Draft code of practice no. 5
and accompanying guidance

Reporting late payment of contributions to occupational pension schemes

June 2013

The Pensions Regulator

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Draft code of practice no. 5
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Reporting late payment of contributions to occupational pension schemes

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6 June 2013

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Contents

Introduction

1. This code of practice is issued by The Pensions Regulator (the regulator), the body that regulates occupational and personal pension schemes provided through employers.

2. The regulator's statutory objectives[1] are to:

   - protect the benefits of pension scheme members
   - reduce the risks of calls on the Pension Protection Fund
   - promote, and improve understanding of, the good administration of work-based pension schemes, and
   - maximise compliance with the duties and safeguards in the Pensions Act 2008.

3. The regulator has a number of regulatory tools, including issuing codes of practice, to enable it to meet its statutory objectives.

4. Codes of practice provide practical guidelines on the requirements of pension legislation and set out standards of conduct and practice expected of those who must meet these requirements[2].

Northern Ireland

5. In this code, references to the law that applies in Great Britain should be taken to include corresponding legislation in Northern Ireland. Appendix A to this code lists the corresponding references.

Status of codes of practice

6. Codes of practice are not statements of the law and there is no penalty for failing to comply with them. It is not necessary for all the provisions of a code of practice to be followed in every circumstance. Any alternative approach to that appearing in the code of practice will nevertheless need to meet the underlying legal requirements, and a penalty may be imposed if these requirements are not met. When determining whether the legal requirements have been met, a court or tribunal must take any relevant provisions of a code of practice into account[3].

7. If there are grounds to issue an improvement notice, the regulator may issue a notice directing a person to take, or refrain from taking, such steps as are specified in the notice. These directions may be worded by reference to a code of practice issued by the regulator[4].

1
Section 5(1) Pensions Act 2004 (c. 35).

2
Section 90(1) ibid.

3
Section 90(5) ibid.

4
Section 13(3) ibid.

This code of practice

8. The regulator is required to issue a code on:

   - the duty of trustees or managers to report material failures to pay contributions timeously, and
   - what constitutes a 'reasonable period' within which to report to the regulator and members[5].

9. This version of the code fulfils both requirements and replaces the current version of **Code of practice no. 5 – Reporting late payment of contributions to occupational money purchase schemes**.

10. The regulator may choose to issue a code containing practical guidance in relation to the exercise of functions under pensions legislation and regarding the standards of conduct and practice expected from those who exercise those functions[6]. In order to fulfil effectively the duty to report material failures to pay, trustees need to monitor the payment of contributions due under the payment schedule. We are therefore issuing this code to include practical guidelines on the exercise of that function.

To whom is this code directed?

11. The code applies to trustees and managers of defined contribution (DC) occupational pension schemes (including schemes with DC sections) which have a payment schedule. This includes any such schemes used by an employer to fulfil their automatic enrolment duties.

Other relevant codes of practice

12. This code complements **Code of practice no. 1 – Reporting breaches of the law** and **Code of practice no. 9 – Internal controls**. **Code of practice no. 3 – Funding defined benefits** covers reporting of payment failures in defined benefit (DB) occupational schemes.

5
Section 90(2)(a), (g) and (i) Pensions Act 2004.

6
Section 90(1) ibid.

Terms used in this code

13. The term 'payment failure' refers to a contribution which has not been paid in accordance with the payment schedule in full on or before its due date. The term 'material payment failure' refers to a payment failure which is likely to be of material significance to the regulator in the exercise of its functions.

14. The term 'member' includes both members and prospective members of a DC occupational pension scheme.

15. As the majority of occupational pension schemes are run by trustees rather than managers, 'trustees' is used throughout this document, but references to 'trustees' also include managers of DC occupational pension schemes not set up under trust.

16. References to 'days' means all days. References to 'working days' do not include Saturdays, Sundays or Bank Holidays.

