

Scheme: Data Factors Executive Pension Scheme	
To:	Mr Brian Patrick Bernstein
Of:	XXXXX XXXXXXXXXX XXX XXXX
To:	Mr S Bernstein
Of:	XXXXXXXXXX XXXXX XXXXX
To:	Mrs Yvonne Bernstein
Of:	XXXXXXXXXX XXXXXXXXXXXXXXXXXX XXXXXX XXXXXX
To:	James Hay Pension Trustees Limited
Of:	XXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXX XXXXXX XXXXXX
Date:	22 June 2006

TAKE NOTICE that the Pensions Regulator of Napier House, Trafalgar Place, Brighton BN1 4DW (“The Regulator”) has made a determination on **21 June 2006**

1.	Determination
1.1	Brian Patrick Bernstein and Spencer Bernstein have applied to the Pensions Regulator for notice in writing waiving their disqualification to act as trustees in respect of the Data Factors Executive Pension Scheme, pursuant to section 29(5)(a) of the Pensions Act 1995 (as amended by the Pensions Act 2004) .

1.2	The waiver of disqualification was refused in respect of both Mr Brian Patrick Bernstein and Mr Spencer Bernstein in relation to the Data Factors Executive Pension Scheme.
------------	---

2.	Procedure Followed: Standard								
2.1	By its Warning Notice dated 23 May 2006 (“the Warning Notice”) the Pensions Regulator gave notice that it proposed to take the above action pursuant to the application of Mr Brian Patrick Bernstein and Mr Spencer Bernstein.								
2.2	<p>The Regulator determined that the following parties are directly affected by this determination:</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 40%;">1. Brian Patrick Bernstein</td> <td>In his role as a member, former trustee and applicant.</td> </tr> <tr> <td>2. Spencer Bernstein</td> <td>In his role as a member, former trustee and applicant.</td> </tr> <tr> <td>3. Yvonne Bernstein</td> <td>In her role as a member and current individual trustee.</td> </tr> <tr> <td>4. James Hay Pension Trustees Limited</td> <td>In its role as the independent trustee for the scheme.</td> </tr> </table> <p>(collectively referred to as “the directly affected parties”)</p> <p>These directly affected parties were entitled to make representations to the Pensions Regulator about the determination.</p>	1. Brian Patrick Bernstein	In his role as a member, former trustee and applicant.	2. Spencer Bernstein	In his role as a member, former trustee and applicant.	3. Yvonne Bernstein	In her role as a member and current individual trustee.	4. James Hay Pension Trustees Limited	In its role as the independent trustee for the scheme.
1. Brian Patrick Bernstein	In his role as a member, former trustee and applicant.								
2. Spencer Bernstein	In his role as a member, former trustee and applicant.								
3. Yvonne Bernstein	In her role as a member and current individual trustee.								
4. James Hay Pension Trustees Limited	In its role as the independent trustee for the scheme.								
2.3	Following the issue of the Warning Notice none of the directly affected parties exercised their right to make representations to the Pensions Regulator.								

3.	Relevant Statutory Provisions/Legislation
	<p>The following statutory provisions are relevant to this matter:</p> <p>Section 29(1) of the Pensions Act 1995 (as amended) states that: “(1) Subject to subsection (5), a person is disqualified for being a trustee of any trust scheme if – (f) he is subject to a disqualification order or disqualification undertaking under the Company Directors Disqualification Act 1986 to a disqualification order under Part II of the Companies (Northern Ireland) Order 1989 or disqualification undertaking under the Company Directors Disqualification (Northern Ireland) Order 2002 or to an order made under section 429(2)(b) of the Insolvency Act 1986 (failure to pay under county court administration</p>

order).”

Section 29(5) of the Pensions Act 1995 (as amended) states that:
“(5)The Authority may, on the application of any person disqualified under this section –

- (a) give notice in writing to him waiving his disqualification, either generally or in relation to a particular scheme or particular description of schemes.”

