Determinations Panel, not TPR, decides whether to impose one of these fines, which are discretionary. One policy relates to the use of anti-avoidance type penalties/non-payment of a contribution notice (CN), while the other relates to breaches of certain information requirements.

In cases where a CN has not been paid, TPR will seek a penalty of 20% of the amount specified in the CN (capped at £1m). If the CN is paid before the relevant Determinations Panel hearing to decide whether to impose a fine, then this will be reduced to 10% of the CN amount (capped at £500,000).

In other cases the size of penalty is calculated by considering the level of culpability, the harm caused to the scheme/member outcomes and any aggravating or mitigating features.

For further information, please get in touch with **Robert Wallace**, **William Fitchew** or speak to your usual XPS Pensions contact.



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