

SCOTTISH PARLIAMENTARY PENSIONS ACT 2009

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Non-Executive Bills Unit on behalf of Alasdair Morgan MSP, convener of the Scottish Parliamentary Pension Scheme Committee (“the Committee”). They have been prepared in order to assist the reader of the Act and to help inform Parliamentary debate. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

GLOSSARY OF TERMS AND STATUTES USED IN THE NOTES

3. When the following abbreviated expressions are used throughout these notes their full citation is as shown below. In some places, to assist the reader, the full phrase or title is used.

“the 1993 Act”	The Pension Schemes Act 1993 (c.48).
“the 1995 Act”	The Pensions Act 1995 (c.26).
“the 1998 Act”	The Scotland Act 1998 (c.46).
“the 1999 Act”	The Welfare Reform and Pensions Act 1999 (c. 30).
“the 1999 pensions order”	The Scotland Act 1998 (Transitory and Transitional Provisions) (Scottish Parliamentary Pension Scheme) Order 1999 (No. 1082).
“the Finance Act 2004”	The Finance Act 2004 (c.12).
“the Pensions Act 2004”	The Pensions Act 2004 (c.35).
“Annual Allowance”	The HMRC limit which sets the maximum value of benefits that an individual is allowed to accrue annually tax-free from contributions to registered pension schemes. The annual allowance provisions are in sections 227-238 of the Finance Act 2004 and the limit for 2007-8 is £225,000.
“AVC scheme”	The facility for additional pension savings and benefits which are available through the additional voluntary contribution part of the

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

scheme (previously there was a statutory requirement for occupational schemes to have an additional voluntary contribution facility in terms of section 111 of the Pension Schemes Act 1993, now repealed). The rules in respect of the AVC scheme are set out in Part R and Schedule 6 of the 1999 pensions order.

- “the Civil Partnership Act”** The Civil Partnership Act 2004 (c.33)
- “FM/PO scheme”** The separate pension scheme for the First Minister and Presiding Officer established by the 1999 pensions order.
- “HMRC”** Her Majesty’s Revenue and Customs.
- “Lifetime Allowance”** The HMRC limit which sets the maximum value of benefits that an individual is allowed to accrue tax-free from registered pension schemes in the course of their lifetime. The lifetime allowance provisions are in sections 214-226 of the Finance Act 2004 and the limit for 2008/09 is £1.65 million.
- “new rules day”** The first day of the first month following the date which occurs six months after Royal Assent. (see section 5(3) of the Act).
- “new scheme rules”** The rules contained in Schedule 1 to the Act.
- “office-holder”** Holders of pensionable offices, defined in rule 22(2) of Schedule 1 to the Act, as that of Presiding Officer, deputy Presiding Officer, one of the Scottish Ministers (this includes the First Minister, Ministers appointed under section 47 of the 1998 Act, the Lord Advocate and the Solicitor General for Scotland) or junior Scottish Ministers (appointed under section 49 of the 1998 Act).
- “participating members”** The participating MSP members and office-holder members as defined in Rule 109 of Schedule 1 to the Act. See also “deferred pensioners” and “scheme pensioners”, also defined in rule 109, who together with participating members form the different categories of members of the scheme.
- “SPCB”** Scottish Parliamentary Corporate Body.
- “SSRB”** Senior Salaries Review Board.
- “the Committee”** Scottish Parliamentary Pension Scheme Committee.
- “the Grants Order”** The Scotland Act 1998 (Transitory and Transitional Provisions) (Grants to Members and Officeholders) Order 1999 (No. 1081).
- “the Pension Fund”** The Scottish Parliamentary Contributory Pension Fund that was established by article B1 of the 1999 pensions order.
- “the report”** Report by the Scottish Parliamentary Pension Scheme Committee published on 29 May 2008, (1st Report 2008, SP Paper 103) which contained its recommendations and draft Act.

“the scheme” or “the SPPS” The existing Scottish Parliamentary Pension Scheme established by and the rules of which are contained within the 1999 pensions order.

SUMMARY AND BACKGROUND TO THE ACT

4. In 1998 the SSRB was asked to make recommendations on appropriate pension arrangements for MSPs and holders of offices connected to the Parliament. Its priority was to arrive at arrangements which would conform to current good practice and take account of the uncertainties of parliamentary life. The SSRB concluded that the Parliamentary Contributory Pension Scheme,¹ the occupational pension scheme for the UK Parliament MPs and office-holders, should be taken as the model scheme. Based on this recommendation, a scheme for MSPs and office-holders was established on 6 May 1999 by the 1999 pensions order. This is the Scottish Parliamentary Pension Scheme as defined in section 4 of the Act. The 1999 pensions order also established a separate pension scheme, the FM/PO scheme, which was based on the arrangements made by the UK Parliament for the Prime Minister, Speaker and Lord Chancellor (see Parliamentary and other Pensions Act 1987 (c.45)).

5. The SSRB report in November 1998 also covered resettlement grants, ill-health retirement grants and severance arrangements. It recommended that the Scottish Parliament have similar provisions to those at the UK Parliament. The recommendations were followed and the arrangements were also made under a transitional order; the Grants Order.

6. Under section 81(3) of the 1998 Act, the Parliament can make provision for payment of pensions and gratuities in respect of persons covered by the 1999 pensions order and the Grants Order. Under section 81(5) of the 1998 Act such provision is either by resolution conferring functions on the Scottish Parliamentary Corporate Body (“SPCB”) or by an Act of the Scottish Parliament. Continuing the current scheme and updating the scheme rules by resolution is not possible given some of the changes required and the legal status of the 1999 pensions order. Primary legislation is required to update the current rules.

7. The SPCB is responsible for the management and administration of the scheme. The SPCB agreed on 13 June 2007 that, as a result of UK legislative changes, it was necessary to amend the scheme rules contained in the 1999 pensions order. The SPCB asked the Parliamentary Bureau to consider the matter and it proposed that a bill committee be established to develop proposals for a committee bill for consideration by the Parliament. The Parliamentary Bureau recommendation and the Committee remit were agreed by the Parliament on 27 June 2007 and extended on 28 November 2007. The Committee therefore examined the scheme, the FM/PO scheme and the Grants Order.