Section 30(1) of the Pensions Act 1995 (as amended) states that:
“(1) Where a person who is a trustee of a trust scheme becomes disqualified under section 29 in

- relation to the scheme, his becoming so disqualified has the effect of removing him as a trustee.”

Section 5(1) of the Pensions Act 2004 Act states that:

“(1) The main objectives of the Regulator in exercising its functions are –

- (a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes ...
- (d) to promote, and to improve understanding of, the good administration of work-based pension schemes.”

Section 5(1) Regulator’s objectives

(1) The main objectives of the Regulator in exercising its functions are –

- (a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,
- (b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),
- (c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (see Part 2), and
- (d) to promote, and to improve understanding of, the good administration of work-based pension schemes.

(2) For the purpose of subsection (1)(b) the members of personal pension schemes within this subsection are-

- (a) the members who are employees in respect of whom direct payment arrangements exist, and
- (b) where the scheme is a stakeholder pension scheme, any other members.

Section 100 of the Pensions Act 2004 – Duty to have regard to the interests of members etc

“(1) The Regulator must have regard to the matters mentioned in subsection

(2) –

- (a) when determining whether to exercise a regulatory function –
 - (i) in a case where the requirements of the standard or special procedure apply, or
 - (ii) on a review under section 99, and
- (b) when exercising the regulatory function in question.

(2) Those matters are –

- (a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and
- (b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.”

Section 6(1) of the Company Directors Disqualification Act 1986 states that:
“(1) The court shall make a disqualification order against a person in any case where, on application under this section, it is satisfied -

- (a) that he is or has been a director of a company which has at any time become insolvent
(whether while he was a director or subsequently), and
- (b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company.”

Section 6(4) of the Company Directors Disqualification Act 1986 states that:
“(4) Under this section the minimum period of disqualification is 2 years and the maximum period is 15 years.”

Section 7(1) of the Company Directors Disqualification Act 1986 states that:
“(1) If it appears to the Secretary of State that it is expedient in the public interest that a disqualification order under section 6 should be made against any person, an application for the making of such an order against that person may be made –

- (a) by the Secretary of State, or
- (b) if the Secretary of State so directs in the case of a person who is or has been a director of a company which is being or has been wound up by the court in England and Wales, by the official receiver.”

Section 7(2)(A) of the Company Directors Disqualification Act 1986 states that:

“(2A) If it appears to the Secretary of State that the conditions mentioned in section 6(1) are satisfied as respects any person who has offered to give him a disqualification undertaking, he may accept the undertaking if it appears to him that it is expedient in the public interest that he should do so (instead of applying, or proceeding with an application, for a disqualification order).”

Section 7(3) of the Company Directors Disqualification Act 1986 states that:
“(3) If it appears to the office-holder responsible under this section, that is to say –

- (a) in the case of a company which is being wound up by the court in England and Wales, the official receiver,
- (b) in the case of a company which is being wound up otherwise, the liquidator,
- (c) in the case of a company which is in administration, the administrator, or
- (d) in the case of a company of which there is an administrative receiver, that receiver,

	<p>that the conditions mentioned in section 6(1) are satisfied as respects a person who is or has been a director of that company, the office-holder shall forthwith report the matter to the Secretary of State.”</p>
--	--

