

<p>The Pensions Regulator</p>	<p align="center">Standard Procedure DETERMINATION NOTICE under Section 96(2)(d) of the Pensions Act 2004 (“the Act”) in respect of s69(1)(b) of the Pensions Act 1995 (“the 1995 Act”)</p> <p align="center">Wright Health Group Limited Superannuation & Life Assurance Scheme (“the Scheme”)</p>	<p>The Pensions Regulator case ref:</p> <p align="center">C14920906</p>
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Matters to be determined

1. The Determinations Panel (“the Panel”) met to determine whether an order should be made under section 69(1)(b) of the 1995 Act to modify the Scheme with a view to enabling the assets remaining after the liabilities of the Scheme have been fully discharged to be distributed to Wright Health Group Limited.

Directly Affected Parties

2. The Warning Notice specified the following parties as being directly affected by the regulatory action outlined therein.
 - Wright Health Trustees Limited (“the Trustee”)
 - Wright Health Group Limited (“the Employer”)

Basis of the application

3. This is an application on behalf of the “the Trustee” pursuant to s10(2)(b) of the Act and pursuant to the standard procedure as set out in s.96 of the Act.
4. The Regulator has the power under s.69(1)(b) of the 1995 Act to make an order in respect of an occupational pension scheme (other than a public service pension scheme) modifying the scheme with a view to achieving any of the purposes mentioned in s. 69(3).
5. One of the purposes referred to in s.69(3)(b) is to enable the assets remaining after the liabilities (of a registered pension scheme under section 153 of the Finance Act 2004 which is being wound up) have been fully discharged to be distributed to the employer and where prescribed requirements in relation to the distribution are satisfied.

6. This application is made to modify the Scheme to enable it to return a proportion of the surplus left following payment of all wind up costs and expenses to the Employer as the Trustees do not have the power to do this under the Scheme's rules.
7. The Regulator's case team supports the application.

Decision

8. The Panel determined that it was not appropriate in the circumstances of this application to make the order under section 69(1)(b) of the 1995 Act to modify the Scheme.

Details of the Scheme

9. The Scheme is a defined benefit occupational pension scheme established under trust. The Scheme commenced wind-up on 7 February 2011. On 9 February 2011, the Trustee accepted a buyout quotation to secure the benefits of all 109 members of the Scheme in full. The Trustee has stated that the buyout included an augmentation for deferred members to the revaluation in deferment and increases applied to pensions in payment. Following payment of the funds needed to effect the buyout, the Trustee has stated that there remains a surplus in the Scheme. This surplus was estimated at approximately £680,000 as at February 2011, before any deduction of wind up costs and expenses and currently at £540,000 taking account of estimated wind up expenses.

Background to Application

The Scheme

10. The Trustee has confirmed that the Scheme is a "registered scheme" within section 153 of the Finance Act 2004 ("the Finance Act").

The reasons for the application

11. There is no express provision under the Trust Deed or the Rules which permits repayment of surplus assets to the Scheme Employers on an ongoing basis or where the Scheme is in wind up.
12. Clause 18(c) of the trust deed provides that no "*alteration, modification or addition shall operate so as-...to result in the payment of any part of the moneys or other assets held by the Trustees in connection with the Scheme to any of the Employers.*"
13. The Trustee has received legal advice that (a) because the trust deed and rules do not contain an explicit provision under which a surplus can be returned to the Employer and (b) because of the restriction contained

at clause 18 of the Trust Deed, an application to the Regulator may be the most appropriate method of returning the surplus to the Employer.

14. The Trustee initially received legal advice setting out two options available to it to return the surplus, the first being an application to the Regulator for a modification order under section 69 of the 1995 Act; the second being a return of the surplus by virtue of a resulting trust. The “resulting trust” option involved exploring the possibility of the surplus being returned to the Employer on a resulting trust as a result of the objects of the trust having failed. The Panel has seen the legal advice to the Trustee that indicated that although there is some precedent in Scottish Law which supports the concept of a resulting trust in pension schemes existing under Scots law “*proceeding with the resulting trust option would be less certain for all parties*” than seeking an order under section 69 from the Regulator. Having taken further advice the Trustee is of the view that:

“if it were to attempt to go down the resulting trust route in the first instance, [it would] be required to obtain an opinion from Counsel on this matter. Even if Counsel’s opinion were favourable to the “resulting trust” approach, it would still be open to challenge by a member.

The only way the Trustees could obtain certainty that the [resulting trust] route is one which is acceptable under Scots law would be to take the matter to court. This route is complex and protracted, would involve substantial cost and has no certainty of success.”

15. Section 70 of the 1995 Act stipulates that an order under section 69 cannot be made, unless the Determinations Panel is satisfied that the purposes for which the application for the order was made cannot be achieved otherwise than by means of such an order or can only be achieved in accordance with a procedure which is liable to be unduly complex or protracted (or involves obtaining consents that cannot be obtained or can only be obtained with undue delay or difficulty).