8. This Act is as a result of a Committee bill (i.e. a bill initiated by a Parliamentary committee under Rule 9.15 of the Parliament’s standing orders). The Bill resulted from the Scottish Parliamentary Pension Scheme Committee’s inquiry and a draft was contained in the report.

¹ S.I. 1993/3253

LEGISLATIVE CHANGES

9. Since 1999 there have been a number of significant legislative changes at a UK level which have affected all pension schemes. The Finance Act 2004 and the Pensions Act 2004 transformed the legal environment in which pensions schemes operate in the UK, necessitating changes to the rules in the 1999 pensions order.

10. In addition there have been a number of general legislative changes which affect occupational pension schemes, with the major ones being as follows—

- the 1999 Act which introduced pension sharing on divorce, where ex-spouses can get membership of a scheme in their own right or a transfer value from the scheme; and
- the new status of civil partner introduced by the Civil Partnership Act.

11. The Finance Act 2004 set out a new, simplified tax regime for registered pension schemes. Historically, tax-approved pension schemes have had to comply with tax rules in order to benefit from tax advantages, for example an exemption from tax on the pension fund's investment income and from capital gains; tax relief on member and employer contributions, and tax-free lump sums on retirement (although pensions in payment are subject to income tax).

12. The Finance Act 2004 replaced the eight then existing taxation regimes with a single set of rules, introduced on 6 April 2006. While there has been a relaxation of some of the tax limits previously imposed, the general principle remains that for a scheme to benefit from the preferential tax treatment it should remain within the tax rules.²

13. The 1999 pensions order as currently constituted must be read subject to the general transitional arrangements made under the Finance Act 2004. These arrangements are expected to expire in April 2011 and, if not replaced, would create uncertainty about how parts of the 1999 pensions order comply with tax rules.

The Committee

14. On 17 October 2007 the Committee published a consultation document and invited comment from MSPs, former MSPs and interested outside bodies on issues to be considered when developing proposals for a replacement for the 1999 pensions order and the Grants Order. The consultation paper was also published on the Scottish Parliament website. The closing date for responses was 17 January 2008.

15. The consultation sought views on a number of areas.

16. These covered **mandatory changes** required to maintain compliance with other legislative changes (pension sharing on divorce, age 75 taxation rules and minimum pension age taxation rules).

² Finance Act 2004, sections 165-168

17. **Discretionary changes** mainly linked to changes in the taxation regime following the Finance Act 2004 in areas such as:-

- Contribution limits
- Maximum pension available
- Amount of tax-free lump sum on retirement
- Amount of death in service gratuity
- Children's pension provision
- Additional voluntary contributions and added years
- Trivial commutation of pension benefits
- Ill-health provisions.

18. Other **discretionary** areas of possible change included age and other equality issues around early retirement, refund of contributions, loss of surviving spouse pension on re-marriage or cohabitation and unmarried partners.

19. Further **possible changes** covered by the consultation document included scheme administration, the rate at which pension accrued, changes to the FM/PO scheme and the Grants Order.

The Committee report

20. The Committee report was published on 29 May and the proposal for a Committee bill was agreed by the Parliament after debate on 26 June 2008. The report made recommendations in all the areas mentioned in paragraphs 17-20 and had attached to it a draft Bill containing a revised set of rules to replace the scheme rules in the 1999 pensions order; provisions to continue with modification the FM/PO scheme rules in the 1999 pensions order; and rules to replace those in the Grants Order.

Commentary on sections

Section 1 Scottish Parliamentary Pension Scheme

21. Section 1(1) of the Act continues the existing scheme while introducing new rules in Schedule 1 to govern it.

22. The SPCB is at present responsible for the management and administration of the scheme. This responsibility includes control and management of the Pension Fund which was established by article B1 of the 1999 pensions order, which vested the Pension Fund in the SPCB.

23. Subsection (2) transfers the Pension Fund and the SPCB's rights, liabilities and obligations in relation to the Pension Fund to Fund trustees to be appointed under the new rules (see Schedule 1 Part B). The transfer takes effect on the day section 1(2) comes into force, which in terms of section 5(3) is on the first day of the first month following the date which occurs six months after Royal Assent.

24. Subsection (3) introduces Schedule 3 which makes other transitional provisions and savings in respect of the 1999 pensions order in specific circumstances (see paragraph 486 onwards).

Section 2: Grants payable on leaving office

25. Section 2 of the Act introduces Schedule 2 which sets out the circumstances in which the SPCB is required to pay grants to individuals after they have ceased to serve as MSPs or have stood down from certain positions as office-holders. As the Schedule makes provision for the payment of gratuities made in accordance with section 81(3) of the 1998 Act, it replaces the Grants Order (see article 2 of the Grants Order which states that it will cease to apply on the making of such provision).

Section 3: Modification of pension schemes etc.

26. The detail of the scheme rules will inevitably require amendment to reflect changes in pension law and also any policy changes. An ability to amend pensions and gratuity provisions in the future without using primary legislation is therefore desirable and reflects section 81(5) of the 1998 Act, which allows for provision on pensions and gratuities to be made by resolution.

27. Section 3 of the Act makes provision for the Parliament by resolution to modify the scheme, the grants scheme set out in Schedule 2 and the FM/PO scheme. The Standing Orders of the Scottish Parliament govern the procedures for motions and resolutions and it is expected that Parliament will consider whether they require to be amended to provide any special procedure for these resolutions.

28. Subsection (1) includes provision for modifications to be made to the scheme by resolution. As the AVC scheme forms part of the scheme the AVC scheme rules saved and modified by paragraph 19 of Schedule 3 can also be amended by such a resolution. Subsection (1) also includes provision for modifications to be made to the FM/PO scheme. The FM/PO scheme is continued in the Act at paragraph 21 of Schedule 3 only in relation to any individual who is or has been a First Minister or Presiding Officer on or before new rules day. The continued FM/PO scheme may need to be amended in future to keep provisions in line with changes to general pensions law.