17. In this code, legislative requirements are indicated by 'must' and code guidelines by 'should'.

The code of practice

18. This code and supporting guidance sets out how trustees of DC occupational pension schemes should meet their obligations and duties to:

    - monitor the payment of contributions to be paid under the payment schedule
    - provide the necessary information to enable members to check contributions, and
    - report material payment failures to the regulator and to members within a reasonable period.

19. The code and supporting guidance are not intended to prescribe the process for every scenario, they do however provide principles, examples and benchmarks against which trustees can consider whether or not they are reasonably complying with and have understood their duties and obligations.

20. Trustees running DC occupational pension schemes should ensure they are aware of overdue contribution payments and material payment failures, through the monitoring of contributions falling to be paid under the payment schedule. The trustees should also take steps to resolve payment failures and any disputes that arise about contributions.

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21. To support increased engagement with members, trustees should provide payment information that will enable the member to understand what has been paid to the scheme and by whom, and to identify where contributions that fall to be paid under the payment schedule have been received by the scheme. This will enable members to take steps to resolve any payment problems with the employer at the earliest opportunity.

Part one – Monitoring contributions

22. Trustees should have risk-based processes in place to monitor the payment of contributions which will allow them to check whether contributions and amounts that are due to be paid to the scheme under the payment schedule are actually paid by the due date. This is a matter of good trusteeship but is also vital to trustees being able to fulfil their obligation to report material payment failures to the regulator and members.

23. To do this, the trustees will need access to information such as:

    - what contributions are due to be paid by the employer and on behalf of the member
    - the pensionable pay that contributions are based upon (where this is the case), and
    - the due date for payment of contributions.

24. Setting up the scheme correctly, preparing and understanding the payment schedule that details the contributions due to be paid, and putting in place processes to facilitate the transparent movement of payment information between the employer, trustees and member, will enable the effective monitoring of contributions.

Scheme set up and maintaining the payment schedule

25. The trustees of DC occupational pension schemes must prepare, maintain, and revise from time to time if necessary, the scheme payment schedule showing:

    - contributions payable to the scheme by or on behalf of the employer and the members
    - other amounts payable to the scheme including for example expenses likely to be incurred in the coming scheme year, and
    - due date(s) on or before which payment of contributions and other amounts are to be made[7].

26. Contribution rates and other matters to be included in the schedule must reflect the rules of the scheme and overriding legislation. Trustees should prepare the schedule in consultation with the employer.

27. Communication of the terms of the payment schedule between the trustees and employer will mean both parties fully understand what is due to be paid and by when and it will support the trustees in tracking and reconciling where contributions have not been paid on time and in full.

28. Employer contributions must be paid by the due date set out under the payment schedule for paying them to the pension scheme. At the latest member contributions deducted from pay must be paid to the pension scheme by the 22nd day (or 19th day if the payment is by cheque) of the month following deduction[8]. These dates do not override any earlier due date set out in the payment schedule. There are special rules for the first deduction of contributions on automatic enrolment under the Pensions Act 2008.

7
Section 87(2) Pensions Act 1995 (c. 26), see also regulations 18 and 19 of the Occupational Pension Schemes (Scheme Administration) Regulations 1996 (SI 1996/1715).

8
Section 49(8) Pensions Act 1995, see also regulation 16 of the OPS (Scheme Administration) Regulations 1996 (SI 1996/1715).

Monitoring the payment of contributions

29. Trustees of DC occupational pension schemes have a duty to check that the contributions that fall to be paid under the scheme rules are taken into the scheme in accordance with the schedule and to safeguard those contributions once they are in the scheme. They also have a duty to seek to recover any outstanding payments and debts to the scheme. Without the trustees monitoring contributions on an ongoing basis they would not be able to carry out these duties or be able to report to the regulator when they identify that a material payment failure has arisen.

30. Trustees should therefore have processes in place to check the contributions that fall to be paid under the payment schedule and to reconcile those with what is actually paid into the scheme. This can be a risk-based process. The guidance supporting this code contains some practical suggestions for monitoring although ultimately it is up to the trustees to set up and operate appropriate procedures.

