

SCOTTISH PARLIAMENTARY PENSIONS ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part B Fund Trustees

45. Part B of Schedule 1 replaces Part B and Schedule 1 of the 1999 pensions order and sets out rules covering Fund trustees who will replace the SPCB, as managers of the Pension Fund. The rules cover the detail relating to the functions, appointment and duties of the Fund trustees.
46. To allow for a smooth transition from the SPCB, the provisions to appoint Fund trustees are brought into force on Royal Assent to allow the first trustees to be appointed. Section 1 of the Act (paragraphs 22-25) applies the new rules to the scheme and transfers the SPCB's functions, rights, liabilities and obligations to the Fund trustees. That conferral of powers and responsibilities on the Fund trustees comes into force on the first day of the first month following the date which occurs six months after Royal Assent.. Until that time, the SPCB continues to administer the Pension Fund in accordance with the 1999 pensions order.

Rule 4: Fund trustees

47. Rule 4 allows only individuals to be appointed and hold office as Fund trustees.

Rule 5: Functions

48. Rule 5 makes clear that the principal function of the Fund trustees is to administer the Pension Fund and to manage and apply its assets under the rules.
49. In Scots law, and as pension scheme trustees, the Fund trustees have additional functions and obligations in exercising their functions at common law and under a wide range of statutory provision, including UK legislation relating to occupational pension schemes.

Rule 6: Number of trustees

50. Under rule 6 there are to be between 3 and 6 Fund trustees. That rule is, however, subject to rule 13 which permits the maximum number to be exceeded in specified circumstances (see paragraphs 73-75).

Rule 7: Eligibility

51. This rule prevents any individual from being or becoming a Fund trustee where they are prevented under any law from holding that position. This specifically includes section 29 of the 1995 Act which contains provisions that disqualify a person from being a pension scheme trustee. The provisions relate to persons with unspent convictions for an offence involving dishonesty or deception, un-discharged bankrupts, anyone who

*These notes relate to the Scottish Parliamentary Pensions Act 2009 (asp 1)
which received Royal Assent on 25 February 2009*

has granted a trust deed for creditors or anyone disqualified from acting as a company director.

52. Any Fund trustee who becomes barred under these provisions is removed automatically from being a trustee without the application of any further formal procedure for removal (rule 11), and any person who purports to be a trustee while disqualified is subject to criminal penalties in terms of section 30 of the 1995 Act.

Rule 8: Appointment of Fund trustees

53. Rule 8 provides a procedure for the appointment of Fund trustees.
54. Under rule 8(1) it is for the Parliament to appoint all Fund trustees by resolution. They must be individuals nominated by the SPCB, and determined by the SPCB as suitable to hold office. There is no bar on a person who has previously been a Fund trustee from being re-appointed. It is expected that the Parliament will wish to consider whether any further provision to supplement the rule is required to be included within Standing Orders.
55. Before deciding who to nominate, the SPCB is required by rule 8(2)(a) to do its best to ensure that there is a participating member and a scheme pensioner among the Fund trustees. A participating member is defined in rule 109 and includes an MSP or one of the law officers who is not an MSP. The expectation is that there will always be at least one participating member as a Fund trustee but the formulation recognises only persons willing to serve will be nominated.
56. When putting forward nominations for Fund trustees, the SPCB is also required by rule 8(2)(b) to have regard to any recommendations made by serving Fund trustees.
57. Under rule 8(3), appointments as Fund trustees have immediate effect unless the Parliament otherwise provides in terms of the resolution making the appointment. This could apply, for example, where the SPCB and the Parliament become aware that a serving Fund trustee will be demitting office during a forthcoming recess period. Any appointment of a new Fund trustee to replace that person could be made to take effect from the future departure date to avoid breaching the restriction on fund trustee numbers in terms of rule 6.
58. The Court of Session has power to appoint new trustees at common law and in a variety of circumstances under the [Trusts \(Scotland\) Act 1921 \(c.58\)](#). Rule 8(4) restricts these powers by permitting the Court only to appoint new Fund trustees in the very limited circumstances where a sole trustee wishes to resign and applies to the court to appoint new trustees under section 19(2). Such an application is only likely to be required as a last resort given the Parliament's powers to appoint new Fund trustees. The provision is necessary because rule 10(3) would otherwise prevent the resignation of a sole trustee in all circumstances.
59. In a similar way to rule 8(4), rule 8(5) disapplies the powers which the Fund trustees would otherwise have to assume new trustees under section 3(b) of the Trust (Scotland) Act 1921 and, ensures that apart from the limited exception provided in rule 8(4), only the Parliament will be able to appoint Fund trustees.

