



An tÚdarás Pinsean
The Pensions Authority

THE PENSIONS AUTHORITY

**PRESCRIBED GUIDANCE IN RELATION TO
SECTION 47 OF THE PENSIONS ACT, 1990**

UNSECURED UNDERTAKING GUIDANCE

VERSION 01

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INTRODUCTION

- 1.1. Section 47 of the Pensions Act, 1990 (the **Act**) (as amended by Section 32 of the Social Welfare and Pensions Act 2012) provides that in respect of any calculation made for the purposes of Part IV of the Act, the resources or investments of a relevant scheme on any date to which such calculation relates shall exclude resources or investments of a prescribed type or in excess of a prescribed percentage within a prescribed class or description of resources or investments.
- 1.2. Section 47 further provides that regulations may prescribe guidance issued by any person (including the Pensions Authority or the Minister) which trustees must comply with when determining whether or not resources or investments shall be included for the purposes of any calculation for the purposes of Part IV of the Act.
- 1.3. The Occupational Pension Schemes (Funding Standard) Regulations, 1993 to 2009 (as amended or replaced, the **Regulations**) will provide that in determining whether or not resources or investments shall be included for the purposes of any calculation made for the purposes of Part IV of the Act, trustees shall comply with the guidance issued by the Pensions Authority in relation to including certain resources or investments. This guidance and the general contingent asset guidance separately issued by the Pensions Authority is the guidance which will be referred to in the Regulations.
- 1.4. As this guidance will be specified by Regulations made under Section 7A of the Act, it cannot be altered by the Pensions Authority without the prior consent of the Minister. Any such alterations will be effective when such consent has been given and with effect from the date specified in the alteration and details will be published by the Pensions Authority as soon as reasonably practicable after the Minister has given that consent.
- 1.5. Sections referred to in this guidance are to sections of the Act. Terms used in this guidance but not defined in this guidance have the meanings given in the Act or the Regulations. The following terms have the following meanings.

“covenantor” means the entity which gives an unsecured undertaking.

“investment grade rating” shall be construed in accordance with paragraph 3.

“principal employer” in relation to a scheme means the employer who undertakes the role of principal employer for the purposes of the scheme’s approval by the Revenue Commissioners under Chapter 1 of Part 30 of the Taxes Consolidation Act, 1997 and any other employer participating in the scheme which, if its liability to contribute to the scheme is terminated, will permit or require the trustees to wind-up the scheme (whether or not any such winding up then occurs).

“secured undertaking” means an undertaking to make a payment for which security has been

provided but, where the amount of the undertaking is greater than the value of the security provided, the undertaking shall only be regarded as a secured undertaking up to the value of the security provided.

“undertaking” is a promise made by a person which involves an obligation on that person to act in accordance with the promise, which obligation can be legally enforced against that person.

"unsecured undertaking" means

- (a) an undertaking which is not a secured undertaking, or
- (b) where security has been provided but its value is less than the amount of the undertaking, an undertaking to the extent that security has not been provided.

2. GENERAL

- 2.1. An unsecured undertaking to make a payment to a scheme by any company, person or firm can only be included as a resource for the purpose of determining if a scheme satisfies the funding standard reserve in accordance with section 44(2) of the Act to the extent and in the circumstances set out in this guidance.
- 2.2. The trustees must have agreed to accept an unsecured undertaking from a covenantor before it can be included as part of the resources of a scheme for the purpose of satisfying the funding standard reserve. As well as being satisfied that any unsecured undertaking complies with the terms of this guidance, the trustees need to be satisfied that agreeing to accept the unsecured undertaking is in compliance with their fiduciary duties.
- 2.3. This guidance sets out minimum requirements which an unsecured undertaking must comply with before it can be accepted by trustees. Bearing in mind their fiduciary duties, trustees may impose additional requirements. As well as complying with the specific requirements set out in this guidance and when considering accepting an unsecured undertaking and its terms
 - 2.3.1. trustees must bear in mind that the circumstances in which payments may become due under the unsecured undertaking may include circumstances in which the covenantor will be under significant financial stress, in which case it may not be able to make all or part of the payment required under the unsecured undertaking, and
 - 2.3.2. trustees should consider the ranking of any payments due under the unsecured undertaking in the event of an insolvency event occurring in relation to the covenantor and whether or not it would be appropriate to obtain security over the assets of the covenantor.
- 2.4. The acceptance by trustees of an unsecured undertaking and compliance with the terms of the

Act and this guidance is a matter for the trustees. The trustees must have obtained all appropriate professional advice, both legal and financial, so as to satisfy themselves as to the availability and enforcement of the unsecured undertaking and compliance with this guidance. It is a matter for trustees to satisfy themselves on these matters and the Pensions Authority will not be involved in the approval of unsecured undertakings. In addition, compliance with this guidance should not be construed as a warranty or confirmation by the Pensions Authority that the acceptance of the unsecured undertaking is appropriate, adequate or suitable in the circumstances of the scheme. This is a matter for the trustees of the scheme. However, the Pensions Authority reserves the right from time to time to request such information as it may decide in relation to the unsecured undertaking including copies of any legal or financial advice and evidence of the investment grade rating of the covenantor.