31. Employers will often provide the payment information trustees need to monitor contributions at the same time as they send the contributions to the scheme. This will be as part of the normal administrative arrangements of the scheme between employer and trustees, which should be agreed at set up. Payment information may include:
    - pensionable earnings, and
    - documentation reflecting the scheme provisions about contributions.

32. Where the necessary payment information is not supplied by the employer, and trustees decide they need it to carry out risk-based monitoring, they should request the additional information they need from the employer[9]. Trustees do not need to obtain payment information as a matter of course, only where it is needed for effective monitoring.

33. The regulator considers that a reasonable period for employers to provide trustees with payment information will be within seven working days of the date of the trustees' request.

continued...

9 Regulation 6 of the OPS (Scheme Administration) Regulations 1996.

34. Trustees should report to the regulator where payment information requested is not supplied by the employer within this reasonable period. The regulator considers that a reasonable period for trustees to report non-receipt of this payment information will be within 14 days of the date of the request.

35. Trustees must have good record-keeping and adequate internal controls in place to ensure that the scheme and the payment schedule are administered, maintained and managed in accordance with the scheme rules and legal requirements[10]. Trustees must also record and retain information on transactions, which will support them in their administration and monitoring responsibilities including:

   - any amount received in respect of any contribution payable in respect of an active member of the scheme, and
   - payments of pensions and benefits[11].

Taking action to resolve overdue contributions

36. Where a payment failure occurs trustees should contact the employer promptly to alert them to the failure and to seek to resolve the overdue payment. Where reasonable, trustees should try to find out and record the causes and circumstances of the payment failure.

37. Supporting guidance suggests an approach to resolving payment failures but ultimately trustees have flexibility to design their own processes so that they can obtain overdue payments from the employer and rectify administrative errors in the most effective and efficient way for their particular scheme.

10
Section 249A Pensions Act 2004.

11
Regulation 12 of the OPS (Scheme Administration) Regulations 1996.

Part two – Providing information to members

38. Trustees must provide basic scheme information to prospective and new members, including information on how contributions are determined. Where the member is being automatically enrolled this must be within one month of the trustees receiving jobholder information or in any other case within two months of becoming a member of a scheme[12].

39. Trustees also have to provide members with an annual statement within 12 months of the end of the scheme year showing contributions credited (before deductions) to the member in the preceding scheme year[13].

40. Trustees should present contributions information to members in an accessible, transparent form so that the member is able to check that they are receiving the contributions they are due. This may include information on:

- contributions received by the scheme after tax relief
- the percentage of pensionable pay due for both employer and member contributions together with pensionable pay information, where held
- the dates contributions were due and the dates paid, and
- charges or commission taken before or after payment to the scheme.

41. Trustees may decide how best to provide this information. Our research shows that best practice amongst many trustees is to provide members with access to online contribution and payments information that is regularly updated and that this is effective in aiding the member to monitor scheme contributions.

12
Regulation 4 of the Occupational Pension Schemes (Disclosure of Information) Regulations 1996 (SI 1996/1655).

13
Regulation 5 ibid.

Part three – Reporting material payment failures

Reporting material payment failures to the regulator

42. Trustees must report a material payment failure to the regulator and members within a reasonable period. A material payment failure is where:

- contribution payments and other amounts under the payment schedule are not paid to the scheme by the due date(s), and
- there is 'reasonable cause to believe' that this failure is likely to be of material significance to the regulator in the exercise of its functions[14].

43. Having 'reasonable cause to believe' means more than an unsubstantiated suspicion. Trustees should make enquiries and use their judgement when deciding whether to report to the regulator. While they are not expected to undertake a full investigation to establish materiality or investigate whether an employer has committed fraudulent behaviour, the trustees should seek to enquire of the employer:

- the cause and circumstances of the payment failure
- what action has been taken by the employer as a result of the payment failure, and
- the wider implications or impact of the payment failure, for example on member benefits.