Rule 9: Remuneration, allowances and expenses

60. Rule 9 makes provision for the payment of expenses to all Fund trustees and for payment of remuneration and allowances to certain Fund trustees, subject to certain conditions being met.
61. Rule 9(1) relates to the payment of remuneration or allowances to Fund trustees. Under condition 1, Fund trustees who have at any time been scheme members are excluded from receiving remuneration or allowances for carrying out their duties.

62. Under condition 2 (in respect of a Fund trustee who meets the first condition), the other Fund trustees, if any, must recommend to the SPCB before appointment is made that the nominee should be remunerated or entitled to allowances. Under condition 3, the SPCB must specify when making a nomination to the Parliament that remuneration and allowances are to be paid, thus giving the Parliament an opportunity to determine the appropriateness or otherwise of payment.
63. Rule 9(2) provides that expenses properly incurred by the Fund trustees in connection with their duties as trustees are to be reimbursed from the Pension Fund. This covers all Fund trustees and not just those who receive remuneration or allowances. The cost of any indemnity insurance (see rule 18) is one example of an expense covered by this rule.

Rule 10: Resignation

64. Fund trustees may, unless they are a sole trustee, resign at any time and rule 10 sets out the procedure.
65. Under Rule 10(1), a Fund trustee must give notice of resignation to the Presiding Officer and other Fund trustees. No specific period of notice is specified, but the terms of rule 108 apply to such a notice and as a formal communication it should be in writing. Once a resignation has been made to the Presiding Officer and at the same time to the other Fund trustees in terms of subsection (2), it has immediate effect. It is expected that the Parliament will wish to consider whether any further provision to supplement the rule is required within Standing Orders, for example requiring intimation of resignation in the Business Bulletin.
66. Rule 10(3) prevents a sole trustee from resigning under this rule. This avoids there being no Fund trustees in post. This provision has to be read with rule 8(4) which allows resignation of a sole trustee only by application to the Court of Session under section 19(2) of the [Trusts \(Scotland\) Act 1921 \(c.58\)](#). The sole trustee can resign once the Court appoints new Fund trustees in terms of section 3 of that Act.

Rule 11: Removal

67. Rule 11 makes provision for the circumstances in which a Fund trustee is removed from office. The Parliament appoints all Fund trustees and can, by resolution, vote to remove them for any reason and at any time. Under Rule 11(3), any resolution to remove a Fund trustee, if not unanimous, must be supported by at least two-thirds of the MSPs who vote.
68. Removal is automatic in the circumstances set out in rule 11(1)(b) where a Fund trustee becomes disqualified (see rule 7 and paragraphs 52-53 of these notes). Rule 11(c) covers removal following a change in the status of the Fund trustee, where the Fund Trustee's tenure automatically comes to an end six months after the change takes effect (see rule 12 and paragraphs 70-72 of these notes).

Rule 12: Change of status

69. Under rule 8(2), the SPCB must do its best to ensure that there is at least one participating member or scheme pensioner included in the Fund trustees. Fund trustees may therefore be appointed partly because of their status as a scheme member or scheme pensioner. Any change in status affects the balance of trustees as does changing status from deferred to scheme member or scheme pensioner. Rule 12 makes provision for any change in status to be notified to the Presiding Officer and other Fund trustees and for the affected Fund trustee's tenure to come to an end unless the Parliament resolves otherwise. This allows consideration to be given to the change in balance of the composition of the Fund trustees.
70. Rule 12(1) sets out the changes of status of Fund trustees which require to be notified. Rule 12(1)(a) covers a participating member leaving the scheme by opting out or by

leaving or losing office under age 65 and becoming a deferred pensioner or, if over 65 or taking early retirement, a scheme pensioner. In addition, any participating member approaching age 75 will, by virtue of the operation of the new rules, convert to a deferred or scheme pensioner. Rule 12(1)(b) applies where a deferred pensioner becomes a participating member on re-election or becomes a scheme pensioner at age 65. It also applies where the deferred pensioner opts to transfer their benefits to another pension scheme and all rights to all scheme benefits are extinguished by virtue of a payment being made to another pension scheme under rule 80. Rule 12(1)(c) applies where a scheme pensioner becomes an MSP or the holder of a qualifying office and has their pension suspended under rule 41.

