



An tÚdarás Pinsean
The Pensions Authority

COMPULSORY AND VOLUNTARY REPORTING TO THE PENSIONS AUTHORITY

GUIDANCE NOTES

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COMPULSORY AND VOLUNTARY REPORTING TO THE PENSIONS AUTHORITY GUIDANCE NOTES

Introduction

- s82-85** 1. Section 38 of the Pensions (Amendment) Act, 1996 amends the Pensions Act, 1990 by inserting a new Part VIII comprising Sections 82 to 85 of the Pensions Act and dealing with compulsory and voluntary reporting to the Pensions Authority. Part VIII was amended by chapter 8 of the Pensions (Amendment) Act, 2002 which applies compulsory and voluntary requirements to *PRSAs*.
- s10** 2. Under Section 10 of the Pensions Act, 1990, as amended, the functions of the Pensions Authority include the issuing of guidelines or guidance notes generally on the operation of the Pensions Act. The following guidance notes are issued by the Pensions Authority so as to give guidance to pensions practitioners and to members of the public as to the Authority's interpretation of Part VIII of the Pensions Act. These guidance notes are not intended to be an authoritative statement of the law on any particular matter and should not be treated as such.

Compulsory Reporting by Relevant Persons

- s82** 3. The obligation to make a compulsory report in relation to a *scheme* or a *PRSA* applies only to a person who is a *relevant person* in relation to that *scheme* or a *PRSA*. The term "*relevant person*" is defined in Section 82 and means any of the following:
- (1) an *auditor* of the *scheme*;
 - (2) an *actuary* of the *scheme*;
 - (3) a *trustee* of the *scheme*;
 - (4) an *administrator*, *investment manager* or *custodian* of the *PRSA*. These terms are defined in Part X of the Pensions Act, 1990, as amended;
 - (5) an insurance intermediary in relation to the *scheme*. The term "insurance intermediary" has the same meaning as in Section 2 of the Insurance Act, 1989. It means a person who is either an insurance agent or an insurance broker in relation to the *scheme*;
 - (6) an investment business firm (as defined in Section 2 of the Investment Intermediaries Act, 1995) which has advised on the *scheme* or *PRSA* or has received any payment in relation to the investment of any of the resources of the *scheme* or *PRSA*. An investment business firm may be a *relevant person* in relation to a *scheme* or *PRSA* even if its advice on the *scheme* or *PRSA* concerned some matter other than investment;
 - (7) a person who has prepared, or who has been instructed to prepare, an annual report of the *scheme* in accordance with Section 55 of the Pensions Act. The persons who may prepare an annual report under that Section include the *trustees* of the

scheme, who would in any event be relevant persons under sub-paragraph (3) above. In addition, for certain small schemes and defined contribution schemes, the *trustees* may cause the annual report to be prepared by a qualified *auditor* or a person designated by the insurance undertaking with which the *benefits* under the *scheme* are secured. A person will be a *relevant person* in relation to a *scheme* once he has been instructed to prepare an annual report of the *scheme*, whether the report is completed or not;

- (8) a person who has been appointed by the *trustees* of the *scheme* to carry out, or who is carrying out, any of the duties of the *trustees* of the *scheme* under Section 59 of the Pensions Act. The duties of the *trustees* under Section 59 include a duty to provide for the proper investment of the resources of the *scheme*, a duty to make arrangements for the payment of the *benefits* as provided for under the *rules* of the *scheme* and a duty to ensure that proper membership and financial records are kept. If a person has been appointed by the *trustees* to carry out any of their duties under Section 59, he will be a *relevant person* whether or not he actually carries out those duties. Conversely, if a person is actually carrying out any of those duties, he will be a *relevant person* even if he does not have a formal appointment from the *trustees* of the *scheme*.
- (9) the *PRSA provider*.
- (10) a *PRSA actuary*.
- (11) an *auditor* of the business of a *PRSA provider*.
- (12) an employee of an employer referred to in s.121.

s.121 refers to an employer who is operating a *scheme* which limits eligibility for membership of it or imposes a waiting period for membership of it which is greater than six months from the date of commencement of employment.