44. The trustees may choose to take an employer's response to their enquiries at face value if they have no reason to believe it to be untrue or where their risk-based process indicates that there is a low risk of continuing payment failure. Where no response is received the trustees may infer that an employer is unwilling to pay the contributions due.

45. Below we set out the circumstances which are likely to be of material significance to the regulator. This list is for illustrative purposes only and is not exhaustive.

14
Sections 49(9) and 88(1) Pensions Act 1995.

Material payment failures that need reporting

46. Trustees must report material payment failures to the regulator and members within a reasonable period of the failure arising after the due date[15]. Circumstances which are likely to be material and which the trustees should report include:

    - where trustees have reasonable cause to believe that the employer is not willing to pay the outstanding contributions. Where the trustees' reminder and recovery process has been exhausted without response from the employer or without them having obtained the outstanding payment they may assume this indicates an employer's unwillingness to pay
    - where there is a payment failure involving possible dishonesty or a misuse of assets or contributions. For example, trustees may have concerns that the employer is retaining and using contributions to assist cash flow difficulties or where trustees have become aware that the employer has transferred contributions elsewhere other than to the scheme
    - where there is a failure to pay contributions which carries a criminal penalty. For example, information available to the trustees may indicate that the employer is knowingly concerned in the fraudulent evasion of the obligation to pay employee contributions
    - where the trustees become aware that the employer does not have adequate procedures or systems in place to ensure the correct and timely payment of contributions due and the employer appears not to be taking adequate steps to remedy the situation, for example where there are repetitive and regular payment failures, and
    - in any event where contributions have been outstanding for 90 days from the due date.

continued...

15
Sections 49(9) and 88(1) Pensions Act 1995.

Material payment failures that need reporting continued...

47. Trustees should not normally report to the regulator where one of the following circumstances applies:

- where trustees have entered into a payment arrangement with the employer for the recovery of the outstanding contributions and the employer is paying in accordance with that arrangement
- where a claim has been submitted to the Redundancy Payments Office National Insurance Fund or the Northern Ireland Redundancy Payments Service.
- where there are infrequent one-off payment failures or administrative errors resulting from, for example employees leaving the scheme or employment, new employees joining, or changes in salary not being notified promptly to the trustees, and those occasional failures or errors have been corrected within 90 days of the due date
- where payments are made in excess of the contributions due under the payment schedule, and
- where contributions are paid late but in full and within 90 days of the due date.

Reasonable period for reporting to the regulator

48. A reasonable period for reporting to the regulator will be within ten working days of the trustees having reasonable cause to believe that a material payment failure exists. For example, the regulator should receive a report within ten working days of the trustees having received verbal or written confirmation from an employer that they do not intend to pay.

49. Exceptionally, where there is a current or imminent danger to members' and/or the employer's payments unless immediate preventative action is taken, trustees should report the failure to the regulator by telephone as soon as they become aware of the occurrence. The trustees should confirm telephone reports in writing, for example by letter or email, as soon as reasonably practicable and in any event within ten working days.

Reasonable period for reporting to members

50. Once the trustees have reasonable cause to believe that a material payment failure exists they should report to members within 30 days of having reported to the regulator.

51. The regulator believes that members should be made aware of outstanding payments and have the opportunity to discuss these with their employer at an early opportunity, as this may assist in the resolution and recovery of overdue payments. For this reason, trustees should consider reporting to the affected members around the same time as their initial contacts with the employer to pursue outstanding payments. If the trustees have already notified the member at an earlier point in their contacts with the employer they may choose whether to notify the member again at the point of reporting to the regulator.

Method of reporting to the regulator

52. Reports should be made in writing (preferably electronically) except where a telephone report is made in the exceptional circumstances set out in paragraph 49 above.

53. The regulator has standardised reporting for material payment failures in terms of content, format and channel and trustees should refer to separate guidance for more details including the data standards which trustees should comply with.