29. Subsection (2) sets out what can be modified by resolution. The power covers the new scheme rules (Schedule 1), the new grants rules (Schedule 2) and the transitional and savings provisions (Schedule 3). Subsection (2)(c) also makes provision for modification of the 1999 pensions order. In terms of article A3 of the 1999 pensions order, the order ceases to apply when the new scheme rules come into force. However Schedule 3 of the Act continues certain articles within the 1999 pensions order. Paragraphs 2, 5, 9, 18, 19 and 21 make provision for specific rules to continue in force and paragraph 22 makes a general provision continuing any rules that are needed to give effect to the provisions specifically saved by the Schedule (see paragraph 486 onwards).

30. Subsection (3) provides that a resolution under section 3 may make different provision for different purposes. The subsection also provides for provisions to have

retrospective effect if required. This is a power generally available for pension schemes, allowing changes in benefits to be made to reflect the start of general legislative changes.

31. As the new rules are contained in primary legislation, amendments must be accessible. Subsection (4) makes provision for the publication of any resolution that is subsequently passed by the Parliament to be treated as if it were a Scottish statutory instrument and allows the Queens Printer for Scotland to publish the resolution. This provision is similar to a provision contained in the Interests of Members of the Scottish Parliament Act 2006 (asp 12) which allowed modification by resolution to provisions within the Schedule to that Act.

Section 4: Interpretation

32. Section 4 contains definitions of four terms that are used throughout the Act. All have been referred to already in these notes.

Section 5: Commencement

33. Section 5 provides for two distinct commencement dates. Subsection (1) provides for a number of provisions to come into force on Royal Assent but only for limited purposes. The limited purposes enable the appointment of trustees and allow participating scheme members to be able to make choices in relation to the level of their scheme member contributions which will apply from the date the remainder of the new scheme rules come into force. The provisions coming into force on the day of Royal Assent are:

- sections 4 and 6 which contain definitions of expressions and the Act's short title;
- section 5;
- rules 4 and 8 to 11 of schedule 1 which provide for the appointment, conditions, remuneration, resignation and removal of Fund trustees; and
- paragraph 1 of schedule 3 in relation to to definition of terms in that schedule; paragraph 4 of schedule 3 in relation to the provisions for scheme members determining what level of contributions they wish to make from the date the new scheme rules come into force; and paragraph 9 of the schedule in relation to the special provisions for participants who reach age 75 between Royal assent and new rules day.

34. Subsection (2) brings section 3 into force on Royal Assent. That section makes provision for modification of the scheme rules, the grants rules, the transitional and saving provisions and the 1999 pensions order. Therefore these provisions could be amended before the general coming-into-force day although the resolution modification power under section 3 is subject to a restriction that, until the remainder of the Act comes into force, only a member of the SPCB may move such a resolution.

35. By virtue of subsection (3) the remainder of the Act comes into force on the first day of the first month following the date which occurs six months after Royal Assent.

SCHEDULE 1

PART A THE PENSION FUND

36. Part B of the 1999 pensions order established the Fund for the purposes of the scheme set out in that order. The Fund is part of the Scottish Parliamentary Pension Scheme as defined in section 4 of the Act and governed in accordance with the rules of the scheme as set out in Schedule 1 to the Act. Most sums payable under and received by the scheme are paid out of and into the Fund (with the exception of AVC contributions).

37. Under the 1999 pensions order, the Fund is vested in and administered by the SPCB (as set out in Schedule 1 to the order). Contributions are made to it by participants and from the SPCB paying scheme sponsor or “employer”³ contributions from the Scottish Consolidated Fund.

Rule 2: The Pension Fund

38. Rule 2 defines “the Pension Fund”, as the Scottish Parliamentary Contributory Pension Fund; which is the Fund established by article B1 of the 1999 pensions order.

Rule 3: Payments to and from Fund

39. Rule 3 makes provision for payments to be made out of and into the Pension Fund. This rule provides the general authority for such payments to be made but is supplemented by provisions relating to AVCs in paragraph 19 of Schedule 3. The scheme is a funded scheme. That is, over the course of its lifetime, the amount paid into the Pension Fund by way of contributions from the scheme members and the SPCB as the ‘employer’ or scheme sponsor, together with investment returns, is intended to be sufficient to meet all payments due from the scheme.

40. Rule 3(1)(a) provides that all pensions and lump sums payable from the scheme will be made from the Pension Fund. Generally, these are pensions to former MSPs or to the surviving partner or any children of the MSP and lump sum amounts on retirement or death (all as set out in the rules).

41. Rule 3(1)(b) enables the Fund trustees to make other payments which are payable by them under the scheme from the Pension Fund. For example, administration costs of the trustees in running the scheme and authorised payments to be made insofar as these fall within the rules in Part B of Schedule 1 to the Act. It also covers payments such as transfers of sums of money out of the Pension Fund under Part N; pension sharing arrangements under Part P; taxes under Part R; and any other payments to be made under the scheme.

³ Despite MSPs’ status as office-holders rather than employees, some references are made in these notes to “employer” or “employee” where the terms are more illustrative for referring to pension schemes.

42. Rule 3(2) provides that the Fund trustees must pay all sums that they receive under the scheme into the Pension Fund. This includes all scheme member contributions (see Part D of schedule 1) and any investment returns.

43. By virtue of paragraph 19(2) of Schedule 3, rule 3 does not apply to benefits payable and contributions received under the Additional Voluntary Contribution (AVC) scheme. The AVC scheme was established under the 1999 pensions order (Part R and schedule 6) and provides for additional pension taken in the form of an annuity purchased with the accrued sum at retirement.

44. The AVC scheme established under the 1999 pensions order will continue to have effect and any agreed AVC contracts continue to operate. However, no individual may become a contributor, and no transfers may be made to the AVC scheme, after new rules day. Schedule 3 also vests rights and functions etc in the Fund trustees from the SPCB (paragraph 19(1)(a)) (see paragraphs 544-554). It will be for the Fund trustees to decide how to manage the existing contractual payments from the AVC contributors to the AVC provider.

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 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) disappplies 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.