3. **INVESTMENT GRADE RATING**

The covenantor giving the unsecured undertaking must have an investment grade credit rating for its long-term and non credit-enhanced debt obligations of A or higher by Standard & Poor's Rating Services (or a comparable rating from an internationally recognised rating agency). Trustees must have satisfied themselves that the covenantor holds that rating on any date on which the unsecured undertaking is to be used for the purposes of determining whether the scheme satisfies the funding standard reserve and have confirmed this fact to the actuary.

4. **AMOUNT OF UNDERTAKING**

The amount of the unsecured undertaking must be stated in the undertaking. It can be stated as being

- 4.1. a fixed amount,
- 4.2. a fixed amount subject to a maximum of the funding standard reserve from time to time, or
- 4.3. the amount of the funding standard reserve from time to time.

An unsecured undertaking complying with this guidance can be included as a resource for funding standard reserve purposes for its face value.

5. **AVAILABILITY OF UNDERTAKING**

- 5.1. The unsecured undertaking must be available as a resource of the scheme and capable of enforcement until it has been terminated in accordance with its terms and those terms must, at a minimum, comply with this paragraph 5.
- 5.2. Except where paragraph 6.2 below applies, the unsecured undertaking must not at any time be capable of termination by the covenantor (in whole or in part)

- 5.2.1. without the written consent of the trustees, or
- 5.2.2. without giving the trustees written notice expiring no earlier than three years after the effective date of the funding standard reserve certificate which next follows the date of the notice

unless the actuary has certified that the scheme satisfies the funding standard reserve without taking account of the unsecured undertaking on the date the unsecured undertaking is to terminate. Trustees who are considering permitting a covenantor to wholly or partly terminate an unsecured undertaking on lesser notice than that set out in paragraph 5.2.2 need to bear in mind that the unsecured undertaking is a resource of the scheme and they should only do so if they are satisfied that to do is in compliance with their fiduciary duties.

- 5.3. Where the trustees are on notice that an unsecured undertaking will terminate in whole or in part then, with effect from the date on which the trustees are put on notice, the unsecured undertaking (or the part being terminated) cannot be included as a resource of the scheme for the purposes of determining whether or not the scheme satisfies the funding standard reserve.

6. ENFORCEABILITY OF UNDERTAKING

- 6.1. The unsecured undertaking must be capable of enforcement by the trustees in at least the following circumstances
 - 6.1.1. the scheme commencing to wind-up,
 - 6.1.2. the covenantor having a receiver appointed over any of its assets, having an examiner appointed in respect of it, going into liquidation or, if it is a person, being declared bankrupt or entering into an arrangement with his or her creditors or, if a partnership, the partnership being dissolved or any partner being declared bankrupt or entering into an arrangement with his or her creditors,
 - 6.1.3. if any act or event occurs which permits or requires the trustees to wind-up the scheme (whether or not a winding up occurs),
 - 6.1.4. the principal employer having a receiver appointed over any of its assets, having an examiner appointed in respect of it, going into liquidation or, if it is a person, being declared bankrupt or entering into an arrangement with his or her creditors or, if it is a partnership, the partnership being dissolved or any partner being declared bankrupt or entering into an arrangement with his or her creditors,
 - 6.1.5. the failure by any employer participating in the scheme to pay contributions due to the scheme within no more than 30 days of the due date, and

6.1.6. the covenantor ceasing to carry on business.

References above to receivership, examinership, liquidation, bankruptcy and arrangements with creditors include analogous or comparable processes in a country other than Ireland.

6.2. The terms of an unsecured undertaking can provide that it will not be enforced to the extent that

6.2.1. the amount of the unsecured undertaking is paid to the scheme,

6.2.2. a secured undertaking, complying with the terms of the general contingent asset guidance issued by the Pensions Authority, is put in place, or

6.2.3. a new unsecured undertaking, complying with terms of this guidance, is put in place.

The original unsecured undertaking must continue to be capable of enforcement to the extent that its value has not been so paid or it has not been replaced.

6.3. The unsecured undertaking must provide that the covenantor will immediately notify the trustees if it ceases to have a credit rating of at least that required under paragraph 3 or if its credit rating has been placed on review for a possible downgrading. However, this obligation does not relieve the trustees from verifying that the credit rating of the covenantor giving the unsecured undertaking, on the date it is to be taken account of for the purposes of determining whether or not the scheme satisfies the funding standard reserve, complies with paragraph 3.

6.4. Where an unsecured undertaking has been included as a resource for the purposes of determining whether or not a scheme satisfies the funding standard reserve, it must continue to be enforceable unless and until it is terminated in accordance with its terms notwithstanding that, following a rating downgrade or the covenantor ceasing to have a credit rating, it can no longer be taken into account as a resource of the scheme for the purposes of determining whether or not the scheme satisfies the funding standard reserve.

6.5. An unsecured undertaking must be capable of enforcement for its full value

6.5.1. notwithstanding that, at the date of enforcement, the scheme satisfies the funding standard or that the amount of the unsecured undertaking is greater than any funding standard deficit within the scheme,

6.5.2. until the notice expires, during any period in which the trustees are on notice that the unsecured undertaking will terminate as described in paragraph 5, or

6.5.3. until the unsecured undertaking is terminated in accordance with its terms, where paragraph 6.4 applies.