Material Misappropriation or Fraudulent Conversion

- s83 (1) 4. Section 83 provides that a *relevant person* must make a report to *the Authority* if he has reasonable cause to believe that a material misappropriation or a fraudulent conversion of the resources of a *scheme* or *PRSA* has occurred, is occurring or is to be attempted.
- s83 (2) 5. The obligation to make a report under Section 83 does not apply to any belief formed as a result of information obtained before the 2nd July 1996, which is the date of the passing of the Pensions (Amendment) Act, 1996.
- s83 6. There is a fraudulent conversion of the resources of a *scheme* or *PRSA* when any of the *scheme* or *PRSA assets* are, with intent to defraud, converted to the use or benefit of any person other than the persons for whose benefit they are required to be applied under the provisions of the *scheme* or *PRSA* or under relevant laws. Fraudulent conversion must always be reported, whether the amounts involved are material or not.
- s83 7. A report must also be made of any material misappropriation of the resources of a *scheme* or *PRSA*. There is a misappropriation when any of the *scheme* or *PRSA assets* are appropriated by

any person who is not entitled to them under the provisions of the *scheme* or *PRSA* or under relevant laws or are appropriated to the use or benefit of any person otherwise than in accordance with the provisions of the *scheme* or *PRSA* and any relevant laws. A misappropriation need not necessarily be fraudulent. If it is fraudulent, it is likely to amount to fraudulent conversion and must automatically be reported. If the misappropriation is not fraudulent, it must be reported if it is material.

Timing and Contents of Report

- s83 (1) 8.** A report must be made “as soon as practicable” when a *relevant person* has “reasonable cause” for his belief regarding the material misappropriation or fraudulent conversion. The *relevant person* is not required to have conclusive proof or even to be in a position to prove the matter on the balance of probabilities. All that is required is that he has “reasonable cause” for his belief, i.e., that his belief is not irrational or frivolous. Once he has reasonable cause, he should make his report without delay and as soon as practicable. A prompt report may be particularly important where the misappropriation or conversion is still going on or where it has not yet occurred but is to be attempted. Even if it has already occurred, a prompt report may assist *the Authority* in taking steps to retrieve the situation.
- s83 (1) 9.** The report to *the Authority* must be in writing. This does not preclude a *relevant person* from making a preliminary report by telephone or in person where the matter is particularly urgent. However, *the relevant person’s* obligations under Section 83 will not be complied with unless any such oral report is followed as soon as practicable by a report in writing.
- s83 (1) 10.** The report in writing should identify the *scheme* or *PRSA* and give full particulars of the misappropriation or conversion. The necessary particulars will vary from case to case. A report should not be delayed until all of the following information is available but matters which it would be useful to specify in a report include:
- (i) the name of the *scheme* or *PRSA*;
 - (ii) the names and addresses of the *trustees* or *PRSA provider* and the *administrator, investment manager or custodian* if known;
 - (iii) the name and address of the principal *employer* and of any other participating employers if known;
 - (iv) the names and addresses of any persons believed to be involved in the conversion or misappropriation;
 - (v) a general description of the misappropriation or conversion, with details of the stage which it has reached and the *assets* affected by it;
 - (vi) any other information which the person making the report believes to be relevant;

Additional compulsory reporting requirements for PRSAs introduced by the Pensions (Amendment) Act 2002

- s83 (2A) 11.** A *PRSA actuary* or an *auditor* of the business of a *PRSA provider* must make a report to the Authority if he has reason to believe that a *PRSA provider* has carried on activities in relation to *PRSA* products referred to in Part X otherwise than in accordance with that Part. Part X deals with the regulation of *PRSA* products.
- s83 (2B) 12.** An *auditor* of the business of a *PRSA provider* must make a report to the Authority if he has reason to believe that a *PRSA provider* has not operated a custodian account in accordance with the requirements of Part X.
- s83 (2C) 13.** A *PRSA provider* or a *PRSA actuary* or an *auditor* of the business of a *PRSA provider* who has reason to believe that an employer has failed or is failing to comply with the provisions of section 121 must make a report to the Authority providing details of the particulars of such failure.
- s83 (2D) 14.** A *PRSA provider* who knows that an employer has failed to remit one or more contributions on behalf of that employer's employees to the *PRSA* provider must make a report to the Authority giving particulars of the failure and must also inform the relevant *PRSA contributor(s)* of the failure.
- s83 (2F) 15.** Every *relevant person* must make reports in respect of any *PRSA* for which he bears any responsibility, at such intervals and in such format and subject to such conditions as may be laid down in regulations. As of March 2005, no regulations have been made under this sub-section.

Format and Timing of Reports under section 83(2A), (2B), (2C) and (2D)

16. A report under any of the above subsections of section 83 should be made in writing as soon as practicable after the circumstances requiring the making of a report have arisen. The *relevant person*, except in the case of a report under subsection 2D of s.83, is not required to have conclusive proof or even to be in a position to prove the matter on the balance of probabilities. All that is required is that he has "reasonable cause" for his belief, i.e., that his belief is not irrational or frivolous. In the case of a report under subsection 2D of s.83, knowledge of the failure to remit one or more contributions is required.