PART C PARTICIPATING MEMBERS

87. Part C of Schedule 1 sets out rules covering who is entitled to participate in the pension scheme as an MSP and office-holder at any given time, together with rules on how an MSP or office-holder may opt-out of or opt-in to the scheme. These rules replace the rules contained at Part C of the 1999 pensions order.

88. The term “participating member” is defined in rule 109 to include the participating MSP members and office-holder members. It should be noted that there are other categories containing individuals who remain as members of the scheme in a different capacity. These are deferred pensioners and scheme pensioners, also defined in rule 109, who are members of the scheme but not “participating members”.

Rule 21: MSP members

89. Rule 21 provides that every serving MSP under age 75 is automatically a participating member of the pension scheme as an “MSP member”, unless the MSP opts out (see rule 23 for the MSP opt-out).

90. On reaching age 75, individuals no longer qualify for tax relief in relation to pension scheme membership available under the Finance Act 2004. At that age serving MSPs are excluded from participating membership and cease to make contributions. Their pension rights are frozen in that they do not accrue further reckonable service and their pension becomes payable only when they cease to be an MSP (see Part F). Other rights in relation to commutation for a lump sum and death benefits are covered at Parts G and K.

91. Under rule 30, an MSP member stops making scheme member contributions from their salary when they obtain sufficient reckonable service as an MSP to entitle them to the maximum annual MSP pension. The figure takes into account the salary of an MSP, office-holder or the aggregate of both. A serving MSP excused from making contributions from their salary as they have reached the limit of their annual MSP pension cap remains a “participating member” in terms of this rule.

Rule 22: Office-holder members

92. Rule 22 makes provision for the membership of the pension scheme of pensionable office-holders. On reaching age 75, serving office-holders can no longer be “participating members” and cease to make contributions. Their pension rights are frozen in that they do not accrue further reckonable service and their pension becomes payable only when they cease to be either an MSP or hold a pensionable office (see Part F). Other rights in relation to commutation for a lump sum and death benefits are covered at Parts G and K.

93. Rule 22(1) provides that every individual aged under 75 holding a pensionable office is a participating member of the pension scheme as an “office-holder member”, unless the individual opts out (see rule 24 for the office-holder opt-out).

94. The pensionable offices, which are defined in rule 22(2), are that of Presiding Officer, deputy Presiding Officer, one of the Scottish Ministers (this includes the First Minister, Ministers appointed under section 47 of the 1998 Act, the Lord Advocate and the Solicitor General for Scotland) or junior Scottish Ministers (appointed under section 49 of the 1998 Act). Section 44 of the 1998 Act makes provision for the composition of the Scottish Executive and for the members of the Scottish Executive to be referred to collectively as the “Scottish Ministers”.

95. Altered pension arrangements are made for First Ministers and Presiding Officers. The previous separate pension entitlement granted to them under Part S of the 1999 pensions order is not repeated in the Act for future holders of such offices. However, existing and former First Ministers and Presiding Officers continue to qualify under the separate arrangements (see paragraph 21 of Schedule 3). Therefore, corresponding transitional provision is made in paragraph 3 of Schedule 3 to exclude such individuals from also being office-holder members in the funded scheme. See paragraph 492.

Rule 23: MSP opt-out

96. Rule 23 permits any participating member to opt-out of the scheme as a participant by notification in writing (see rule 108) to the Fund trustees.

97. This rule further provides that an MSP who is an office-holder member may opt-out of the pension scheme as an office-holder member while remaining in it as an MSP member but not vice versa. This is because the office-holder pension is an addition to the MSP pension and not a separate pension in itself.

98. Members may opt out of the scheme at any time but where they opt out within three months of first being elected as an MSP, rule 23(2) provides refund provisions. Such members will be treated as never having been scheme members either as MSPs or office-holders and any contributions paid by the member will be refunded.

99. Where an MSP chooses to opt out within three months of an election and has previously accrued pension rights under the scheme, no refund of contributions can be made. The new period of scheme membership to the date of their opting out will be added

to their earlier period. Such members are excluded by the terms of the Finance Act 2004 from receiving a refund of contributions and rule 23(2) therefore refers to “first being elected”.

100. Rule 23(3) applies to members who opt out of participating membership more than three months after being elected or re-elected. Upon receiving notice of the MSP opt-out, the Fund trustees will determine a date for the termination of the MSP membership to the scheme. That date is to be as soon as is practically possible, which is likely to be the end of the period covered by the payment of the last contribution deducted from the MSPs salary.

Rule 24: Office-holder opt-out

101. Rule 24 makes provisions for office-holder members to opt-out of the pension scheme as office-holder members by giving notice in writing (see rule 108) to the Fund trustees.

102. If an office-holder member opts out within three months of being appointed to a relevant office, rule 24(2) provides that the office-holder will be treated as never having been an office-holder member since their appointment. Any contributions paid by the office-holder since being appointed will be refunded.

103. Rule 24(3) applies to qualifying office-holders who opt out of office-holder membership after more than three months of being appointed. Upon receiving notice of the office-holder opt-out, the Fund trustees will determine a date for the termination of the office-holder membership to the scheme. That date is to be as soon as is practically possible, which is likely to be the end of the period covered by the payment of the last contribution deducted from the office-holder’s salary.

Rule 25: MSP opt-in

104. If an individual who has opted out of the scheme is subsequently elected as an MSP, rule 25 sets out provisions which enable that individual to apply to rejoin as an MSP member of the scheme. Opt-in must be made by giving the Fund trustees written notification (see rule 108) within three months of election. Opt-in becomes effective from the election date.

105. A member opting in to the scheme has to pay to the Fund trustees the amount of contributions which would have been payable between the election date and the next day on which a scheme member contribution is due to be deducted from the MSP salary. Any outstanding sums must be paid by the “due date”, which is by the 28th day after the trustees have given the member details of the amount of scheme contributions payable, unless the Fund trustees determine that a longer period applies.

Rule 26: Office-holder opt-in

106. Rule 26 provides that an opted-out office-holder may apply to rejoin the scheme as an office-holder member. If they are an MSP, they must also be an MSP member. Opt-in must be made by giving the Fund trustees written notification (see rule 108) within three months of their appointment to a qualifying office. The opt-in becomes effective from the appointment date.