Appendix A
Northern Ireland references

GB legislation	Northern Ireland (N.I.) legislation
The Pensions Act 1995 (c. 26) – Section 49 – Section 87 – Section 88	The Pensions (Northern Ireland) Order 1995 (S.I. 1995/3213 (N.I. 22)) – Article 49 – Article 85 – Article 86
The Pensions Act 2004 (c. 35) – Section 5 – Section 13 – Section 90 – Section 249A	The Pensions (Northern Ireland) Order 2005 (S.I. 2005/255 (N.I. 1)) – Article 4 – Article 9 – Article 85 – Article 226A
The Pensions Act 2008 (c. 30)	The Pensions (No. 2) Act (Northern Ireland) 2008 (c. 13 (N.I.))
The Occupational Pension Schemes (Disclosure of Information) Regulations 1996 (S.I. 1996/1655) – Regulation 4 – Regulation 5	The Occupational Pension Schemes (Disclosure of Information) Regulations (Northern Ireland) 1997 (S.R. 1997 No. 98) – Regulation 4 – Regulation 5
The Occupational Pension Schemes (Scheme Administration) Regulations 1996 (S.I. 1996/1715) – Regulation 6 – Regulation 12 – Regulation 16 – Regulation 18 – Regulation 19	The Occupational Pension Schemes (Scheme Administration) Regulations (Northern Ireland) 1997 (S.R. 1997 No. 94) – Regulation 6 – Regulation 12 – Regulation 16 – Regulation 18 – Regulation 19

Accompanying guidance

to draft code of practice no. 5:
Reporting late payment of contributions
to occupational pension schemes

Appendix B

Code-related guidance accompanying code of practice no. 5

A guide for trustees of DC occupational pension schemes

Introduction

This guidance is designed to complement **Code of practice no. 5 on reporting late payment of contributions to occupational pension schemes** and should be read in conjunction with that code. It provides further practical guidance on some of the matters dealt with in the code, such as:

- the monitoring of contributions, and
- example processes for the recovery of outstanding contributions.

Each section of the guidance is referenced and linked to the appropriate code paragraph.

Guidance for specific paragraphs of the code

Code paragraphs 29 to 35 (about monitoring the payment of contributions)

When setting up the scheme, trustees will have discussed and agreed with the employer what level of contributions fall to be paid under the payment schedule. The trustees will therefore know what contributions they can expect to receive when each payroll is run by the employer.

Trustees should have a monitoring process in place to identify whether the contributions that fall to be paid under the payment schedule are paid in full and on time.

It is for the trustees to decide what process to put in place. However, it should be fit for the purpose of identifying payment failures so that the trustees can fulfil their legal duty to report material payment failures to the regulator and to members. Ideally the process and policies that the trustees will adopt for monitoring will be documented in writing.

continued...

Guidance for specific paragraphs of the code continued...

The process used need not require the checking of every contribution received. It may be a risk-based process, allowing the trustees to identify situations which present a higher risk of material payment failures occurring that require a trustees' intervention. The process needs to enable the trustees to comply with their reporting duties, but the regulator recognises that it must be commercially viable for the trustees and proportionate so that it is in the interests of the scheme membership as a whole.

Where a higher risk situation occurs, the trustees' processes should enable them to check the accuracy of the contribution due. This could involve checking the calculation of a contribution which is expressed as a percentage of pensionable pay in the payment schedule.

To assist trustees in establishing a risk-based process, the regulator believes the type of situation or characteristic that may indicate higher risk includes:

- employers who have demonstrated a past history of errors or repeated late or underpayment of contributions
- employers who use manual payroll processes or a payroll provider that has supplied inaccurate pension contributions or pensionable pay data in the past
- employers who provide manual payment information to the trustees, or who have not provided accurate and timely payment information in the past, and
- unexpected fluctuations in the level of contribution where the trustees would normally expect contribution levels to be consistent, for example where the trustees have not previously seen fluctuating contributions from the employer and contributions received suddenly drop without warning. If the trustees are used to seeing fluctuating contributions across pay periods (for example because they are aware that workers have fluctuating levels of pensionable pay) regular changes to contributions may not give the trustees any cause for concern.