4.	Background to the Application
	<ol style="list-style-type: none"> 1. The Data Factors Executive Pension Scheme, a small work-based occupational pension arrangement, was established by a Definitive Trust Deed on 28 May 1996 by the Principal Employer, Data Factors Limited. 2. The Principal Employer appointed James Hay Pension Trustees Limited together with Brian Patrick Bernstein, Yvonne Bernstein and Spencer Bernstein to be the first named trustees of the scheme. 3. The Principal Employer went into voluntary liquidation on 17 July 2002. On 23 July 2002, Martin John Atkins of Harris Lipman was appointed as Liquidator. 4. This is a small family pension scheme with only three deferred members; Brian Patrick Bernstein, Yvonne Bernstein and Spencer Bernstein. 5. The Actuarial Report on the review of the scheme as at 31 August 2004 stated the value of the fund as being £109,788. 6. On the 22 August 2005 Brian Patrick Bernstein and Spencer Bernstein were both disqualified under section 7 of the Company Directors Disqualification Act 1986 from acting as a director of a company. The Disqualified Directors Register states that Spencer Bernstein was disqualified from acting as a director of a company for a period of two years from 22 August 2005 to 21 August 2007 and Brian Patrick Bernstein for a period of three years from 22 August 2005 to 21 August 2008. This meant that both men were automatically disqualified from acting as a trustee pursuant to sections 29 and 30 of the Pensions Act 1995 (as amended) which automatically disqualifies a person from acting as a trustee if they are subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986. 7. On 7 September 2005, Brian Patrick Bernstein made an application to the Regulator requesting that his disqualification, and that of Spencer Bernstein, to act as trustees be waived by the Regulator. This letter stated that each of them had given an undertaking to the Department of Trade and Industry (DTI) that they would not act as company directors for three years in the case of Brian Patrick Bernstein and two years in the case of Spencer Bernstein. Regrettably, and despite a number of reminders sent to the current addresses given for both Mr B P Bernstein and Mr S Bernstein, neither applicant responded to requests for a copy

of their undertaking given to the DTI. The specific reasons given for their disqualification to act as company directors remain unknown to the Regulator.

8. On 3 October 2005 and 24 November 2005 Mr B P Bernstein gave his reasons in writing why his disqualification to act as a trustee should be waived. In summary these were:
 - i. he had reached pensionable age and stated on 3 October 2005: *“As I am one of those eligible to now draw a pension, it is crucial that I am freely able to influence the way this takes place”*;
 - ii. he maintained that, despite giving the undertaking not to act as a director, he had done nothing wrong;
 - iii. on 24 November 2005 he wrote: *“Firstly, the rules of the scheme require that all members are Trustees. If I am ineligible to be a Trustee, it would appear that I lose my rights to my portion of the fund.”*
9. On 3 October 2005 and 29 November 2005 Mr S Bernstein gave reasons in writing why his disqualification to act as a trustee should be waived. In summary these were:
 - i. he was not eligible to draw a pension and therefore it was “imperative” that he had some influence on the changes to the scheme in terms of investments and pension drawings;
 - ii. he maintained that, despite giving the undertaking not to act as a director, he had done nothing wrong;
 - iii. he maintained that the rules of the scheme required that all members be trustees and that if he was ineligible to be a trustee he would lose his rights to the pension accumulated which seemed to him neither fair nor appropriate.
10. In a letter dated 11 November 2005, Mrs Y Bernstein a member and continuing individual trustee of the scheme, confirmed that she had no objection to Mr B P Bernstein and Mr S Bernstein being given written notice waiving their disqualification to act as a trustee. She also confirmed that neither Mr B P Bernstein nor Mr S Bernstein had acted as a trustee since their disqualification.
11. Neither Mr B P Bernstein nor Mr S Bernstein appear to have been removed as signatories to the trustee bank account following their disqualification to act as a trustee. However, James Hay Pension Trustees Limited, the scheme’s appointed independent trustee, confirmed that there had been no transactions on the scheme account since their disqualification, nor had there been any instances where they had formally acted as trustees.
12. The scheme documents provided showed no provision that there should be a minimum number of trustees in place to properly administer the scheme. A trustee was defined in the scheme rules as *“the Trustees or Trustee for the time being of the Scheme,”* and this suggested that Mrs Y

	<p>Bernstein and James Hay Pension Trustees Limited, the two current trustees were sufficient in number to properly administer the scheme.</p> <p>13. The power to remove and appoint new trustees was transferred from the Principal Employer to the trustees of the scheme by Deed of Amendment dated 4 September 2000.</p>
--	---