107. The office-holder opting in to the scheme has to pay to the Fund trustees the amount of contributions which would have been payable between the date they took up office and the next deduction taken directly from their salary. Any outstanding sums must be paid by the “due date” which is by the 28th day after the trustees have given the member details of the amount of scheme contributions payable, unless the Fund trustees determine that a longer period applies.

108. Rule 26(2) provides that an MSP who had also been an office-holder member and had opted out of the scheme as an office-holder member may not rejoin the scheme as an office-holder member unless they are or become an MSP member.

PART D CONTRIBUTIONS

109. Part D of Schedule 1 sets out the arrangements for obtaining scheme member contributions from an MSP’s salary, office-holder salary or both. It also makes provision for a yearly direct contribution from the SPCB, in effect the scheme sponsor’s contribution, into the Fund. These rules replace Part D of the 1999 pensions order.

Rule 27: Scheme member contributions

110. Rule 27 requires the SPCB, as the organisation currently responsible for paying a participating member’s salary, to deduct a pension contribution from each participating member’s salary and pay it to the Fund trustees. The Fund trustees must pay any sums received into the Pension Fund under rule 3(2).

111. The rule provides that references in other scheme rules to “scheme member contributions” are to be read as deductions under this rule.

Rule 28: Amount of scheme member contribution

112. The higher rate scheme member contribution is 11% of salary. That rate is the default rate for contributions unless participating members elect to pay the lower rate scheme member contribution of 6% of salary (see rule 29). Definitions for the scheme member contribution rates referred to in this Part are set out in rule 109. Rules 38 and 39 provide that during the period when higher rate scheme member contributions are paid pension will accrue at 1/40th of final salary and when lower rate scheme member contributions are made the accrual rate is 1/50th of final salary.

Rule 29: Procedure for changing scheme member contribution rate

113. Rule 29(1) allows a participating member to alter their scheme contribution rate from the higher to the lower rate or vice versa by giving notice to the Fund trustees.

114. Under rule 29(2) a participating member must give written notice to the Fund trustees to change their contribution rate. An MSP participating member can only change their contribution rate within three months of being elected (or re-elected) and a non-MSP participating member who holds a qualifying office (Lord Advocate or Solicitor General for Scotland) can only make the change within three months of being appointed (or re-appointed). The rule makes no provision for an MSP office-holder to elect to change contribution rates on election to an office, the effect being that office-holders who do not opt out as office-holder members must pay scheme contributions towards their office-holder pension at the same rate as they pay towards their MSP pension.

115. The effect of rule 29(3) is that any notified change in contribution rate will be backdated to the date of being elected or appointed. In the case of a change from the higher rate to the lower rate, any overpaid contributions will be refunded to the participating member. In the case of a change from the lower rate to the higher rate, the participating member must pay any shortfall in contributions.

116. A transitional provision is made in Schedule 3 at paragraph 4 for those who are existing participating members before the new rules come into force and want to elect to pay the lower contribution rate of 6%. They must notify the SPCB of that intention at least 14 days before the new rules come into force (see paragraphs 493-496).

Rule 30: Relief from liability to make scheme member contributions

117. Rule 30 makes provision for contributions where a scheme member has sufficient reckonable service to be entitled to the maximum permitted pension under the scheme. Under rule 30(1), an MSP scheme member ceases to pay member contributions where their pension entitlement has reached the maximum allowable under the scheme, which is two-thirds of their salary (see Part F, rule 38(2)).

118. Although the maximum pension entitlement of two-thirds final salary may have been reached, any subsequent increase to an MSP scheme member's salary would leave room to accrue further pension. Rule 30(2) enables an MSP member to recommence paying scheme member contributions following a salary increase, allowing them to accrue further pension up to two-thirds of the increased salary.

119. Rule 30(3) determines that the MSP scheme member contributions payable under rule 30(2) shall only be for the amount by which the MSP salary increases and at the contribution rate applicable when they stopped making contributions.

120. Rule 30(4), (5) and (6) make similar provisions to rule 30(1), (2) and (3) for office-holders (see Part F, rule 39(4) for office-holder's maximum pension entitlement).

121. A scheme member can increase their pension entitlement by increasing their reckonable service through the purchase of added years under Part O. Added years may be purchased by lump sum or monthly payments. Rule 30(7) determines that for the purposes of calculating the maximum pension entitlement, the full reckonable service bought through added years, whether yet paid for in full or not, should be included in the calculation.

Rule 31: Contributions when salary not drawn

122. Should a participating member, for whatever reason, decide not to receive their salary as an MSP or office-holder, rule 31 makes provision for payment of their scheme member contributions. The rule requires the person responsible for paying the salary, if it was being paid, to pay to the Fund trustees an amount equal to the scheme member contributions that would have been deducted if the salary had been paid. By virtue of the payments being made the individual becomes eligible for the full applicable range of scheme benefits. The rule does not apply to an individual who has opted-out of the pension scheme under rules 23 or 24.

Rule 32: Contributions from the SPCB

123. The SPCB, by virtue of rule 27, is required to pay all scheme member contributions deducted from salary to the Fund trustees who then pay the contributions into the Pension Fund. Rule 32 provides that a sum must also be paid directly into the Fund each year by the SPCB.

124. Rule 32(2) allows the SPCB to determine the amount of that sum, providing it takes account of the scheme actuary's recommended rate for future contributions and any advice received from the Fund trustees. The Fund trustees must obtain an actuarial report from the scheme actuary at intervals of no longer than three years. Such a report must include a recommended contribution rate from the SPCB, which is set as a percentage of a scheme member's salary (see rule 103(3)).

PART E RECKONABLE SERVICE

125. In order to calculate the pension entitlement of a pension scheme member (see Part F) it is necessary to determine the period of service which should be taken into account for that individual. This period is referred to as "reckonable service". Part E of the Schedule sets out rules determining the meaning and calculation of periods of reckonable service as an MSP or office-holder. It also determines how reckonable service is measured. These rules replace the rules contained in Part E of the 1999 pensions order.

