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## MEMBER-NOMINATED TRUSTEES

### 1 INTRODUCTION

The Pensions Act 2004 (PA 2004)<sup>1</sup> 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.<sup>2</sup>

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 "opt out"). This will no longer be possible and the existing trustees will need to secure compliance with the new provisions.

To help trustees, the Pensions Regulator (TPR) published a draft code of practice - "Member-nominated trustees and directors – putting arrangements in place" - on 8 July 2005. The consultation on the associated draft Regulations was published by the DWP on 15 July 2005.

Copies of the code and the draft Regulations can be found at:

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

[http://www.dwp.gov.uk/publications/dwp/2005/occ\\_pen\\_schemes/m-ntd-regs-2005.pdf](http://www.dwp.gov.uk/publications/dwp/2005/occ_pen_schemes/m-ntd-regs-2005.pdf)

The closing date for comments is 30 September for the code of practice and 6 October 2005 for the Regulations.

### 2 IN BRIEF

Trustees will need to ensure that the arrangements they design produce MNTs who meet the test set out in PA 2004. This test has two parts:

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<sup>1</sup> Sections 241-243

<sup>2</sup> Date announced by Stephen Timms, the Pensions Minister, at the TUC conference on 17 June 2005 but the precise timing is part of the consultation exercise

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- 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) (see sections 3 and 4).
- Trustees must be *selected* as a result of a process which involves some or all of the members of the scheme (see section 5).

Whilst there is no mention of deferred members in the above requirements, trustees can open up both the nomination and selection process to deferreds if they wish.

### 3 NOMINATION PROCESS

Relying on principles rather than prescription, the code states that trustees must ensure that the process they choose is “proportionate, fair and transparent in the circumstances of the scheme”. But the code does give the following details of what TPR expects to see in a nomination process:

- effective communication to the members and/or representative organisations involved of the requirement for MNTs, the process the trustees have adopted for nomination (including, for example, what will happen if the number of nominations is more or less than, or equal to, the number of vacancies) and how they may nominate someone for selection;
- sufficient time for members or representative organisations to consider proposals; and
- communication of the outcome.

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The code also specifies a number of methods of communication which TPR considers appropriate and, moving with the times, suggests the use of email and the company intranet (as well as letters, the staff notice board or staff meetings).

### **4 WHO SHOULD BE INVOLVED IN THE NOMINATION PROCESS?**

Instead of contacting active and pensioner members directly, it is open for the trustees to seek nominations from an "organisation which adequately represents" either group. The difficulty for trustees lies in assessing whether an organisation does in fact meet this test.

Helpfully, the code gives details of what type of factors TPR "expects trustees to take into account" and also lists the types of organisation which TPR considers might meet this test. Examples given are: recognised trade unions; staff committees; member representative committees; pension management committees; and pensioner organisations.

### **5 SELECTION PROCESS**

Again, as for the nomination process, the appropriate method of selection will depend on the circumstances of the scheme, but the code refers to the following methods which trustees could consider:

- a ballot;
- selection panels;
- selection by member representative committees;
- selection by pension management committees; and
- selection by existing trustees (provided, of course, that the trustees are members of the scheme).

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### **6 WHEN DO THE NEW ARRANGEMENTS HAVE TO BE IN PLACE?**

The date for commencement of the new provisions will be 6 April 2006. Whilst new schemes will have to comply from day one, in order to dovetail with existing arrangements, the draft 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 cease; and
- 31 October 2007.

TPR considers that a reasonable period for deciding on the arrangements following the commencement date is six months (and the trustees should take no more than a further six months to implement them) but with the proviso that “the length of time taken may vary according to the size, structure and circumstances of the scheme”.

For example, in a scheme whose opt-out is coming to an end, TPR “would not expect that it would take the trustees as long as six months after the end date to decide what the process should be”.

### **7 REVIEW OF ARRANGEMENTS**

Arrangements will need to be reviewed periodically. The code suggests that for most schemes this should be “every 3-5 years”. However, TPR notes that any significant changes of circumstance (such as a redundancy programme or a bulk transfer-in of members) should trigger a review.

### **8 ANTI-DISCRIMINATION**

PA 2004 incorporates an anti-discrimination rule (which prevents discrimination between MNTs and company appointed or independent trustees) and, whilst the topic is not covered in the code, the consultation on the draft Regulations addresses a number of areas of concern.

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- On the question of whether the anti-discrimination rule precludes the chairman of trustees holding the casting vote the DWP say: "our view is that there is nothing in the legislation that prevents a chairman from exercising a casting vote, provided that there is nothing in the trust deed and rules that actively prevents an MNT becoming the chairman".
- We assume that this principle would carry through even where it is the employer which in practice appoints the chair.
- As the required percentage of MNTs will move up from one-third to 50%, the position of independent trustees was also in doubt but the consultation paper gives some comfort by saying: "we do not want to disturb the position of independent trustees, so we propose to make provision to disregard any independent trustees for the purpose of calculating the 50% minimum".

## 9 CONCLUSIONS

It is clear from the code that it is open for trustees and employers to keep existing arrangements in place provided that these arrangements produce MNTs who meet the tests set out in PA 2004. Before existing arrangements expire, all schemes will need to audit the arrangements to see if they comply. If not, trustees must put in place new arrangements that do.

If the new requirements are not met, TPR makes it clear that it will use a number of measures to ensure compliance, including appointment of new trustees or removing existing trustees as well as imposing fines.