The Surplus

16. The Trustee has advised the Panel that the Scheme has consistently shown surpluses at valuation dates since September 1999. Despite the ability of the Employer to take a contribution holiday, the Employer has maintained payment of contributions. The Employer and the Trustee agreed at each valuation that the surplus would be used to subsidise the cost of future service benefits over an extended period.
17. On 9 February 2011, as part of the winding up process, the Trustee accepted a buy out quotation issued by Prudential on 19 January 2011. The Trustee has stated that the buy out has secured members’ benefits in full and included an augmentation for deferred members.

18. Members were notified of the wind up and the securing of benefits with an insurer on 5 March 2011. Former Scheme members who were employees at the date that the Scheme ceased accrual were given access to the existing defined contribution arrangement operated by the Employer (the "DC Scheme"), on more generous contribution rates than other employees.
19. The Trustee has stated that the surplus has arisen principally as a result of:
 - the Scheme's investment in an insurance policy with "very generous guaranteed annuity terms relative to current market rates for annuities"; and
 - the rate that was estimated by the Scheme's actuary to be the rate of employer contributions needed to meet the cost of providing accrued benefits proving to be higher than the rate that was actually needed to meet the cost of providing benefits.

Proposals for the use of the surplus

20. The Trustee and the Employer are of the view that, over time, the approximate ratio of contributions to the Scheme was one third (on the part of members) and two thirds (on the part of the Employer).
21. Consequently it was proposed that:
 - one third of the surplus assets be retained by the Trustee and used to further augment members' benefits beyond that currently provided for as part of the buy out. A proportionate uplift in benefits, based on each member's liabilities be provided to both deferred and pensioner members from the additional surplus returned to members; and
 - the other two thirds of the surplus assets be returned to the Employer and be ring-fenced from the Employer's assets in a separate bank account and used to meet future defined contribution costs of the former final salary Scheme members (payable to the DC Scheme) at the prevailing contribution rates. The current contribution rates will be honoured until, at the earliest, the surplus assets have been exhausted.
22. The Trustee considers it reasonable for any remaining surplus, less any wind up costs relating to the wind up of the Scheme, to be distributed in the ratio identified, on the basis that the members have enjoyed the benefit of augmentation which was secured as part of the buy out and will enjoy a further augmentation which will be provided using the one third of the surplus.

23. The Employer has agreed to meet all of the costs arising in connection with the refund of surplus.

The Regulator's position

24. The Regulator's case team is of the view that the power should be exercised in the manner sought by the Trustee having regard to the following:-
- a. that members' benefits accrued under the Scheme have been bought out in full;
 - b. that an augmentation has already been effected in connection with the buyout;
 - c. the reasons for the surplus having arisen;
 - d. the proposal to use any surplus returned to the Employer to meet the future cost of providing defined contribution benefits to the former final salary Scheme members at their current rates.
25. Subsequent to their original comments, the Regulator's case team has also drawn to the Panel's attention the fact that, if the application is refused, this may serve *"to discourage employers of schemes with similar rules from agreeing recovery plans that fund those schemes to above the level of the technical provisions on the basis that they may give rise to the risk that a non-returnable surplus is generated"*. The Regulator's case team acknowledges, however, that the Panel's decision may be specific to the rules of this particular Scheme.

Additional information

26. The Panel requested additional information from the Parties on 24 April 2013 including in respect of the following matters:
- a. The effect of Rule 19, including Rule 19(iii) of the Scheme rules;
 - b. A breakdown of the assets and liabilities of the Scheme;
 - c. Details of the Trustee and any roles or interests they may have in the Employer;
 - d. The additional benefits accruing to the members of the Scheme if the Order is made and any additional risks to members if the Order were to be made;
 - e. Representations on the effect of section 70(1)(b) of the 1995 Act.
 - f. Whether all liabilities of the Scheme had been discharged;
27. In response and in summary, the Trustee provided further information including that:-
- a. The buy out quotation accepted by the Trustee on 19 January 2011 secured members' benefits in full and included an augmentation in respect of the majority of Scheme members. No specific comment was made by the Trustee as regards the effect of Rule 19(iii);