Rule 33: Reckonable service as an MSP

126. Rule 33 provides that the period during which an MSP member is making scheme contributions from salary payments is counted as a period of reckonable service.

127. Under rule 33(2)(a), reckonable service as an MSP member is the total of all periods, whether continuous or interrupted, where such contributions are made. That period is increased under rule 33(2)(b) by any additional period of increased reckonable service granted as a result of transferred payments from other schemes under Part N Chapter 2, and added years purchased under Part O.

128. The period of reckonable service used to calculate pension entitlement (see Part F) can also be affected by other provisions in the scheme rules. In particular the period is adjusted to provide for periods where a person had a dual mandate under Part Q. It can be enhanced under the ill-health retirement provisions in Part I.

129. Service as an MSP can also be ignored where rules in relation to short service refunds under Part M, and transfers out under Part N Chapter 1, apply. Periods in respect of which a refund or a transfer out occurs do not count as periods of reckonable service.

Rule 34: Reckonable service as an office-holder

130. Rule 34 makes similar provision to that of rule 33 but in relation to reckonable service as an office-holder. Reckonable service is counted during any period when an office-holder member is making scheme contributions from salary payments. A scheme member can accrue reckonable service as an MSP under rule 33 as well as accruing reckonable service for the same period as an office-holder under rule 34.

131. Under rule 34(2), reckonable service as an office-holder is the total of all periods whether continuous or interrupted, where contributions are deducted from salary. That period can be increased under rule 34(2)(b) by any additional period of increased reckonable service granted as a result of transferred payments from other schemes under Part N Chapter 2, and added years purchased under Part O. Such increases to office-holder reckonable service will only be made when the office-holder member is not also an MSP member (possible for the Lord Advocate or Solicitor General for Scotland).

132. The period of reckonable service used to calculate pension entitlement in Part F in relation to office-holders only can be enhanced under the ill-health retirement provisions in Part I.

133. Service as an office-holder can also be ignored where rules in relation to short service refunds under Part M, and transfers out under Part N Chapter 1, apply. Periods in respect of which a refund or a transfer out occurs do not count as periods of reckonable service.

Rule 35: Total reckonable service

134. Rule 35 provides for the calculation of an individual's "total reckonable service". Total reckonable service is used in relation to the calculation of entitlement to short service refunds under Part M and entitlement to transfers under Part N.

135. Total reckonable service is the total of any periods where an individual acquires reckonable service:

- as an MSP only (under rule 33);
- as an office-holder only (under rule 34); and
- as both an MSP and office-holder (under both rules 33 and 34).

136. The wording of the rule avoids any period of service being double-counted. Any period during which an individual is both an MSP and office-holder would be counted under rule 35(c) only.

Rule 36: Measuring reckonable service

137. Rule 36 sets out that a period of reckonable service as an MSP or office-holder is to be measured in years and fractions of a year.

Transitional provisions re: reckonable service

138. Provision is made in Schedule 3 at paragraphs 6, 7 and 8 to cover the position of members and office-holders under the 1999 pensions order in relation to carrying their existing reckonable service accrued into the new scheme. See paragraphs 499-512 of these notes.

PART F PENSIONS

139. Part F of Schedule 1 sets out rules covering when the normal pension entitlement of MSPs and office-holders on retiral commences together with rules on how the amount payable is calculated, the maximum pensions payable and the duration of pensions. These rules replace the rules contained at Part F and Schedule 2 of the 1999 pensions order.

Rule 37: Scheme pension

140. Rule 37 sets out the qualifications that must be met for an individual to become entitled to a pension under the scheme. Under rule 37(1) a scheme pension is payable to an individual who has reckonable service (see Part E) as an MSP or office-holder and has reached the age of 65. The age 65 requirement is subject to other scheme rules covering where the individual has taken an early retirement pension (see Part H) or is in receipt of an ill-health pension (see Part I). Rule 37(1) also prohibits entitlement to pensions where an individual is serving as an MSP or office-holder. This is subject to rule 44 which applies to serving MSPs and office-holders age 75 and above. See also rule 40(2) in relation to commencement of pension payments.

141. Rule 37(2) provides that the annual pension payable from the scheme is the total of the MSP pension accrued under rule 38 and the amount of office-holder pension accrued under rule 39. The actual amount of pension payable can vary should other rules apply. This could be due to the individual commuting part of their pension for a lump sum

payment (see Part G) or because an individual's entitlement to a guaranteed minimum pension⁴ is greater than their scheme entitlement (see rule 105).

142. Rules 37, 38 and 39 recognise that the actual amount of pension payable may vary from a calculation based on actual service alone. This is achieved in the rules by (i) a variation of the definition of reckonable service (see Part E) which covers an increase as a consequence of a purchase of added years under Part O, or transfers in under Part N; or (ii) by other rules (see rule 37(2)). Other rules which can vary entitlement from actual service are those providing for the reduction in scheme benefits under section 31 of the 1999 Act where a pension sharing order has been made (see rule 92) and those allowing for the retention of some of a transfer out value to preserve a guaranteed minimum pension entitlement which a receiving scheme is not willing to accept (see rule 77).

Rule 38: Amount of MSP pension

143. Under the new rules members will from new rules day (see paragraphs 36 and 488) automatically begin to accrue pension at 1/40th of final salary for each year of reckonable service and will be required to pay higher contributions. Members can however elect to continue to accrue pension at 1/50th of final salary and pay contributions at the existing rate.

144. Rule 38(1) provides the formula used to calculate the annual MSP pension payable. Rule 109 provides definitions used in the rule of "final salary", "lower rate scheme member contributions" and "higher rate scheme member contributions".

145. **Final salary** is defined in rule 109 as the amount of MSP salary paid to the individual during their last 12 months as an "MSP member" (see rule 21). If they were an MSP member for less than 12 months, rule 109(1)(6) applies with the final salary being the actual amount received during the period which is increased to a pro-rata annual figure using the formula.