A report to the Authority under any subsections should comply with paragraph 9 and should follow the format set out in paragraph 10, where appropriate. In respect of reports made under subsection (2A) and subsection (2B) of section 83 the report should provide details of the *PRSA provider* believed to be involved in the breach of Part X and a general description of the breach together with the stage it has reached. A report under subsection (2C) should provide details of the employer who has failed to remit contributions together with details of the contributions which have not been remitted, if known. A report under subsection (2D) should set out details of the employer who is failing to comply or has failed to comply with section 121 requirements together with particulars of such failure.

Additional voluntary reporting requirements for PRSAs introduced by the Pensions (Amendment) Act 2002

- s83 (2E) 17.** Any relevant person may voluntarily make a report to the Authority in relation to the operation and performance of any PRSA product to which he is a relevant person. The Minister has power to make regulations prescribing the format of a report under section 83(2E) and the conditions subject to which it may be made. No regulations have been made as of March 2005.
- s83 (2G) 18.** Where an employee has reason to believe that his employer has failed or is failing to comply with the provisions of section 121 the employee may report such failure to the Authority. Section 121 requires an employer who is not operating a *scheme* or who is operating a *scheme* which limits eligibility for membership of it or imposes a waiting period for membership of it which is greater than 6 months from the date of commencement of employment to provide mandatory access to at least one *standard PRSA*. There is no requirement for a report to the Authority to be in writing where the report is made by an employee on the grounds that he has reason to believe that his employer has failed or is failing to comply with the provisions of section 121.

Offences

- s83 (3) 19.** A *relevant person* is guilty of an offence if he fails to make a report in writing as soon as practicable, as required under sub-section (1), (2A), (2B), (2C), (2D) or (2F) of Section 83.
- s83 (3) 20.** A *relevant person* is also guilty of an offence if he knowingly or willfully makes a report under sub-section (1), (2A), (2B), (2C), (2D) or (2F) which is incorrect. An offence is not committed if a report is made in good faith, even if the report proves to be incorrect. However, a *relevant person* commits an offence if he knows at the time of making a report that his report is incorrect or if he is reckless as to whether it is correct or incorrect.
- s83 (4) 21.** Where a *relevant person* commits an offence under Section 83 he is liable –
- (a) on summary conviction to a fine not exceeding £1,500 (€1,905) or to imprisonment for a term not exceeding 1 year, or to both,
 - (b) on conviction on indictment to a fine not exceeding £10,000 (€12,700) or to imprisonment for a term not exceeding two years, or to both.
- s83 (4) 22.** Section 3(4) of the Pensions Act provides that where an offence under *the Act* is committed by a body corporate with the consent or connivance of or due to any neglect on the part of any person who is a director, manager, secretary or other officer of the body corporate, or who purports to act in any such capacity, that person shall be guilty of an offence and shall be liable to be prosecuted as if he were guilty of the first-mentioned offence. A *relevant person* under Section 83 may be a body corporate, for example, a corporate trustee. If the corporate *relevant person* fails to make a report in writing when a report is required under Section 83, every director, manager, secretary or other officer of the body corporate may also be guilty of the same offence if he consents to or connives at the failure to report or if the failure to report is attributable to any neglect on his part.

Defence to Prosecution

- s83 (5) 23.** Sub-section (5) provides that if a *relevant person* is prosecuted for an offence under Section 83(1), it is a defence for him to show that his contravention of the section was attributable to another person failing to comply with the section and that he himself took such reasonable steps in the circumstances as were open to him to secure the compliance of that other person with the section.
- s83 (5) 24.** The above defence could apply where several relevant persons become aware of the same material misappropriation or fraudulent conversion of the resources of a *scheme* or *PRSA*. In order to avoid numerous reports relating to the same matter, they might agree that the matter should be reported to the Pensions Authority by one of them. If the person who had been delegated to make the report failed to do so, it could be a defence by the other relevant persons to show that they had taken reasonable steps to get him to do so. However, it would be expected that, once the other relevant persons became aware that the delegated person had not made the report, they would then themselves make a report as soon as practicable.
- s83 (5) 25.** A defence under sub-section (5) could also apply where an *employee* is a *relevant person* and takes reasonable steps to ensure his superiors comply with the reporting requirements of s.83, for example, where an *employee* of an insurance undertaking is instructed to prepare an annual report of a *scheme* or where an *employee* of some third party has been appointed by the *trustees* of the *scheme* to make arrangements for the payment of *benefits* or to carry out any of the other duties of the *trustees*. In such cases, if the *employee* has reasonable cause to believe that there is a material misappropriation or fraudulent conversion of the resources of the *scheme*, he may in the first instance report his concerns to his superiors. If the *employee* takes reasonable steps to ensure that his superiors comply with the reporting requirement under Section 83, this would be a defence to the *employee* against any prosecution for his own failure to report directly to the Pensions Authority.
- s83 (6) 26.** A barrister or solicitor is a *relevant person* if he fulfils any of the criteria for a *relevant person*, for example, if he is also a trustee of the *scheme* or a person who has been appointed by the *trustees* of the *scheme* to carry out any of their duties. However, sub-section (6) provides that in any prosecution for an offence under Section 83(1), it is a defence for the accused to show that he was, in the ordinary scope of professional engagement as a barrister or solicitor, assisting or advising in the preparation of legal proceedings and would not have had reasonable cause to believe that a material misappropriation or a fraudulent conversion of the resources of the *scheme* or *PRSA* had taken place if he had not been so assisting or advising.

