

Staff Determinations

Non-reserved functions procedure
(under section 93 of the Pensions Act 2004)

Introduction and definitions

Introduction

1. The regulator must, under section 93, determine the procedure it will follow in relation to the exercise of certain functions by members of its staff (defined in paragraph 4(vii) as Non-Reserved Functions). These members of staff may have had some involvement in the matter. The regulator has determined this is the procedure to be followed for these Non-Reserved Functions.
2. This procedure provides for the standard and special procedure. The Case Team Procedure and the Determinations Panel Procedure also provide for the standard and special procedure in respect of Reserved Regulatory Functions. Certain Non-Reserved Functions under this procedure may be delegated by the regulator to the Determinations Panel¹.

Definitions

3. Where there are relevant matters which are covered by the Act, statutory provisions have not been repeated in this document unless it is appropriate.
4. Unless the context otherwise requires, the following expressions used in this document shall have the following meanings:
 - i. The Act – the Pensions Act 2004. Unless otherwise stated, any reference to a section is to a section from this Act
 - ii. Case Team Procedure – the regulator’s Procedure for the Reserved Regulatory Functions. It can be found at www.tpr.gov.uk/caseteam
 - iii. Determination – the regulator’s decision whether, and how, to exercise a Non-Reserved Function
 - iv. Determinations Panel (the DP) – the Determinations Panel established under section 9
 - v. DP Procedure – The Determinations Panel’s procedure. It can be found at www.tpr.gov.uk/determinations
 - vi. Directly Affected Party – a person appearing to the regulator to be directly affected by the regulatory action, see section 96(2)
 - vii. Non-Reserved Functions – the functions set out in section 93(2) (except for 93(2)(c))
 - viii. Reserved Regulatory Functions – the functions set out in Schedule 2 to the Act where the decision whether, and how, to exercise the function is made by the Determinations Panel

¹
See paragraphs 53 and 54.

- ix. regulator – The Pensions Regulator as established under section 1
 - x. Reply – the Directly Affected Party’s reply to the Response. Not applicable in the case of a Third Party Request
 - xi. Request – other than for a Third Party Request, when, under the standard procedure, the regulator sends a Non-Reserved Function for a Determination
 - xii. Response – the regulator’s further comments on the Directly Affected Party’s representations to the warning notice. The Response will be sent to the Directly Affected Party for its Reply. Not applicable in the case of a Third Party Request
 - xiii. Special Procedure Request – when, under the special procedure, the regulator sends a Non-Reserved Function for a Determination.
5. A Third Party Request is a valid² request³ made by a third party for a Determination⁴ of the following:
- i. to appoint a trustee under either section 7(3)(b) or section 23 of the Pensions Act 1995
 - ii. to issue, or refuse to issue, a clearance statement under either section 42 or section 46
 - iii. to issue a notice to approve a financial support arrangement under section 45(1)
 - iv. to grant or revoke cross-border authorisation (under section 288) or approval (under section 289); or
 - v. all under the Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678):
 - for a suspension period under regulation 7(1)
 - to approve a withdrawal arrangement under regulation 7(3)(b)
 - to issue a direction that amount B under an approved withdrawal arrangement is not to be treated as a debt due from the guarantors under regulation 7(7)
 - that an approved withdrawal arrangement no longer continues to be in force under regulation 7(10); or
 - to issue a notice of approval of a regulated apportionment arrangement under regulation 7A(2).

2
The regulator will assess the validity of a Third Party Request in the light of any relevant guidance it has issued which relates to the Non-Reserved Function.

3
It may also include a request to vary or revoke, under section 101, the exercise of a Non-Reserved Functions made as a result of Third Party Request.

4
The regulator reserves the right to exercise these Non-Reserved Functions absent a Third Party Request.

6. Unless context indicates otherwise, or the contrary intention is expressed, in this document:
 - i. the singular denotes the plural and vice versa
 - ii. any term used in this document which is defined for the purposes of any provision of the Act shall have the meaning used in the Act
 - iii. references to staff should be taken to cover the regulator's board, its chief executive, its executive directors, its non-executive directors and its employees.

