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CRACKING THE MNT CODE!

1 INTRODUCTION

The Pensions Act 2004 (PA 2004)¹ will require that at least one-third of the total number of trustees of occupational pension schemes are member-nominated trustees or directors (MNTs). The current proposal is that this moves up to 50% in 2009.

The Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006 ("MNT Regulations") were laid on 16 March 2006. Much more recently, the Regulator's code of practice was published in final draft. This document is important because it sets out guidance on how trustees should approach the nomination and selection process.

A copy of the Regulations can be found at:

<http://www.opsi.gov.uk/si/si2006/20060714.htm>

A copy of the Regulator's code of practice can be found at:

<http://www.thepensionsregulator.gov.uk/pdf/codeMntMndAgreed.pdf>

2 KEY POINTS

- New MNT provisions will mean all schemes will have to have one-third MNTs in future.
- Although the new rules came into force on 6 April 2006, transitional arrangements apply.
- The Regulator's code of practice provides guidance on nomination and selection procedures.
- Arrangements will need to be reviewed every 3-5 years.

¹ Sections 241-243

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3 A BRIEF RECAP

PA 2004 represents a change in direction from the current MNT provisions, which allow an employer to propose alternative arrangements which differ from the legislative requirements (the “employer opt-out”). This route will no longer be possible and the existing trustees will need to comply with the new framework provisions, which provide that:

- Trustees must be *nominated* as a result of a process in which at least the following persons are eligible to participate:
 - all the active members (or an organisation which adequately represents active members); and
 - all the pensioner members (or an organisation which adequately represents pensioner members).
- Trustees must be *selected* as a result of a process which involves some or all of the members of the scheme.

4 TRANSITIONAL PROVISIONS

The date for commencement of the new provisions is 6 April 2006.

Whilst new schemes will have to comply from day one, in order to dovetail with existing arrangements, the MNT Regulations make allowance for the commencement date for existing schemes to be the earlier of:

- the date when the current opt-out or trustee arrangements cease²; and
- 31 October 2007.

² The Regulations have been modified to make it clear that the transitional provisions apply to trustee alternative arrangements as well as to employer opt-outs

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But, reading between the lines, employers can withdraw an existing opt-out before it is due to end. The new arrangements will then need to comply with the revised MNT requirements. Although the trustees are responsible for compliance it is, of course, open to them to seek the employer's views.

5 AMENDMENTS

There have been a number of changes to the MNT Regulations and code of practice to reflect comments made during the consultation process.³ We examine the final provisions under the following headings:

- Scheme specific (section 6)
- Nomination process (section 7)
- Selection process (section 8)

6 SCHEME SPECIFIC

The framework requirements set out in PA 2004 and the MNT Regulations require that the various stages are accomplished within "reasonable periods". Although the code sets out the Regulator's views on what are reasonable periods, like a lot of the recent legislation, the emphasis is on scheme specific processes.

For instance, when setting the time limit within which trustees need to decide what arrangements to introduce, the Regulator states that the six-month period suggested "is not an absolute time limit and that it may be reasonable in the circumstances of the scheme for trustees to decide upon their arrangements within a shorter or, in some cases, a longer period."

³ See our Sackers Extra Alert "Member-nominated trustees" dated 15 July 2005, for details of the draft Regulations and code of practice

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7 NOMINATION PROCESS

Here we pick up on some of the key code changes:

- The code retains all the criteria to guide trustees on whether an organisation “adequately represents” its membership, but now also notes that one organisation is unlikely to represent both active and pensioner members.
- Following a change in the MNT Regulations, if a scheme has no active or pensioner members, some or all of the deferred members (as the trustees determine) will be eligible to participate in the nomination process. Indeed, the code notes generally that “where the majority of members are deferred members it may not necessarily be fair to exclude them”.
- To tie in with the new trustee knowledge and understanding requirements⁴, the Regulator has added “a short explanation of the role of a trustee and any available training” to the list of items to be included in any communication with members when requesting nominations.
- Note that the period set by the code within which the nomination and selection processes should be completed remains at six months. If insufficient nominations are received, the nomination and selection processes must be re-run. But the period for doing so has been extended from within 12 months of the original nomination process taking place to three years.

8 SELECTION PROCESS

Little has changed as a result of consultation on the selection process. The main area of concern – namely, that MNTs can be selected by only “some” of the members – was not the subject of consultation, as it is written into PA 2004.

⁴ For further details, see our Sackers Extra Alert “TKU – Coming to a scheme near you” dated 31 March 2006

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However, the Regulator makes it clear in the code that the overriding requirements of “proportionality, fairness and transparency” apply and any arrangements should be judged by these standards.

9 REVIEW OF ARRANGEMENTS?

Finally, the code suggests that arrangements should normally be reviewed every three to five years but may need to be reviewed sooner if there have been material changes in the scheme’s circumstances or membership.

However, in an era of change, trustees will be relieved to know that if the outcome of the review is that the arrangements remain appropriate then there may be no need for any changes.