Where a higher risk situation is identified trustees should carry out checks to ascertain whether contributions are being paid in accordance with the payment schedule. The type of checking required will depend on the risk identified and the circumstances of the case but appropriate checks may range from random contribution sampling to a full audit of contributions.

continued...

For example, an employer has provided late, manual, payment information to the trustees multiple times in a year. The trustees undertake an initial sampling of contributions to establish whether payment failure have occurred and this indicates the likelihood of systemic failure. The trustees therefore decide to carry out a full analysis of all contributions received in order to be able to understand the extent of the problem before being able to seek to resolve the payment issues.

Where only lower risk situations are identified, the trustees may simply decide to carry out occasional spot checks of the contributions received from employers. This will allow them, for example, to satisfy themselves that the basis on which contributions are being paid aligns with the payment schedule. It will also help to assure the trustees that they have set their risk indicators correctly and that their risk-based monitoring process is working effectively.

There is no need for trustees to systematically duplicate the contribution calculation process undertaken by the employer's payroll system. However, they should carry out periodic checks across employers to ensure that the percentages used by payroll in the calculation of contributions are consistent with those set out in the payment schedule. This will help trustees ensure that their control framework is working and their monitoring processes are able to spot where obvious anomalies exist in the pensionable pay information provided by the employer.

The regulator accepts that a monitoring process based on information provided by the employer may not be able to confirm deliberate underpayment or non-payment, or fraudulent behaviour by the employer (as the employer may try to manipulate payment information to disguise their actions). But it should be able to detect situations where fraud may be more likely to occur and where additional checks may be appropriate.

To be able to monitor contributions, the trustees may from time to time require payment information from the employer including pensionable pay details where contributions are expressed as a percentage of pay. How this is provided by the employer should be established at the set up of the scheme. Where payment information is not provided regularly by the employer and it is necessary to carry out risk-based monitoring, the trustees should request it from the employer. If the employer refuses to provide it, then the trustees may report this to the regulator. The trustees may accept the payment information provided by the employer at face value unless they have reason to believe it to be incorrect.

continued...

The trustees are not expected to carry out detailed examinations of pay data, such as to examine whether the elements of pay which are pensionable under the scheme rules are actually being taken into account in the calculation of contributions. However, the trustees' processes should be able to identify when clear errors or omissions arise, for example, if payments were to suddenly fall by a certain percentage or more from period to period.

A suitable monitoring process should be established for all schemes regardless of whether the scheme is being used by an employer for automatic enrolment purposes after their staging date.

The regulator recognises that older legacy schemes may not currently have a suitable process in place and it may take time for trustees to establish one. When considering a risk-based process for this type of arrangement the recent history of payment failures by employers using the legacy schemes may be a factor to be taken into account.

Code paragraphs 36-37 (about taking action to resolve overdue contributions)

Where there is a payment failure, the regulator considers that trustees should attempt to contact the employer to resolve the overdue contributions. The regulator considers that trustees should make at least three attempts to contact the employer within 90 days of the due date having passed without full payment of the contribution. Trustees should, in making contact, alert the employer to the failure, request payment of any outstanding amounts and seek an explanation of the cause and circumstances of the payment failure.

The regulator believes that telephone contact is the best method for encouraging employers to comply and therefore recommends that at least one of the three contact attempts should be by phone. However, it is for the trustees to decide the most effective way to resolve payment failures and how contact should be made, taking into account their own circumstances as well as those of their employers. The regulator acknowledges that telephone contact is not practicable for all schemes or in all circumstances.

Trustees should record the communication attempts made to contact the employer and to record the cause and circumstances of the payment failure where this can be established. Recording this information will help to evidence effective monitoring by the trustees.

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