- b. Wind up expenses are the only liability to be deducted from the surplus, currently estimated to be £540,000 (allowing for the cost of wind up);
 - c. The current directors of the Trustee have roles in the Employer, including as Financial Controller and Finance Director;
 - d. One third of the surplus assets would further augment benefits beyond that currently provided for as part of the buy out and the two thirds returned to the Employer would be used to provide enhanced benefits for former final salary Scheme members. As the benefits of all Scheme members have been bought out in full and, in most cases, benefits in excess of the entitlement of the Scheme rules have been secured. On this basis the Trustee stated that there is no foreseeable risk that members would not get, as a minimum, their full Scheme entitlement;
 - e. Legal advice obtained by the Trustee indicates that the only other method by which surplus could be returned to the Employer would be under the doctrine of “resulting trust” which is likely to be unduly complex and protracted;
 - f. The Trustee is satisfied that all benefits have been secured as part of the buy out;
28. Having reviewed the responses of the Parties, the Panel wrote to the parties again on 12 June 2013 explaining its initial view that the obligations arising under Rule 19(iii) of the Scheme rules create “liabilities of the Scheme” in the terms provided for in s.69(3)(b) of the Act and seeking the Parties’ representations on this initial view. The Panel also asked for more information on matters relevant to the points set out at para 27 b., d., and f. above.

Reasons for decision

29. In making its decision the Panel had regard to the objectives of the Regulator as set out in Section 5 of the Act and to the matters mentioned in Section 100 of the Act.
30. The Panel considered the terms of s.69 of the 1995 Act and noted that it required a number of requirements to be satisfied before the Panel could exercise its power under s.69(1) to make the order requested in this application. In particular the Panel had to determine:
- (i) Is the Scheme an occupational pension scheme (other than a public service pension scheme) and is it registered under section 153 of the Finance Act 2004?
 - (ii) Is the Scheme being wound up?
 - (iii) Is the order required to enable the assets remaining after the liabilities of the scheme have been fully discharged to be distributed to the Employer;
 - (iv) Have the prescribed requirements in relation to the distribution to the Employer referred to in s. 69(3)(b) been satisfied?

- (v) Can the purposes for which the order is sought be achieved otherwise than by means of the order and if so, is the procedure required to do so liable to be unduly complex or protracted or, does it involve the obtaining of consents which cannot be obtained or can only be obtained with undue delay or difficulty?
31. The Panel considered on the basis of the evidence before it and the submissions from the Parties that the Scheme is an occupational pension scheme (other than a public service pension scheme), it is registered under section 153 of the Finance Act 2004 and it is being wound up.
32. The Panel noted that an Order may be required to enable distribution of the assets to the Employer because of the provision at clause 18(c) of the trust deed, which contains an express prohibition on the payment of any part of the assets of the Scheme to the Employer. However, the Panel considered that the Warning Notice and the evidence submitted with it did not adequately address the issue of whether the order requested would have the effect of enabling the assets remaining after the liabilities of the scheme have been fully discharged to be distributed to the Employer. The Panel felt unable to assess what assets would remain after the liabilities of the Scheme had been discharged. For this reason the Panel sought further representations and information from the Parties, as described in paragraphs 26 and 27 above.
33. Having reviewed the representations and information provided by the Parties the Panel remained concerned that it did not have sufficient information to understand what assets would remain after the Scheme had entered into an agreement to buy out the liabilities to the members and then completed the winding up of the Scheme. The Panel was also concerned that the Trustee and the Employer had not taken account of the effect of Rule 19(iii) of the Scheme rules in considering whether this Rule created liabilities that fell within the ambit of s.69(3)(b) of the 1995 Act.
34. Rule 19 of the Scheme rules expressly provides for the distribution of the assets of the Scheme where the Scheme is to be wound up. Rules 19(a)(i) and (ii) provide in some detail for the assets of the Scheme to be used to meet all of the costs, charges and expenses of the Scheme and to pay or secure the payment of all benefits due to the Members at the date of winding up and to secure the payment of future benefits to the Members. Rule 19(a)(iii) provides for the use of any balance remaining after the trustees have complied with the provisions of Rules 19(a)(i) and (ii) and states:

“Any balance remaining thereafter shall be applied to increase the benefits conferred upon the Members or other persons under this Rule in such a manner as the Trustee may decide (provided that any such augmentation of benefits of an individual to or in respect of whom a lump

sum benefit has already been paid, whether in commutation of pension or otherwise, shall be in the form of non-commutable pension only)."

35. An order under s.69 of the 1995 Act is intended to provide a means for overcoming the effect of a provision such as Clause 18(c) in a pension trust deed. However, in this case the Panel has also to understand and assess the effect of Rule 19(iii) before it could decide whether to make the order requested and determine the terms on in which any such order might take effect.
36. The Panel noted that there is no general definition of the phrase "liabilities of the scheme" in the 1995 Act, although it is used on a number of occasions (see s.73(1), 73A(2)(a), s.73B(6)(d), s.74(6)(b), s.75(2), (4) and s.76(3)(a)).
37. The Panel took the initial view that the phrase "liabilities of the scheme" in the Act should have its ordinary meaning. The Panel informed the Parties of its initial view on this point and explained that the effect of this interpretation is that the Trustee is required to use any surplus on a winding up to augment the benefits of members and other persons, whilst retaining discretion under Rule 19(a)(iii) as to how it achieves this purpose. The Parties were invited to respond to the initial view of the Panel on this point. The Trustee responded stating:-

"It is our view that the Determinations Panel's statement that the obligation to distribute surplus assets remaining in the Scheme is "properly describable as part of the "liabilities of the Scheme"" is too broad an interpretation. There is a clear distinction between a payment made to settle an existing obligation or "liability" and a payment made, even if under an obligation, to someone who has no pre-existing entitlement to receive any identifiable amount. We do not think it is consistent with the ordinary use of language to describe a potential "entitlement" of a beneficiary to participate in the distribution of surplus assets as a "liability" of the Scheme.

