

Compulsory and voluntary reporting to the Pensions Authority

Guidance note

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Table of contents

| | |
|--|----|
| Introduction | 3 |
| Compulsory and voluntary reporting by relevant persons | 4 |
| Material misappropriation or fraudulent conversion..... | 6 |
| Timing and contents of report..... | 7 |
| Additional compulsory reporting requirements for PRSAs..... | 8 |
| Format and timing of compulsory PRSA reports | 8 |
| Additional voluntary reporting requirements for PRSAs | 10 |
| Additional compulsory reporting requirements for KFHS | 11 |
| Offences..... | 12 |
| Defence to prosecution | 13 |
| Protection of person making report | 15 |
| Voluntary reporting..... | 16 |
| Protection from unfair dismissal | 17 |
| Action by the Authority | 19 |

Introduction

- s82-85** 1. Part VIII (sections 82 to 85) of the Pensions Act, 1990, as amended (the Act) deals with compulsory and voluntary reporting to the Pensions Authority (the Authority).
- s10** 2. Under section 10 of the Act, the functions of the Authority include the issuing of guidelines or guidance notes. The following guidance note is issued by the Authority to give guidance on the Authority's interpretation of Part VIII of the Act. This guidance note is not intended to be an authoritative statement of the law on any particular matter and should not be treated as such.

Compulsory and voluntary reporting by relevant persons

s82 **3.** The obligation to make a compulsory and/or voluntary report to the Authority in relation to a scheme, trust retirement annuity contract (RAC), or a personal retirement savings account (PRSA) applies to a relevant person in relation to that scheme, trust RAC or PRSA. The term relevant person is defined in section 82 and means the following:

- an auditor of the scheme or trust RAC;
- an actuary of the scheme or trust RAC;
- a trustee of the scheme or trust RAC;
- an administrator, investment manager or custodian of the PRSA; (these terms are defined in Part X of the Act);
- a registered administrator (RA);
- an insurance intermediary in relation to the scheme or trust RAC within the meaning of section 2 of the Investment Intermediaries Act, 1995. The term 'insurance intermediary' has the same meaning as in section 2 of the Insurance Act, 1989;
- an investment business firm (within the meaning of section 2 of the Investment Intermediaries Act, 1995) which has advised on the scheme, trust RAC or PRSA or has received any payment in relation to the investment of any of the resources of the scheme, trust RAC or PRSA. An investment business firm means any person, other than a member firm within the meaning of the Stock Exchange Act, 1995, who provides one or more investment business services or investment advice to third parties on a professional basis and for this purpose where an individual provides an investment business service and where that service is carried on solely for the account of and under the full and unconditional responsibility of an investment business firm or an insurance undertaking or a credit institution that activity shall be regarded as the activity of the investment business firm, insurance undertaking or credit institution itself;
- a person who has prepared, or who has been instructed to prepare, an annual report of the scheme or trust RAC in accordance with section 55 of the Act. A person will be a relevant person in relation to a scheme once they have been instructed to prepare an annual report of the scheme, whether the report is completed or not;

- a person who has been appointed by the trustees of the scheme or trust RAC to carry out, or who is carrying out, any of the duties of the trustees of the scheme or trust RAC under section 59 of the Act. If a person has been appointed by the trustees to carry out any of their duties under section 59, they will be a relevant person whether or not they actually carry out those duties. Conversely, if a person is actually carrying out any of those duties, they will be a relevant person even if they do not have a formal appointment from the trustees of the scheme;
- the PRSA provider;
- a PRSA actuary;
- an auditor of the business of a PRSA provider;
- an employee of an employer referred to in section 121 of the Act;
- a key function holder (KFH) defined in section 64AA of the Act as a person who carries out a key function. A key function is specified in section in 64AH of the Act as a risk management function, an internal audit function and where applicable an actuarial function for the scheme or trust RAC; and
- a depositary referred to in Part VIB of the Act.