Preliminaries

7. Where the regulator considers it appropriate to do so it may:
 - i. carry out an investigation into the facts and circumstances which have given rise to the Non-Reserved function being considered
 - ii. consider a Third Party Request.
8. Either of the steps in paragraph 7 may include, for example, information-gathering. An investigation under paragraph 7(i) may include, for example, the inspection of premises. Considering a Third Party Request under paragraph 7(ii) may include, for example, asking the third party to provide further information to support its request or to suggest to the third party that it may consider amending the request.
9. The regulator may also, where it considers it appropriate to do so, discuss the Non-Reserved Function being considered with a potential Directly Affected Party. This may be by way of an exchange of correspondence. The regulator will take the content of these exchanges into account when deciding how to proceed.
10. In the event the regulator reaches the conclusion that it may be appropriate to exercise a Non-Reserved Function or to proceed with a Third Party Request, the regulator may apply the standard procedure (see Standard procedure).
11. In some circumstances, the special procedure may apply (see Special procedure).

Standard procedure

12. The regulator will prepare and issue a warning notice. This applies irrespective of whether or not the regulator has discussed the Non-Reserved Function with the potentially Directly Affected Parties. Where the regulator is issuing a warning notice, it will decide who appears to be a Directly Affected Party and will serve the warning notice upon them.

Warning notice

13. The warning notice will ordinarily include:
 - i. the Non-Reserved Function under consideration, including how that functions should be exercised. It will include the relevant circumstances and information, the supporting grounds and the evidence. The warning notice may include details of any alleged breach of law
 - ii. for Third Party Requests, the warning notice will contain the details of the Third Party Request and a statement from the regulator on the merits of the Third Party Request. The regulator's statement on the merits of the application will include the regulator's views on whether the application satisfies any applicable legislative grounds for the use of the Non-Reserved Function and also whether it considers that it is appropriate for the function to be exercised (having regard to the contents of the Third Party Request and the outcome of any regulator consideration up to that point)
 - iii. material received or obtained by the regulator that might:
 - other than for a Third Party Request, reasonably be considered to support or undermine the case for the use of the Non-Reserved Function
 - for a Third Party Request, be relevant to the Non-Reserved Function.
 - iv. the period granted for service of written representations to the regulator.
14. Material referred to in paragraph 13(iii):
 - i. will exclude material which is legally privileged; and
 - ii. may not be disclosed where there is good reason not to do so and the regulator is satisfied that there will be no unfairness. In that event the regulator would, in most circumstances, inform the Directly Affected Parties of this, although circumstances may arise in which it would not be appropriate to do so. The regulator may include additional information if it considers that it is necessary to do so to ensure fairness.

15. The period in paragraph 13(iv) will be at the regulator's discretion. The regulator shall grant a representation period that it considers gives the Directly Affected Parties a reasonable period of time to respond to the matters raised in the warning notice and any accompanying documents. The period will not normally be less than 14 days, although in appropriate cases, the period may be shorter. For Third Party Requests, the period is often likely to be less than 14 days and may be as short as a number of hours.
16. The regulator may grant extensions to this period if it considers it appropriate to do so. In cases where the representation period is:
 - i. up to seven days, the regulator will detail in the warning notice the deadline for making any request for an extension
 - ii. is between seven and 14 days, the regulator will expect any request for extension to be made no later than two working days before the expiry of that period
 - iii. 14 days or more, the regulator will expect any request for extension to be made no later than three working days before the expiry of that period.

Representations

17. If any Directly Affected Party wishes to make representations in response to the warning notice, these should be sent to the regulator (and, if the responding Directly Affected Party so wishes, to any other Directly Affected Party) within the representation period specified in the warning notice (see paragraph 13(iv)), or as varied by the regulator (see paragraph 16).
18. Representations should state whether the Directly Affected Party accepts the contents of the warning notice and/or opposes the exercise of the Non-Reserved Function. The Directly Affected Party should also attach all evidence that it wishes to rely upon (for example, documentary, witness and expert). This will assist the regulator in considering the representations and deciding whether or not to pass the matter for Determination.