146. For MSPs who leave the scheme and return later as MSP scheme members, periods of service are aggregated before final salary is applied (see rule 33). For members who cease to be MSPs or office-holders prior to becoming entitled to their pension, their final salary is calculated as above, and up-rated from the date of leaving to the date of retirement.⁵ Up-rating or revaluation is required by Chapter II of Part IV (sections 83-86) and Schedule 3 to the 1993 Act. The relevant percentage increases for schemes to apply are set by means of annual Occupational Pensions (Revaluation) Orders.⁶

⁴ Such entitlement would only possibly arise in this scheme in respect of any transferred in service, as such GMP rights are only for periods of employment prior to April 1997 where there was also membership of a SERPS contracted out scheme

⁵ By an amount set by the Secretary of State under the powers contained in paragraph 2(1) of Schedule 3 to the Pension Schemes Act 1993

⁶ The Order applying from 1 January 2008 is the Occupational Pensions (Revaluation) Order 2007 SI 2007/3369

147. **Lower rate scheme member contributions** are defined as being scheme member contributions of 6% of salary with **higher rate scheme member contributions** being scheme members contributions of 11% of salary. The difference in contribution amount is the actuarially-provided figure⁷ to fully meet the increased cost of pension entitlement under the scheme accruing at 1/40th per year when higher rate contributions are paid as opposed to 1/50th per year when lower rate contributions are paid.

148. Using the formula, A is the period of reckonable service during which lower rate scheme contributions were paid divided by 50; B is the period of reckonable service during which higher rate scheme contributions were paid divided by 40. A/50 and B/40 are added together and multiplied by the MSP final salary to produce the amount of annual pension payable. This figure is subject to a maximum set out in rule 38(2). Paragraph 6(2) of Schedule 3 ensures that contributions under the old rules are treated as having been made at the lower rate.

149. Rule 38(2) sets a maximum MSP pension payable under the scheme by reference to an individual's "annual MSP pension cap". The annual MSP pension cap is set at two-thirds of an individual's final MSP salary, ignoring any reduction that is made under section 82(2) of the 1998 Act as a consequence of a member also being a member of the Westminster or European Parliaments (dual mandate members).

150. Where the annual MSP pension cap is exceeded, the annual MSP pension payable is reduced to the level of the annual MSP pension cap (in relation to the effect on future contributions payable by the member when the cap is reached, see also rule 30).

151. The annual MSP pension cap replaces the previous maximum pension rules which were set out at article F5 and Schedule 2 to the 1999 pensions order. Other than the two-thirds salary cap which is retained, the previous limits were linked to former Inland Revenue restrictions which were repealed in the Finance Act 2004. The new Revenue limits are the annual and lifetime allowances⁸ which set the maximum value of benefits that an individual is allowed to accrue tax-free from contributions to registered pension schemes. Where the lifetime allowance is exceeded a tax liability accrues and is recoverable from the member (see Part R). Under existing salaries and contribution limits the annual allowance will not be exceeded by contributions to this scheme alone. If a member's aggregate contributions including contributions to other schemes exceed the limit, the individual will be liable for the tax charge under section 277 of the Finance Act 2004 (see also rule 89(3) for limitations on purchasing added years in this regard).

Rule 39: Amount of office-holder pension

152. Rule 39 makes similar provisions for office-holders to those made in rule 38 for MSPs. The rule sets out the formula which applies to calculate the amount of an office-holder pension that is payable as well as setting a maximum pension payable. The provisions have the identical effect to rule 38 for MSP pension in relation to the

⁷ Scottish Parliamentary Pension Scheme Committee, 1st Report 2008 (Session 3), paragraph 94 (SP Paper 103)

⁸ Finance Act 2004 sections 227-238

calculation of pension entitlement where the member has lower and higher scheme member contribution rates.

153. Rule 39 differs from rule 38 to account separately for separate periods of office-holder service. This recognises the varying nature and salaries attributable to different qualifying office-holder posts an individual may hold in their career, where a final office-holder salary may be much less or much more than a salary for an office held earlier in a person's career. Rule 39(2) makes clear that each period of service as an office-holder entitles the individual to a separate pension entitlement. Under rule 39(3), the value of office-holder benefits accrued are calculated individually before being aggregated for payment purposes.

154. Rule 39(4) applies an office-holder pension cap similar to the MSP pension cap of two-thirds of the final salary of the office-holder (rule 39(4)(a)). However, where there has been more than one office held such an approach would apply multiple caps. Rule 39(4)(b) applies the cap as two-thirds of the highest office-holder salary.

Rule 40: Duration of scheme pension

155. Rule 40(1) makes pension payable from the first day that the individual is entitled to receive it. Under rule 40(3), pension is paid for the remainder of their life (subject to exceptions under rule 41). The entitlement date applies whether or not the individual complies with rule 40(2). Under rule 40(2), before the individual entitled to a pension is able to receive any payments they should first (a) notify the Fund trustees that payments should begin, and (b) give the trustees such information as they require.

156. The required information under rule 40(2)(b) covers other entitlements to pensions the individual has and other information required to calculate any tax liability.

157. Rule 40(4) requires pensions to be paid monthly in arrears but also provides the Fund trustees with discretion to pay by other instalments subject to a minimum of at least one instalment per year.

Rule 41: Suspension of scheme pension

158. Rule 41 supplements rule 37 in making clear that an individual is not entitled to a scheme pension while serving as an MSP or an office-holder. The loss of pension applies even if they have previously qualified for and received a pension (save for the special circumstances of rule 44 for serving members age 75 and over). In the event that a scheme pensioner is elected as an MSP or becomes the holder of a pensionable office (see rule 22(2)), pension payments are suspended under rule 41(1).

159. When the individual again becomes eligible to receive their pension, the period of suspension ends and pension payments resume. Any additional benefits accrued during the period of suspension will be treated as a separate entitlement, although they may ultimately be aggregated for payment purposes.