Material misappropriation or fraudulent conversion

- s83(1)** 4. Section 83 of the Act provides that a relevant person must make a written report to the Authority, as soon as practicable, if they have reasonable cause to believe that a material misappropriation or a fraudulent conversion of the resources of a scheme, trust RAC or PRSA has occurred, is occurring or is to be attempted.
- s83(2)** 5. The obligation to make a report under section 83(1) of the Act does not apply to any belief formed as a result of information obtained:
- in the case of a scheme before 2 July 1996,
 - in the case of a PRSA before 7 November 2002,
 - in the case of a trust RAC before 27 April 2007, and
 - in the case of an RA before the commencement of section 27 of the Social Welfare and Pensions Act, 2008.
- s83** 6. There is a fraudulent conversion of the resources of a scheme, trust RAC or PRSA when any of the scheme, trust RAC 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, trust RAC 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, trust RAC or PRSA. There is a misappropriation when any of the scheme, trust RAC or PRSA assets are appropriated by any person who is not entitled to them under the provisions of the scheme, trust RAC 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, trust RAC 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 written report to the Authority must be made as soon as practicable when a relevant person has reasonable cause for their 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 they have reasonable cause for their belief, i.e., that their belief is not irrational or frivolous. Once they have reasonable cause, they should make their report without delay and as soon as practicable. A prompt report may be particularly important where the misappropriation or fraudulent conversion is still ongoing 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 until the report is made in writing, as soon as practicable.
- s83(1)** **10.** The report in writing should identify the scheme, trust RAC or PRSA and give full particulars of the material misappropriation or fraudulent 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 would be useful to specify in a report include but are not limited to:
- the name of the scheme, trust RAC or PRSA;
 - the names and addresses of the trustees or PRSA provider and the administrator, investment manager or custodian if known;
 - the name and address of the principal employer and of any other participating employers if known;
 - the names and addresses of any persons believed to be involved in the conversion or misappropriation;
 - a general description of the material misappropriation or fraudulent conversion, with details of the stage which it has reached, and the assets affected by it; and

- any other information which the person making the report believes to be relevant.

Additional compulsory reporting requirements for PRSAs

- s83(2A)** **11.** A PRSA actuary or an auditor of the business of a PRSA provider must make a written report to the Authority as soon as is practicable if they have reason to believe that a PRSA provider has carried on activities in relation to PRSA products referred to in Part X of the Act 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 written report to the Authority as soon as is practicable if they have 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, 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 written report to the Authority, as soon as is practicable 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 written report to the Authority, as soon as is practicable 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 they bear any responsibility, at such intervals and in such format and subject to such conditions as may be laid down in regulations. No regulations have been made under this subsection to date.

Format and timing of compulsory PRSA reports

- 16.** A report under any of the above subsections of section 83 of the Act should be made in writing as soon as is practicable after the circumstances requiring the making of a report have arisen. The relevant person, except in

the case of a report under section 83(2D) of the Act, 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 they have reasonable cause for their belief, i.e., that their belief is not irrational or frivolous. In the case of a report under section 83(2D) of the Act, knowledge of the failure to remit one or more contributions is required.

A report to the Authority under any of the above subsections should follow the format set out in paragraph 10, where appropriate. In addition to the detail recommended in paragraph 10, in respect of reports made under section 83(2A) and (2B) of the Act, the report should also 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 details of the current position.

In addition to the detail recommended in paragraph 10, a report under section 83(2C) of the Act should also provide details of the employer who has failed or is failing to comply with the requirements of section 121 of the Act together with the particulars of such failure.

In addition to the detail recommended in paragraph 10, a report under section 83(2D) of the Act should also set out details of the employer who has failed to remit one or more contributions along with details of the contributions which have not been remitted.

Additional voluntary reporting requirements for PRSAs

- 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 they are a relevant person. The Minister for Social Protection has the 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 to date.
- s83(2G)** 18. Where an employee has reason to believe that their employer has failed or is failing to comply with the provisions of section 121 of the Act the employee may voluntarily report such failure to the Authority. In this instance, there is no requirement for a report to the Authority to be in writing.

Additional compulsory reporting requirements for KFHs

s83(2H) 19. Where a KFH has reason to believe that:

- there is a substantial risk that the scheme or trust RAC will not comply with a materially significant requirement under the Act or any other enactment which could have a significant impact on the interests of members and beneficiaries; or
- a significant material breach of requirements under the Act or any other enactment applicable to the scheme or trust RAC and its activities has occurred in the context of the key function of the relevant person; and
- the KFH has reported their belief in relation to the above to the trustees of the scheme or trust RAC and the trustees have failed to take appropriate remedial action in relation to the risk or breach within 21 days of the report being made to them,

the KFH shall inform the Authority of the substantial risk or significant material breach as soon as reasonably practicable from the expiry of the 21 day period.

Offences

- s83(3)** **20.** A relevant person is guilty of an offence if they fail to make a report in writing as soon as practicable, as required under subsections (1), (2A), (2B), (2C), (2D) or (2F) of section 83 of the Act.
- s83(3)** **21.** A relevant person is also guilty of an offence if they knowingly or wilfully make a report under subsections (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 they know at the time of making a report that their report is incorrect or if they are reckless as to whether it is correct or incorrect.
- s83(4)** **22.** Where a relevant person is found guilty of an offence under section 83, they are liable:
- on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 1 year, or to both,
 - on conviction on indictment to a fine not exceeding €25,000 or to imprisonment for a term not exceeding two years, or to both.
- 83(4)** **23.** Section 3(4) of the Act provides that where an offence under the Act is committed and is proved to have been so 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, as well as the body corporate, be guilty of an offence and shall be liable to be prosecuted as if they were guilty of the first-mentioned offence. A relevant person under section 83 of the Act 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 or who purports to act in any such capacity shall also be guilty of the same offence in line with the conditions set out above.

