

Mr Chris Opie
The Pensions Regulator
Napier House
Trafalgar Place
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5 December 2012

Maintaining Contributions: Consultation on the revised codes of practice on reporting late payment of contributions to defined contribution (DC) occupational and personal pension schemes (code of practice nos 5 and 6) and accompanying guidance.

Dear Mr Opie,

The National Association of Pension Funds (NAPF) is the leading voice of workplace pensions in the UK. We speak for 1,300 pension schemes with some 16 million members and assets of around £900 billion. NAPF members also include over 400 businesses providing essential services to the pensions sector.

Summary of the NAPF view

The NAPF is concerned that the proposed new guidance introduces requirements for scheme administrators to more closely monitor contributions paid into the scheme, and thereby transfers the legal obligations of the employer and regulators to schemes. This would require processes for sharing employment information and regularly comparing it against contributions received. Trustees and providers would further be required to reach a judgement on whether an employer is unwilling or unable to pay contributions. These requirements will be especially onerous for multi-employer schemes, which may have hundreds or thousands of participating employers. The Pensions Regulator should consider whether these new requirements are beneficial for members or consonant with current legislation.

More broadly, the NAPF would like The Pensions Regulator to take a more flexible approach concerning the monitoring of payments across the scheme and communications with members. The NAPF would also appreciate greater clarity on how The Pensions Regulator will respond to reports of late or incorrect payments.

The NAPF welcomes the opportunity to respond to this consultation by The Pensions Regulator (TPR) on maintaining contributions. The accurate and efficient payment of contributions to providers is a key part of ensuring that pensions are a trusted financial product for members.

Currently, it is the duty of employers to contribute to members' pensions in accordance with a payment schedule. Trustees and providers have a duty to report late payments. Trustees and providers should have procedures in place to identify clear or systemic discrepancies, but many will not currently compare all contributions against payroll records and employment information.

With the introduction of automatic enrolment, it is right to be concerned that employers who are not voluntarily providing pensions may experience difficulties in making correct contributions or could be inclined to underpay. However, automatic enrolment legislation makes clear that it is the duty of the employer, not the scheme administrator, to pay contributions correctly. The Employers' Duties (Registration and Compliance) Regulations 2010 envision that trustees are required only to keep records. Certification that the correct contributions are paid is to be performed by the employer, and it is the employer's performance of its duties, rather than any duties of the scheme, that is certified. Trustees may have some obligations to monitor minimum contributions where a scheme is used for automatic enrolment, and should request sight of the materials that the employer is using to track contributions. But correct payment to the penny is an employer responsibility. Where that responsibility has not been fulfilled, it is the duty of TPR rather than the scheme administrator to enforce legislation.

The NAPF is concerned that TPR's proposals will place new and onerous obligations on trustees and managers of contract-based schemes. Under these proposals, trustees and managers would be required to reconcile contributions paid into the scheme on an ongoing basis. Information at this level of detail is not currently available to many trustees. This would duplicate a role currently performed by employers, increasing the costs on the pensions industry as a whole. Single employer schemes would face a greater burden, but the proposals would be especially onerous for multi-employer schemes that may have to monitor contributions from hundreds or thousands of participating employers. The detailed reconciliation that these proposals suggest is not required under law. There will also be a greater burden for employers who may be required to share payroll data, including information about recent promotions and changes of job classifications, with trustees or managers.

The degree of surveillance expected by TPR is not entirely clear from the codes of practice; they appear to indicate that spot checks will be sufficient yet also seem to envision that any incorrect payments will be reported promptly. The NAPF is concerned that these proposals inappropriately shift responsibility for monitoring to trustees and managers.

The proposals would also place further obligations on trustees and providers to reach a judgement on whether an employer is unwilling to pay. It will be a considerable challenge for trustees and managers to judge an employer's motives and it is unclear whether or how trustees and providers will be penalised if they do not make such a judgement. The NAPF is aware of cases where adherence to a statutory or regulatory deadline has not prevented the Pensions Ombudsman finding that maladministration has occurred if action could have taken place more quickly. There is a danger that this could have particularly serious implications for trustees, who have a legal obligation to uphold members' interests, rather than providers of contract-based schemes.

These obligations are also likely to become more onerous as automatic enrolment is introduced. Millions of new members will join schemes and there will be a large increase in the number of employers providing pensions, many of whom will have no prior experience of pensions. In some cases employers will provide multiple pension schemes for different parts of their workforce, one or more of which may be a multi-employer scheme. These factors will make it even more difficult for trustees and providers to monitor and assess employers.