Steps following representations

19. The regulator will assess any representations submitted by the Directly Affected Parties in order to consider whether it is still of the view that it may be appropriate to exercise the Non-Reserved Function.
20. As part of its consideration (see paragraph 19), the regulator may undertake further investigation or request further information.

21. Following further investigation or request for further information, in the light of issues raised either in the representations, or further information received, the regulator may provide a Response to the Directly Affected Parties. In this case, the Directly Affected Parties will then be given a reasonable opportunity to submit a Reply.
22. The outcome of the regulator's consideration (see paragraph 19) may, for example, be that the regulator:
 - i. will not pass the matter for Determination
 - ii. will pass the matter for Determination but only with respect to the use of a particular Non-Reserved Function and/or with respect to a particular Directly Affected Party
 - iii. will pass the matter for Determination.
23. The outcome of the regulator's consideration will be communicated to each Directly Affected Party. This communication will not apply to Third Party Requests except where the regulator has decided not to pass the matter for Determination.
24. Passing the matter for Determination entails sending the warning notice together with any representations (received in accordance with paragraphs 17 and 18) any relevant information as well as any Request, Response or Reply to the regulator's member of staff responsible for making the Determination.
25. If representations are not received from any Directly Affected Party within the period in the warning notice (or as varied with regulator agreement (see paragraph 16)) the regulator will take such action as it deems appropriate.
26. Should it receive any additional material which falls within the description set out in paragraph 13(iii), or if there is any existing material in the categories in paragraph 13(iii) which becomes relevant in this regard (for example, after receipt of representations), the regulator shall disclose this as soon as is possible to the Directly Affected Parties (subject to paragraph 14). If additional material is disclosed by the regulator prior to the matter being referred for Determination, the regulator shall give the Directly Affected Parties the opportunity to comment on this.
27. The regulator may also send copies of the representations received from Directly Affected Parties to any of the other Directly Affected Parties where it considers this to be appropriate.

Special procedure

28. The special procedure will be used where the regulator considers that section 97 applies (for example, where the regulator considers that there may be a need to exercise the regulator's functions immediately to protect the members' interests or scheme assets).
29. In the event that the regulator considers that section 97 applies, it shall pass the Special Procedure Request to the regulator's member of staff responsible for making the Determination. The Special Procedure Request will explain why the regulator considers that the case falls within section 97(1) and will also attach a draft of any Order⁵ requested.
30. In cases falling within section 97(2), the Special Procedure Request will also cover material which falls within paragraph 13(iii) (subject to paragraph 14), so far as is appropriate.
31. In cases falling with section 97(3) and (4), any warning notice, Directly Affected Party representations, Response and Reply served up to that point will also be included in a Special Procedure Request.
32. The Directly Affected Parties will not be informed in advance of the regulator's intention to use the special procedure nor will they be sent a copy of the Special Procedure Request.

Withdrawal

33. A matter passed for Determination (under either the standard or special procedure) may be withdrawn at any time prior to the regulator reaching its Determination.
34. Withdrawal may take place, for example, where:
 - i. the regulator no longer considers the special procedure applies
 - ii. the regulator no longer considers that the exercise of the Non-Reserved Function may be appropriate as a result of representations served or evidence received; or
 - iii. an appropriate resolution is reached between the parties.
35. Where a matter has been passed for Determination under the standard procedure has been withdrawn, the regulator will notify all the Directly Affected Parties.
36. For the avoidance of doubt, a Special Procedure Request cannot be withdrawn when a Determination has been made using special procedure pending the compulsory review. However, the regulator may make representations as part of a compulsory review that the Determination should be varied or revoked.

⁵
This ordinarily arises in requests for the appointment of a trustee under section 7(3) or section 23 of the Pensions Act 1995.

Effect of withdrawal

37. The effect of withdrawal under paragraph 33 is that the regulator will send a letter confirming withdrawal and explaining the effect of withdrawal to all the Directly Affected Parties (if appropriate).

Determinations and compulsory reviews

Decision-making and making Determinations

38. In taking decisions, the regulator will ensure that decisions are made in compliance with the applicable legal requirements (including section 100 and the regulator's public law duties).
39. A Determination under this procedure will normally be made considering:
 - i. Standard procedure: the documents passed for Determination under paragraph 24
 - ii. Special procedure: the Special Procedure Request.
40. The standard of proof applied when making a Determination will be on the balance of probabilities.