71. There is no obligation to give prior notice in anticipation of a change in status. However, when a change set out in rule 12(1) takes place, the Fund trustee concerned must, under rule 12(2)(a), give notice to that effect to the other Fund trustees and the Presiding Officer. Under rule 12(2)(b) their tenure of office ceases six months after their status changes unless the Parliament resolves otherwise.

Rule 13: Member-nominated trustees

72. Section 241 of the Pensions Act 2004 requires that at least one-third of the total number of Fund trustees are member-nominated trustees. Member-nominated trustees are trustees who are nominated as a result of a process in which all active and pensioner members of a pension scheme can participate or are represented by an organisation representing their rights.
73. Rule 13 makes the necessary provision for member-nominated trustees.
74. The rule at (a) requires the SPCB to put forward to the Parliament any individual nominated as a Fund trustee who the Fund trustees recommend for the purpose of fulfilling their obligations to secure member nominated trustees under section 241. Part (b) disapplies the provisions of rule 6 which restricts the maximum number of Fund trustees holding office where the appointment is made to ensure that the minimum number of one-third member-nominated trustees is reached.

Rule 14: Procedure

75. Rule 14 allows the Fund Trustees to regulate the procedures that they follow in administering the Pension Fund in so far as this is not otherwise regulated by the scheme rules.

Rule 15: Quorum

76. Rule 15 sets a quorum for meetings of the Fund trustees at a minimum of three unless there are fewer than three holding post, in which case all must be present.

Rule 16: Staff and advisers

77. Rule 16 provides the Fund trustees with the authority to employ staff and to seek advice from any other person. The rule supplements the powers and requirements placed on trustees to appoint professional advisers (scheme auditor, actuary and fund manager) under section 47 of the 1995 Act.
78. The power in this rule could be used to appoint staff to undertake the day-to-day administration of the pension scheme. The Fund trustees can set the terms of appointment as they see fit. The rule also allows the Fund trustees to seek advice from specialist advisers, for example medical specialists, in relation to health conditions and prognosis.

Rule 17: Fund management

79. Section 47(2) of the 1995 Act requires every occupational pension scheme whose assets include investments to appoint an individual or a firm to act as fund manager on behalf of the trustees. Under section 34 of that Act, while trustees (subject to restrictions imposed by any scheme) may make investments as if they were absolutely entitled to the scheme assets, they may also delegate decisions about investments to their fund managers. Section 34(4) of that Act relieves the Fund trustees from responsibilities in relation to the fund managers' performance, provided they have satisfied themselves that the person appointed has the appropriate knowledge and experience, is carrying out work competently and complies with the investment principles for the scheme.
80. Under rule 17, the Fund trustees must monitor the performance of the fund manager so that they may satisfy themselves in terms of their responsibilities in relation to the delegation of their authority to make investments.

Rule 18: Indemnity insurance

81. The Fund trustees are restricted by their fiduciary duties from using the fund for personal gain. Rule 18 loosens the restriction to the extent that it permits the Fund trustees to purchase insurance indemnifying them against personal liability claims in connection with their performance of their functions. The cost of the insurance premium to that extent becomes an allowable charge to be met by the Fund as a consequence of this rule.

Rule 19: Delegation

82. Rule 19 permits the Fund trustees to authorise any person, including one or more of the Fund trustees to act on behalf of them all. Their actions are limited to the extent given in the authorisation, which does not need to be in writing.
83. An authorisation does not exempt the Fund trustees from responsibility that would otherwise fall upon them for the delegated task unless that exemption is otherwise provided in law (see paragraph 80 of these notes for such an example). They must, therefore, be satisfied that those authorised have the ability to undertake the task delegated. Likewise it does not prevent them from carrying out a function themselves which was previously delegated.

Rule 20: Validity of acts

84. Rule 20(1) ensures that decisions, authorisations and acts of the Fund trustees are not invalidated by defective appointments, changes in those holding the office of Fund trustee or in the event that there are fewer than three trustees holding office.
85. Rule 20(2) allows the Fund trustees to vary or revoke decisions made by or authorisations granted by previous Fund trustees. That power is not applicable in relation to decisions which have the effect of reducing scheme benefits to any person, unless the decision is made under other scheme rules. It would not, however, prevent a change where the new decision increases benefits.
86. This rule generally prevents Fund trustees from reversing discretionary decisions made by their predecessors. For example, a decision to allow a scheme member to purchase added years could not be unilaterally revoked by the Fund trustees. Similarly, an initial decision to award an ill-health pension could not be reversed. However, the scheme provides for a subsequent review of these benefits and the pension could be reduced or revoked under these provisions at a later stage because that would constitute a new decision using other rules.