The NAPF is particularly concerned that this guidance should not increase obligations on trust-based schemes without a commensurate increase in obligations for contract-based schemes. Trust-based schemes are well placed to deliver good member outcomes and by law must have governance arrangements. Trustees have a fiduciary duty to correct obvious or systemic errors that come to their attention; well managed trust-based schemes should already have procedures in place to detect errors. There is a danger that the most engaged schemes may have to increase their costs to demonstrate compliance, but these schemes are the least likely to need regulation. TPR should avoid introducing new guidance that discourages employers from choosing a trust-based pension scheme.

TPR should also carefully consider who in a contract-based scheme would be given the responsibility for monitoring payments and reporting payment failures. In some contract-based schemes, where the scheme is merely a set of similar but individual contracts between members and the providers, and where there is no governance committee, it is unclear who would have responsibility for overseeing the contributions paid by employers under these proposals.

It is particularly important that trustees and providers are fully aware of the process that follows a report of material payment failure. There is little information in the *Maintaining Contributions* document on how TPR will respond to reports. It is unclear, for example, whether trustees and providers will continue to have responsibilities for chasing a late payment after they have reported it to TPR or whether TPR will assume all responsibility. More clarity on TPR's policy for resolving payment failures would be greatly appreciated.

The proposed guidance places great importance on informing members promptly following a payment failure. Engaged members will be able to monitor contributions themselves, and this will aid monitoring of the system as a whole. But it is also important that trustees or providers are able to address late payments themselves, and it may be possible to quickly resolve minor payment problems. Trustees and providers should be given greater flexibility in how and when they inform members of payment failures.

This guidance places onerous requirements on trustees and providers to reconcile contributions received with those owed by employers. However, this is only one part of pensions saving. For instance, trustees and providers may also want to check that funds are invested in the correct assets. A dramatic increase in the requirements on trustees and providers in one narrow part of the supply chain might allow less time for oversight of other parts, for instance the oversight of fund managers. A more proportionate approach would give trustees and providers greater flexibility to focus on those parts of their pension scheme where they identify the greatest risk.

Once again, the NAPF is pleased that TPR has taken the time and effort to engage with the industry on these important issues.

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Document 1: Draft code of practice no 5 – Maintaining contributions and reporting payment failures to the regulator for occupational defined contribution pension schemes

Part 1: Monitoring contributions

1. Does the code clearly explain the payment schedule and due dates?

The payment schedule and due dates are clear. But it is important to note that payment schedules will not always have detailed information on pensionable pay and individual employees. Often, the percentage of pensionable pay that is contributed varies by the employee or the hours worked and pay is subject to frequent change. It is inappropriate to require that schemes keep track of payroll and employment information at this level.

2. Do you agree that a reasonable period for the provision of information to trustees by the employer, where trustees have to rely on the power under pensions legislation to request information from the date of request is seven days?

In some cases employers may need longer to develop a full response. We instead recommend that either a period of 10 working days or a reference to a ‘reasonable period’ would be more appropriate.

More broadly, trustees should have some flexibility in deciding whether a timeframe is reasonable for a full response. This may prevent employers from unnecessarily delaying a response.

Part 2: Providing information to members

3. Do you support the importance of providing accurate and timely member information and will you promote greater take up by members of online account access?

Clear, accurate and timely information to members is important. Online account access will be helpful, and it may facilitate and encourage members who wish to monitor contributions and performance in their pension accounts. But online account access will not always be sufficient. Any rules on information for members should account for members without internet access.

Whilst regular and clear information to members is generally positive, reporting of bad news could have negative consequences. It may be preferential for trustees to report to TPR, and explore possibilities for recovering contributions, before informing members. In risk-sharing schemes with guarantees, premature contact with members may discourage engagement.

The NAPF promotes clear and regular communications with members through the Pension Quality Mark. Many Pension Quality Mark schemes use online accounts to inform and engage with members. TPR should promote the provision of clear and relevant information, regardless of whether that information is provided online or in print.

Part 3: Reporting to the regulator and the member

- 4. The regulator proposes to replace the pure time based filter with one based on identification of an employer who is not willing to pay, or where a contribution has been outstanding for 120 days. Do you agree with this approach of identifying defaulting employers for whom enforcement action may be appropriate?**

This will be a substantial change from the current responsibility for correct payments, which falls on employers rather than trustees. Trustees will be required firstly to closely monitor contributions and secondly to exercise a judgement on whether an employer is willing or unwilling to pay. The NAPF would prefer a pure-time based filter.