Reasons and Determination Notice

41. Once the regulator has made the Determination, a Determination Notice will be issued to the Directly Affected Parties.
42. Reasons for the decision will be given in writing and will generally be included in the Determination Notice. If this is not possible, the reasons will be issued separately to the Directly Affected Parties as soon as reasonably practicable.
43. At the Determination Notice stage, all representations received under paragraphs 17 and 18 from a Directly Affected Party will be made available to other Directly Affected Parties, if this has not already taken place.
44. Depending upon the particular Non-Reserved Function in question, the Determination Notice may contain information about the right of a Directly Affected Party to make a reference to the Tax and Chancery Chamber of the Upper Tribunal and the other details as required by the Act.

Special Procedure Determinations and compulsory reviews

45. Where a Determination is made following a Special Procedure Request, the regulator will issue a Determination Notice (and any appropriate Orders) to the Directly Affected Parties.
46. In cases where a trustee is appointed as a result of a Special Procedure Request and where it is considered necessary to protect the interests of members or the assets of a scheme, the regulator and the trustee appointed may be notified of the appointment Order in advance of the other Directly Affected Parties.
47. A compulsory review will follow any Determination made under the special procedure. It will be undertaken by the Determinations Panel as soon as is reasonably practicable and in accordance with its procedure. The DP Procedure will apply to that review. See the DP Procedure for more detail on how it approaches compulsory reviews.
48. The regulator shall comply with any directions issued by the Determinations Panel as part of any compulsory review (including, for example, preparing submissions for the compulsory review hearing). The regulator may undertake further investigations prior to the compulsory review.

General

Regulator guidance

49. This procedure should be read in accordance with any guidance issued by the regulator which is relevant to a Non-Reserved Function subject to this procedure.

Procedural matters

50. A Directly Affected Party may raise a procedural issue with the regulator. The regulator will consider whether, and how, to deal with that procedural issue. The regulator may share details:
 - i. of any procedural issue raised; and
 - ii. how the issue is being dealt withwith the other Directly Affected Parties.
51. Where any procedural irregularity comes to its attention, the regulator may (as it considers appropriate) seek to cure or waive the irregularity.

Clerical mistakes or factual errors

52. Clerical mistakes or factual errors arising from an accidental slip or omission may be corrected by the regulator. A copy of any corrections will be sent to the Directly Affected Parties as soon as is reasonably practicable.

Delegation to the Determinations Panel

53. Only the regulator may delegate making Determinations to the Determinations Panel. This is only applicable for certain Non-Reserved Functions and would be applicable in special circumstances (for example, where there has been a request for an oral hearing; or where there are mix of Non-Reserved and Reserved Regulatory Functions which relate to a common set of facts).
54. Where a Determination is delegated to the Determinations Panel the Directly Affected Parties and the Determinations Panel will be notified. From that point on the DP Procedure will apply to making the decision with regard to the Non-Reserved Function. The regulator shall comply with any directions issued by the Determinations Panel following any delegation.

Publication

55. Under section 89, the regulator may, if it considers it appropriate, publish a report of the consideration given by it to the exercise of its functions and the results of that consideration.

Other matters

56. This document sets out the procedure the regulator expects to follow in the circumstances described. There may be occasions on which the regulator considers it appropriate to depart from this procedure. In that event, the regulator will provide as much notice of the procedure it is to apply as possible.
57. The regulator may review this procedure from time to time. Notice (by way of publication on the regulator's website) shall be given of any revisions made.

Northern Ireland

58. In this procedure references to the law that applies in Great Britain should be taken to include the corresponding legislation in Northern Ireland.

Determined by the regulator on 10 September 2014.

How to contact us

Napier House
Trafalgar Place
Brighton
BN1 4DW

T 0845 600 0707

F 0870 241 1144

E customersupport@thepensionsregulator.gov.uk

www.thepensionsregulator.gov.uk

www.trusteetoolkit.com

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