Defence to prosecution

- 83(5)** **24.** Section 83(5) provides that if a relevant person is prosecuted for an offence under section 83(1) of the Act it is a defence for them to show that their contravention of the section was attributable to another person failing to comply with the section and that they took such reasonable steps in the circumstances as were open to them to secure the compliance of that other person with the section.
- s83(5)** **25.** By way of specific example, 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, trust RAC or PRSA. In order to avoid numerous reports relating to the same matter, they might agree that the matter should be reported to the 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 them 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 written report as soon as practicable. Note, however, that each case will be decided on its own facts.
- s83(5)** **26.** By way of specific example, a defence under section 83(5) could also apply where an employee is a relevant person and takes reasonable steps to ensure compliance with the reporting requirements of section 83(1) of the Act. In some instances, an employee, in the course of their activities, could have reasonable cause to believe that there is a material misappropriation or fraudulent conversion of the resources of the scheme. While each case will be considered on its own facts, this could arise where an employee is instructed to prepare an annual report of a scheme or where an employee of a third party who has been appointed by the trustees of the scheme is tasked with making arrangements for the payment of benefits or to carry out any of the other duties of the trustees. If the employee takes reasonable steps to ensure that their employers comply with the reporting requirements under section 83, this would be a defence to the employee against any prosecution for their own failure to report the matter directly to the Authority.
- s83(6)** **27.** A barrister or solicitor can be a relevant person if they fulfil any of the criteria for a relevant person, for example, if they are 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, section 83(6) provides that in any prosecution for an offence under section 83(1), it is a defence for the accused to show that they were, 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, trust RAC or PRSA had taken place if they had not been so assisting or advising.

Protection of person making report

- s84** **28.** Section 84 of the Act provides protection where a person in good faith makes a report, whether in writing or otherwise, to the Authority of any matter concerning the state and conduct of a scheme, trust RAC or the state of a PRSA. Protection under section 84 of the Act applies not only to relevant persons but also to any person 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, assuming the report is made in good faith.

Voluntary reporting

s84 **29.** 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, trust RAC or the state of a PRSA. The purpose is to enable persons to make voluntary reports in good faith without incurring liability. For example, the kind of matters which might be covered in such a voluntary report would include (but are not limited to the following):

- 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 of the Act. For example, a member of the scheme, trust RAC or a PRSA contributor.
- Any breach of the Act.

Protection from unfair dismissal

s3(2A) 30. Section 3(2A) of the Act make it an offence for an employer to dismiss an employee solely or mainly because, they have, in good faith:

- notified the Authority of an alleged breach of the Act, other than of Part VII (equality provisions) (section 3(2A)(a));
- made a report to the Authority under section 83 or a voluntary report of any matter concerning the state or conduct of a scheme, or PRSA, other than a matter to which Part VII applies (section 3(2A)(b));
- made a reference under sections 38, 53, 58, 64A or 81G of the Act (section 3(2A)(c));
- gave evidence in any proceedings under this Act other than Part VII; and
- gave notice to their employer of their intention to do anything referred to in section 3(2A)(a) to (d) of the Act.

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

- on summary conviction, to a fine not exceeding €5,000 or imprisonment for a term not exceeding one year or to both,
- on conviction on indictment, to a fine not exceeding €25,000 or imprisonment for a term not exceeding two years or to both.

s3(2B) 31. The court has power, where an employer is convicted under section 3(2A) and if the dismissed employee is present or represented in court and consents to:

- order the re-instatement by the employer of the dismissed person in the position which that person held immediately before the dismissal on the terms and conditions on which that person was employed immediately before that dismissal, together with a term that the reinstatement shall be deemed to have commenced on the day of the dismissal;
- order the re-engagement by the employer of the dismissed person either in the position which that person held immediately before the dismissal or in a different position which would be reasonably suitable for that person on such terms and conditions as are reasonable having regard to all the circumstances; or

- impose on the employer, in addition to any fine imposed under subsection 3(3), a fine not exceeding the amount which, in the opinion of the court, the dismissed person would have received from the employer concerned by way of remuneration if the dismissal had not occurred:

Provided that that amount shall not exceed:

- if the conviction was a summary conviction, an amount which together with the fine imposed under subsection 3(3) does not exceed €3,500,
- if the conviction was on indictment, an amount equal to 104 weeks' remuneration of the dismissed person.

Action by the Authority

s86-90 **32.** Part IX of the Act gives the 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 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 and for an order,
- an employer to pay arrears of contributions to a scheme,
- trustees of a scheme or trust RAC to dispose of any investment held for the purposes of the scheme or trust RAC.

The Authority can 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 **33.** For the purposes of the law of defamation, section 85 of the Act gives absolute privilege to the publication by the Authority of any report made to it under section 83 and of any other report of any matter concerning the state and conduct of a scheme, trust RAC or the state of a PRSA (including a voluntary report).