While the NAPF can understand why TPR has adopted this approach, it substantially increases responsibilities for trustees. Employers will seldom state that they are unwilling to pay, and trustees will therefore be required to reach a judgement. They could then be criticised by members or the Pensions Ombudsman for failing to come to a conclusion more quickly where hindsight suggests that the employer had no intention of paying.

The requirement will be especially onerous for multi-employer schemes, which may be required to monitor many different employers and reach separate judgements about whether each of them is willing to pay. Multi-employer schemes may have many small participating employers and monitoring their payments is likely to be extremely onerous and expensive.

It is not exactly clear whether TPR requires trustees merely to check whether total contributions meet expectations or go further and reconcile contributions paid in respect of individual members. The latter would be extremely onerous, and could require trustees to access payroll information which is not currently normal. It is also important to remember that payroll data would have to be supplied by the employer. Trustees could check contribution received against this payroll data, but would be unable to check the validity of the data. The capacity, therefore, of trustees to fully monitor contributions is limited. The requirement to provide payroll data to trustees could also be expensive and burdensome for employers.

The NAPF would welcome greater clarity around the process after a payment failure has been reported to TPR. Under current regulations, TPR has responsibility for enforcing late payments after a payment failure has been reported. However, the draft code of conduct does not make that clear. If TPR remains solely responsible for resolving these payment failures, it should clarify what enforcement strategy will be in place. Multi-employer schemes may have to monitor several unengaged employers; the NAPF would welcome more information on how TPR will resolve late payments from these employers. Clarification on this issue would be welcome since, under debt recovery rules, it may be problematic if more than one organisation is chasing the same debt.

More broadly, TPR should be aware that extending the deadline for reporting to 120 days may increase costs for providers. Many providers currently have schedules for following up late payments; this may include letters, emails and telephone calls at intervals throughout the 90 day period. As this time period is extended to 120 days, employers will need to amend their systems. In some cases that will involve an additional series of letters, emails or telephone calls during the final 30 days. However, the NAPF can appreciate that extending the period to 120 days allows TPR to focus its resources on those cases with the longest overdue payments.

5. A list of examples of what is unlikely to be materially significant is provided. Are there any further examples of payment failures which may be resolved between the employer and scheme as a matter of course that should be included?

This list provided by TPR is illustrative only and certainly not exhaustive. It would be helpful to include situations in which trustees have discovered an underpayment as a result of an annual spot check, and where the problem has been resolved within the 120 day period.

This is a substantial new requirement for trustees and TPR should produce comprehensive guidance for trustees on how it should be exercised. The NAPF would welcome more information on how trustees could be penalised if they do not report material payment failures.

6. Do you agree that a reasonable period for reporting once a material payment failure has been identified is ten days?

This is a very short timescale and TPR should consider giving trustees more time to report payment failures. It is important to note that trustee boards may only meet quarterly and some scheme rules may require trustee approval before a payment failure can be reported. In addition, it may be difficult to identify the exact date from which they have reasonable cause to believe that a material payment failure has occurred.

In general, TPR should be flexible in how this rule is enforced. For instance, it may be helpful to allow trustees to set a policy and timescale for reporting payment failures; either a set period of time after trustees identify a payment failure or after a set time up to 120 days has elapsed.

The NAPF would also appreciate hearing more about TPR's plans for responding to late payment reports. It would be especially helpful if TPR were to produce a similar schedule for it to follow when addressing reported payment failures.

7. Do you agree that a reasonable period for reporting to the member is at the same point as reporting to the regulator ie when a material payment failure has been identified?

A requirement to report to members at the same time as TPR within 10 working days of a material payment failure will be onerous for trustees, especially if they must also decide whether an employer has no intention to pay. The date on which trustees have reasonable cause to believe that a material payment failure has occurred will itself be a subjective judgement. As this requirement could require trustees to send letters to several hundred or thousand members, it should probably only be employed once the trustees have determined that the problem cannot be resolved.

Current rules require that members are contacted 30 days after trustees are aware of a total payment failure and there is no obligation to inform members where there has been a minor problem. This is a sensible rule which should be retained.