Protection of Person Making Report

- s84 27.** Section 84 provides protection where a person makes a report to *the Authority* of any matter concerning the state and conduct of a scheme or the state of a *PRSA*. Protection under Section 84 applies not only to relevant persons but to any person whatever who may make either a compulsory or a voluntary report to *the Authority*. The basic requirement to avail of the protection of the section is that the report must be made in good faith. If that requirement is fulfilled, Section 84 provides that no duty to which the person making the report may be subject,

for example, a duty of confidentiality, shall be regarded as contravened. It further provides that no liability or action shall lie against the person in any *Court* for making the report. This would preclude, for example, any action for defamation, always provided that the report is made in good faith.

Voluntary Reporting

- s84** **28.** Section 84 will provide protection, not only to a *relevant person* who makes a compulsory report under Section 83 but also to any person making a voluntary report of any matter concerning the state and conduct of a *scheme* or the state of a *PRSA*. The purpose is to enable persons to make voluntary reports in good faith without incurring liability. The kind of matters which might be covered in such a voluntary report would include:
- (i) fraudulent conversion or material misappropriation, reported by a person who is not a *relevant person* and is consequently not obliged to make a compulsory report under Section 83, for example, a *member* of the *scheme* or a *PRSA contributor* who becomes aware of misappropriation or conversion;
 - (ii) any breach of the Pensions Act;
 - (iii) maladministration which the person making the report believes to be sufficiently serious to warrant a report to *the Authority*.

Protection from Unfair Dismissal as inserted by Schedule 2, Section 22 Social Welfare (Misc Prov) Act 2004

- s3 (2A)** **29.** Sections 3(2A) (b) of the Pensions Act, 1990, as amended, makes it an offence for an employer to dismiss an employee solely or mainly because, he has, in good faith, notified the Authority of an alleged breach of the Pensions Act or made a report to the Authority under section 83 or made a voluntary report to the Authority of any matter concerning the state or conduct of a *scheme* or *PRSA*, other than a matter to which Part VII (equality provisions) applies.

This protection was originally put in place by section 80 of the Pensions Act, 1990 as amended by section 37 of the Pensions (Amendment) Act, 1996 and section 3 (2A) extends and enhances the original measures. Section 3(2A)(e) also affords protection to an employee who is dismissed from an employment because he gave notice to his employer of his intention to make a report to the Authority under section 83 or of his intention to make a report to the Authority of any matter concerning the state or conduct of a *scheme* or *PRSA*.

An employer guilty of an offence under section 3(2A) shall be liable –

- (i) on summary conviction, to a fine not exceeding £1,500 (€1,905) or to imprisonment for a term not exceeding one year, or to both,
- (ii) on conviction on indictment, to a fine not exceeding £10,000 (€12,700) or to imprisonment for a term not exceeding two years, or to both.

- s3 (2B) 30.** The Court has power, where an employer is convicted under Section 3(2A) to order the reinstatement of the dismissed employee or to impose on the employer an additional fine, payable to the dismissed employee, towards compensation for loss of salary or wages.

Action by Authority

- s86-90 31.** The Pensions (Amendment) Act, 1996 inserts a new Part IX in the Pensions Act, 1990 giving the Pensions Authority power to make miscellaneous applications to the High Court. Some of these *Court* applications may be relevant where *the Authority* receives a report, whether compulsory or voluntary, under Part VIII. In particular, *the Authority* now has power to apply to the High Court for an Order directing the restoration of any of the resources of a *scheme* which have been wrongfully paid or transferred to any person or to apply for an injunction prohibiting a person from doing any act which constitutes a misuse or misappropriation of any of the resources of a *scheme*. In each case *the Authority* must establish to the satisfaction of the High Court that the wrongful payment or transfer or the misuse or misappropriation of any of the resources of the *scheme* is likely to jeopardise the rights and interests of the members under the *scheme*.
- s85 32.** For the purposes of the law of defamation, Section 85 of the Pensions Act as amended gives absolute privilege to the publication by *the Authority* of any compulsory report made to it under Section 83 and of any other report of any matter concerning the state and conduct of a *scheme* or the state of *PRSA* (including a voluntary report).