

	<p>DETERMINATION NOTICE under section 96(2)(d) of the Pensions Act 2004 (“the Act”)</p> <p>B.S.E. Genex Company Limited Staff Insurance Scheme (the Scheme)</p>	<p>The Pensions Regulator case ref:</p> <p>TM2626</p>
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1. The Determinations Panel (the Panel) met on 21 January 2008 to decide whether to exercise a reserved regulatory function in relation to the issues in the Warning Notice dated 6 September 2007. The Pensions Regulator (the Regulator) considered under section 10(2) of the Pensions Act 2004 (the Act) that the exercise of a reserved regulatory function was appropriate.
2. The function the Panel was asked to exercise on behalf of the Regulator was the application made by the trustees of the Scheme for an order to be issued authorising the wind up of this Scheme under section 11(1)(c) of the Pensions Act 1995 on the grounds that it is necessary in order to protect the interests of the generality of the members of the Scheme that it be wound up.
3. The Warning Notice specified the following parties as being directly affected by the regulatory action outlined in the Warning Notice:
 - (a) Genex Trade Limited (the Employer),
 - (b) Mr Azmat Ali (individual trustee),
 - (c) Mr Zeljko Popovic (individual trustee),
 - (d) Miss Tiha Franulovic (individual trustee).

A copy of the Warning Notice had been sent to these directly affected parties.

An interim Notice was sent out to all parties on 17 December 2007 and further information was received from the Regulator in response to this Notice. In retrospect the Regulator considered that the Pensions Protection Fund should have been a directly affected party in this case and had forwarded the Warning Notice and exhibits to it.

4. The Panel granted the application for an order to be issued under section 11(1)(c) of the Pensions Act 1995 authorising the Scheme to be wound up under the following terms:

that the B.S.E. Genex Company Limited Staff Insurance Scheme commence wind up proceedings within three months of the 18 February 2008 in accordance with section 96(5)(a) of the Act;

the order is made because the Regulator is satisfied that it is necessary in order to protect the interests of the generality of the members of the Scheme that it be wound up pursuant to section 11(1)(c) of the Pensions Act 1995. In accordance with section 11(4) of the Pensions Act 1995, the Regulator authorises that the Scheme be wound up subject to the following provisions:

- the Scheme be wound up in accordance with the provisions of sections 73-75 of the Pensions Act 1995 (as modified by the Occupational Pension Schemes (Winding Up) Regulations 1996) and any relevant provision of those regulations, or such other statutory provisions and regulations as may be in force from time to time and may be applicable to the winding up of the Scheme.
5. In making the determination the Panel took into account the evidence and submissions included in the Warning Notice. They also took into account the Regulator's response to the Interim Notice dated 17 December 2007. There was no other submission or evidence placed before the Panel and there was no evidence in dispute.
 6. This is a closed, defined benefit scheme with 25 members (16 deferred and 9 pensioners) and as at 1 July 2006 the Scheme was 68% funded to Pensions Protection Fund (PPF) level. The Scheme was established on 1 April 1971 by an interim Trust Deed.
 7. On 14 June 2007 Mr Azmat Ali, for and on behalf of the trustees, applied to the Regulator requesting that a wind up order be granted. In support of the application was a letter of advice from the trustees' legal adviser dated 25 August 2005 stating that the Regulator had the power to wind up the Scheme under section 11 of the Pensions Act 1995 if it was satisfied that it was necessary in order to protect the interests of the generality of the scheme members. The Regulator therefore took the view that the application was being submitted under this ground.
 8. Winding up could only be triggered by the Employer giving notice to the trustees that it is terminating its liability to pay contributions to the Scheme. Rule 4.18 of the Scheme rules gives power to the Employer to wind up the Scheme. There is no alternative power expressed or implied which allows the trustees to put the Scheme into wind up.
 9. The Employer is currently listed as active but is due to be struck off and the trustees are therefore concerned to protect members' interests. The Registrar of Companies has agreed to suspend striking off the Employer until January 2008 at the request of the trustees. The trustees made the request in order that the Regulator may consider this application.

10. A letter to the Regulator from Mr Ali dated 30 January 2006 advised that the Employer had *“refused to respond to repeated requests from the trustees for a continuation of financial support to the Scheme. The Employer is assetless. The trustees are therefore of the opinion that the Scheme no longer has a sponsoring Employer as Genex Trade Limited appears to have abandoned it.”*
11. The Regulator contacted the Employer and received a response dated 5 July 2006 which stated that the company had been *“at rest for a number of years, with no business activities and no funds”*. This letter also advised that *“the mother (parent) company ‘Generalexport’ is undergoing the process of privatization, being in a difficult financial position, its accounts being blocked for months and therefore unable to settle its own debts or the debts of its foreign offices.”*
12. A copy of the schedule of contributions commencing 24 June 2005 was provided by Mr Ali. This had only been signed by the trustees and stated that the Employer and trustees failed to agree a contribution rate.
13. The Panel originally heard this case on 17 December 2007 but adjourned making a decision and requested further information from the Regulator. An interim Notice dated 17 December 2007 was sent to all directly affected parties. Following receipt of this Notice the Regulator provided further information in relation to the following points:
 - the manner and timing of any order that might be made;
 - whether the Pensions Protection Fund was a directly affected party;
 - whether a Financial Support Direction had been considered by the Pensions Regulator against the ultimate parent company.
14. The Panel reconvened on 21 January 2008 following the response from the Regulator. The statutory provisions set out in the Warning Notice were considered by the Panel. In making their decision the Panel also 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, as set out in Appendix 1.
15. The reasons given by the Panel for their decision were as follows:
 - (a) if the Scheme is wound up the section 75 debt can be calculated and formal insolvency proceedings brought against the Employer;
 - (b) if the Scheme was to enter the PPF, member benefits would be secured to PPF levels. However, in order for the Scheme to enter a PPF assessment period an insolvency event will need to occur in respect of the Employer. The winding up provisions of the Scheme did not permit the trustees to put the Scheme into wind up;
 - (c) it is therefore in the interests of the generality of the members of the Scheme that it is wound up in order to protect members’ entitlements.

16. Appendix 2 to this Determination Notice contains important information about the rights of appeal of the parties against this decision.

Signed: **Daniel Taylor**

Chairman: Daniel Taylor

Dated: 25 January 2008.....

Section 5 of the Pensions Act 2004
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 purposes 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.
- (3) In this section-
- “stakeholder pension scheme” means a personal pension scheme, which is or has been registered under section 2 of the Welfare Reform and Pensions Act 1999 (c.30)(register of stakeholder schemes);
- “work-based pension scheme” means-
- (a) an occupational pension scheme,
 - (b) a personal pensions scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, or
 - (c) a stakeholder pension scheme.

Section 100 of 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
 - (i) 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.

Referral to the Pensions Regulator Tribunal

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:

The Pensions Regulator Tribunal
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 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 Support
The Pensions Regulator,
Napier House
Trafalgar Place
Brighton
BN1 4DW.
Tel: 01273 627698