5.	Facts and Matters Relied Upon
	<p>Having considered all the relevant statutory provisions, including s100 of the Pensions Act 2004, and all the evidence provided, the Determinations Panel refused to waive the disqualification of Mr Brian Bernstein and Mr Spencer Bernstein as trustees of the Data Factors Executive Pension Scheme. The following was of significance in relation to this decision:</p> <ul style="list-style-type: none"> • Mr Brian Bernstein and Mr Spencer Bernstein had failed to inform James Hay Pension Trustees Limited that they had been disqualified • Neither Mr Brian Bernstein or Mr Spencer Bernstein had provided the Regulator with a copy of their undertaking to the DTI not to act as company directors for the specific periods of their disqualification. This was despite a number of reminders from the Pensions Regulator • Mr Brian Bernstein had stated that he had reached pensionable age and it was crucial he was freely able to influence the way his pension was drawn down. This was factually incorrect • Disqualification under the Company Directors Disqualification Act 1986 was a serious matter <p>The Panel noted that there were sufficient trustees to manage the scheme.</p>

6.	Conclusion: Details of Determination
	<ol style="list-style-type: none"> 1. That the application to waive the disqualification of Mr Brian Patrick Bernstein from being a trustee of the Data Factors Executive Pension Scheme only, under s29(5)(a) of the Pensions Act 1995, was refused. 2. That the application to waive the disqualification of Mr Spencer Bernstein from being a trustee of the Data Factors Executive Pension Scheme only, under s29(5)(a) of the Pensions Act 1995, was refused.

7.	Decision Maker
	<p>The determination which gave rise to the obligation to give this Determination Notice was made by the Determinations Panel.</p>

8. Scheme details	
Name of scheme	Data Factors Executive Pension Scheme
Type of scheme	defined contribution
Status of scheme	Not identified
Membership	Three deferred members
Size of fund	£ 109,788 as at 31 August 2004
Contracted in/out	Not contracted out

9. Scheme trustees			
	Name	Period of office	Status of trustee
1.	James Hay Pension Trustees Limited	From 28.05.96 to present	Corporate independent trustee
2.	Brian Patrick Bernstein	From 28.05.96 to 22.08.05	Individual, removed automatically following disqualification
3.	Yvonne Bernstein	From 28.05.96 to present	Individual
4.	Spencer Bernstein	From 28.05.96 to 22.08.05	Individual, removed automatically following disqualification

10. Scheme advisers				
	Type	Name	Period of office	Company
1.	Actuary	D O Downie	Not stated	James Hay Consultancy

11. Employer details	
Name	Data Factors Limited (in liquidation)
Address	c/o Liquidator, M J Atkins, Harris Lipman, 2 Mountview Court, 310 Friern Barnet Lane, Whetstone, London N20 0YZ
Nature of business	Software consultancy & supply
Number of employees	Not known
Company Registered Number	02428374
Current Status	Creditors Voluntary Liquidation

12. Important Notices	
	This Determination Notice is given to you under sections 96(2)(d) of the Act. The following statutory rights are important.

13. Referral to the Pensions Regulator Tribunal	
---	--

13.1	<p>You have the right to refer the matter to which this Determination Notice relates to the Pensions Regulator Tribunal (“the Tribunal”). Under section 103(1)(b) of the Act you have 28 days from the date this Determination Notice is given to you 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: 15-19 Bedford Avenue, London WC1B 3AS (tel: 020 7612 9649). The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act and The Pensions Regulator Tribunal Rules 2005 (SI 2005/690).</p>
15.2	<p>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 Support at The Pensions Regulator, Napier House, Trafalgar Place, Brighton BN1 4DW.</p>

<p>Signed: <i>Daniel Taylor</i></p> <p>Chairman: Daniel Taylor.....</p> <p>Date: 22 June 2006</p>