Document 2: Draft code-related guidance accompanying code of practice no 5

8. Do you agree with the divide between the code and guidance?

It would be helpful for some material in the guidance to be placed in the code itself. This should aim to clarify what exactly TPR expects of trustees. For example, the penultimate paragraph on page 23 of the consultation document could be incorporated into the code of conduct.

Clear information on identifying material payment failures should be incorporated into the code.

9. Are there any further clarifications or explanation you would like to see included in the guidance?

More guidance for trustees on identifying material payment failures would help to give the greatest possible clarity to trustees. However, assessing an employer's motives may be impossible even with clear guidance.

Document 3: Draft code of practice no 6 – Maintaining contributions and reporting payment failures to the regulator for personal pension schemes

Part 1: Monitoring contributions

10. Does the code clearly explain how to recognise direct payment arrangements?

While the consultation does clearly explain how direct pay arrangements can be recognised, these arrangements generally have little detail about the basis on which contributions are paid. They will not always explain what percentage of pensionable pay is payable, seldom identify individual employees and rarely define pensionable pay.

Levels of contributions paid on behalf of individual members will vary between members and over time. These details will not normally be set out in direct pay arrangements, which typically refer to the agreement between the employer and member.

11. Do you agree that a reasonable period for the provision of information to managers by the employer, where managers have to rely on the power under pensions legislation to request information from the date of request is seven days?

As above (Q2), The NAPF recommends that 10 working days is more realistic.

Part 2: Providing information to members

12. Do you support the importance of providing accurate and timely member information and will you promote greater take up by members of online account access?

While reporting to members is important, the first priority should be to resolve any problems. Alerting members with bad news before reasonable attempts have been made to find a resolution may be alarming for members, and could discourage engagement.

The NAPF promotes clear and regular communications with members through the Pension Quality Mark. TPR should promote the provision of clear and relevant information, regardless of whether that information is provided online or in print. While online communications are appropriate in some cases, and many Pension Quality Mark schemes use online accounts, it is important to recognise that some members would prefer offline communications.

Part 3: Reporting to the regulator and the member

13. The regulator proposes to replace the pure time based filter with one based on identification of an employer who is not willing to pay, or where a contribution has been outstanding for 120 days. Do you agree with this approach of identifying defaulting employers for whom enforcement action may be appropriate?

This is a substantial change for providers. The responsibility for paying contributions currently falls to employers, with regulators having responsibility to ensure compliance. This is a substantial change that appears to shift that responsibility onto scheme providers.

As discussed above (Q4), providers will often not have access to the information necessary to identify that individual members' contributions have been paid.

More broadly, the NAPF is concerned that trustees of occupational schemes are not given new responsibilities unless a comparable change is made to workplace personal pensions. It would be unfair for members of those schemes if requirements were only placed on one of either trust-based or contract-based schemes. Furthermore, it could discourage employers from choosing trust-based schemes.

The NAPF will also welcome more information on how TPR will respond to reported payment failures. This is particularly pressing with regard to contract-based schemes, since these schemes are merely a collection of similar but individual contractual arrangements between members and the provider. It would be helpful to have more information on how TPR will respond to reports and whether there is also a role for the Financial Services Authority and its successors.

14. A list of examples of what is unlikely to be materially significant is provided. Are there any further examples of payment failures which may be resolved between the employer and scheme as a matter of course that should be included?

As above (Q5), these examples are vague and there are likely to be other circumstances where employers are unwilling to pay promptly. TPR must provide comprehensive guidance for providers if it proceeds with imposing this new requirement.

15. Do you agree that a reasonable period for reporting once a material payment failure has been identified is ten days?

This will be onerous for providers. The NAPF recommends that providers are given a longer timescale for reporting payment failure. Instead, the NAPF would also like to see

16. Do you agree that a reasonable period for reporting to the member is at the same point as reporting to the regulator ie when a material payment failure has been identified?

This will be an onerous requirement for providers as hundreds or thousands of members may need to be contacted. Providers of Group Personal Pensions could have many thousands of members to contact after a payment failure.

Providers should have greater flexibility to set a policy on contacting members. In some cases, it may be appropriate for a provider to take steps to correct a payment failure before contacting members.

Document 4: Draft code-related guidance accompanying code of practice no 6

17. Do you agree with the divide between the code and guidance?

Incorporating more specific information from guidance into the code may increase clarity for providers. However, generally the balance is right.

18. Are there any further clarifications or explanations you would like to see included in the guidance?

Greater information to support providers to identify material payment failures would be helpful. However, it may be impossible to assess an employer's motives even with the best possible guidance.