To expand on this further, the word "liability" itself supposes that there is a pre-existing creditor, with an entitlement to payment of a monetary amount which he can enforce. That is not the case here. The only entitlement from the Scheme which a member can enforce is the entitlement to his basic pension benefits as determined under the Scheme rules. No member has an entitlement to all or any part of any assets which remain once pension and benefit liabilities have been secured.

It is clear to the Trustee that, under the Scheme rules, the surplus on winding-up is to be payable to such beneficiaries as the Trustee may decide and the Schemes' rules cannot be amended to permit payments to the employer. In addition, the Schemes' amendment power contains a specific restriction, which reflects the conditions for tax approval when the Scheme was established, specifically preventing amendments to

permit payments to the employer. There are no express provisions under the Scheme which permit repayments of surplus assets to the employer on an ongoing basis or where the Scheme is in wind up. In our view it is precisely these circumstances which fall within the scope of section 69, and confer upon the Regulator a discretion, which we accept must be carefully considered before exercise, to modify a scheme which is being wound up to permit remaining assets to be paid to the employer.”

38. The Regulator’s case team did not comment on the proper construction of the 1995 Act or the Scheme rules. Instead it outlined the potential wider implication of the decision that the Panel may make (- see paragraph **25** above).
39. The Panel considered the responses from the Parties and reviewed the position and decided that, as a matter of ordinary English and legal authority, the word ‘liability’ means ‘under an obligation at law’. None of the provisions of the Act require the phrase to be given a different meaning. The Panel therefore remained of the view that, on the evidence and arguments before it, Rule 19(a)(iii) places the Trustee under an obligation at law to distribute any surplus on winding up to members or other persons mentioned in Rule 19. While it is in their discretion how they do so, the Trustee is obliged to distribute the surplus to those persons, and that obligation is enforceable by a Court. It is therefore in the view of the Panel properly describable as a “liability of the scheme”. The liability under Rule 19(a)(iii) therefore falls within the meaning of the phrase “liabilities of the scheme” in s.69(3)(b).
40. The effect of determining that Rule 19(a)(iii) creates “liabilities of the scheme” is that there is uncertainty about the effect of the order requested in the Warning Notice. It is not clear to the Panel whether there will be any assets remaining after the liabilities of the Scheme have been fully discharged that can be distributed to the Employer. The Panel remains concerned that it has not been provided with definitive information about the assets and liabilities of the Scheme or about the complexity or otherwise of alternative means of achieving the same purpose. The Panel notes that clause 20 of the Trust Deed provides for limits on the benefits that may be provided to Members. These limits may have the effect of limiting the augmentation that may be made under the provisions of Rule 19 (iii).
41. In all of the circumstances of this case, the Panel determined that the order sought in this application could not be made on the basis of the information provided. The onus was on the Trustee in applying for the order to establish that the proper basis existed under sections 69 and 70 of the 1995 Act for the Panel to make the order requested in the Warning Notice. The Panel concluded that the Warning Notice and the supplementary information provided by the Trustee and the Regulator’s case team did not provide a sufficient basis for the making of an order under s.69(1)(a) or (b).

42. It is open to the Trustee to submit a new application with additional information should it wish to do so in the future.

Rights of appeal

43. **Appendix 1** to this Determination Notice contains important information about the rights of appeal of the Directly Affected Parties against this decision.

Signed:

Chairman: Peter Hinchliffe
Dated: 26 July 2013

Referral to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”)

You have the right to refer the matter to which this Determination Notice relates to the Tribunal. Under Section 103 of the Pensions Act 2004 (“the Act”) you have 28 days from the date this Determination Notice is given to refer the matter to the Tribunal or such other period as specified in the Tribunal rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Determination Notice. The Tribunal’s address is:

The Tax and Chancery Chamber of the Upper Tribunal
45 Bedford Square
London
WC1B 3DN
Tel: 020 7612 9700

The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act and the Tribunal Rules.

You should note that the Tribunal Rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the reference notice to The Pensions Regulator. Any copy reference notice should be sent to:

Determinations Panel Support
The Pensions Regulator,
Napier House
Trafalgar Place
Brighton
BN1 4DW
Tel: 01273 811852