159(a) Rule 41(2) restricts the amount of any lump sum death benefit payable should the individual die during their new period as a participating member. The amount payable under Part K is reduced by the total of: the amount of scheme pension received before the suspension; the amount of any retirement lump sum paid to the individual; and the amount of any pension or lump sum payable under Part L (5 year guarantee). It takes account of pension paid and other benefits payable in respect of scheme pensioners who then re-participate in the scheme, ensuring that participating members and scheme pensioners who re-participate in the scheme are treated equally in so far as the amount of death benefit payable to their survivors is concerned.

160. Rule 41(3) details what happens to the amount of pension payable when the original pension was an ill-health pension granted under Part I of the rules.

161. The rules for the award of an ill-health pension include the criteria that the individual stops working as an MSP or office-holder as a direct result of their illness or, in relation to deferred pensioners, stops gainful work, and that they are prevented by the illness from working (rules 47-49). As the individual had been able to resume gainful work as an MSP or office-holder the previous criteria for award of an ill-health pension no longer apply.

162. Under rule 41(3), any enhancement to the pension entitlement awarded as a consequence of the illness is removed. Rule 41(3)(a) provides that any earlier ill-health entitlement is ignored, so the right to be paid before 65 is no longer applicable when the person ceases their subsequent service as an MSP or office-holder. If this subsequent service ends when the person is 65 or older, then rule 41(3)(b)(i) the earlier ill-health enhancement to pension payments is removed and the pension is recalculated based upon actual reckonable service.

163. Similarly, under rule 41(3)(b)(ii) any increase to the ill-health pension attributed to added years partly paid for in instalments before service was interrupted on serious ill-health grounds will be reduced to reflect the amount of added years actually paid for. Rule 86(2)(a) provides that in serious ill-health cases the scheme pensioner gets the benefit of all the added years they have applied for even where they are not fully paid up when the MSP stops being an MSP.

PART G RETIREMENT LUMP SUMS

164. Part G of Schedule 1 sets out the rules for commuting part of a pension into a tax-free lump sum. Part G also makes provision for payment of a one-off trivial commutation lump sum.⁹ These rules replace the rules contained at Part G and Schedule 3 of the 1999 pensions order.

Rule 42: Right to commute pension into a lump sum

165. Under the Finance Act 2004 a person who is a member of a tax-registered scheme may exchange (commute) part of their pension entitlement for a tax-free lump sum called

⁹ Paragraph 7 of Schedule 29 to the Finance Act 2004

a “pension commencement lump sum”.¹⁰ The maximum portion of pension that may be commuted under the Finance Act 2004 is 25%, otherwise the payment would be an unauthorised payment in terms of section 160 of that Act (see part R, paragraphs 407-421).

166. Under rule 42(1), an individual who qualifies for a scheme pension (under Part F - Pensions, Part H - Early Retirement and Part I - Ill-health) may commute part of their pension into a tax-free lump sum by giving notice to the Fund trustees.

167. Rule 42(2) determines that the notice must be in writing and details the portion of the pension to be commuted at rule 42(2)(b). Rule 42(2)(a) requires the notice to be given before the earlier of the day on which the pension is first paid or the individual’s 75th birthday. Under the rules for payment of a “pension commencement lump sum” a scheme participant aged 75 or over cannot commute part of their pension for a pension commencement lump sum and any such payment would be an unauthorised payment. Rule 44 makes special provision for members approaching age 75.

168. Rule 42(2)(c) requires that the individual must also provide information to allow the Fund trustees to determine the amount payable and to confirm that the retirement lump sum would be a pension commencement lump sum. One of the requirements for a “pension commencement lump sum” is that all or part of the scheme member’s Lifetime Allowance is available.

Rule 43: Payment of retirement lump sum and corresponding reduction in pension

169. When a retirement lump sum is taken the pension payable is reduced. Rule 43 provides detail on the calculation of the amount of lump sum payable and the corresponding reduction to pension.

170. Rule 43(1) allows the Fund trustees to determine the amount of lump sum payable up to the maximum amount of lump sum (permitted maximum) allowable under the Finance Act 2004.¹¹ The permitted maximum is an amount equivalent to 25% of the pension. Rule 43(1)(a) allows the Fund trustees to commute an amount equivalent to a lower percentage if the individual indicates in the commutation notice that this is what they wish to commute. It is for the Fund trustees to determine the actual amount of lump sum that is equivalent to the pension being commuted. Rule 43(3) requires them to have that amount either certified by the scheme actuary or made in accordance with guidance and tables prepared by the scheme actuary.

171. Under rule 43(2), the amount of pension payable is reduced by the value of any retirement lump sum being paid.

¹⁰ Paragraph 1 of Schedule 29 to the Finance Act 2004

¹¹ Paragraph 2 of Schedule 29 to the Finance Act 2004

Rule 44: Special rule for commutation by individual approaching age of 75

172. Under the Finance Act 2004, a participating member aged 75 or over cannot commute part of their pension into the tax-free “pension commencement lump sum”.¹² Under the scheme, an individual cannot qualify for a scheme pension while they are an MSP or holder of a pensionable office. Therefore a serving MSP or office-holder approaching age 75 may lose the opportunity to commute part of their pension into a “pension commencement lump sum”. Rule 44 therefore makes special provision for serving MSPs and office-holders approaching age 75 to receive a retirement lump sum.

173. Rule 44(1) makes provision for a participating member who would be entitled to be paid a scheme pension, except for them still being an MSP or holder of a pensionable office, to apply to the Fund trustees to commute part of their pension into a tax-free lump sum. The application must be made prior to their 75th birthday so that the individual becomes entitled on the day prior to their 75th birthday. For the lump sum to be payable by the Fund trustees it must not attract an unauthorised payments charge under section 208 of the Finance Act 2004 (see rule 100). In this case, the payment must therefore meet the tests for a “pension commencement lump sum”. In particular, it must not be paid later than one year after the day on which an individual becomes entitled to it.

174. Serving MSPs and office-holders aged 75 and over are not eligible to be a participating member and accumulate more service in the pension scheme (see Part C, rules 21 and 22(1)). Rule 44(2) determines that an individual who is an MSP or holder of a pensionable office will be entitled to an annual pension from the day before their 75th birthday but no sum is payable until the individual ceases to be a MSP or holder of a pensionable office. A scheme pension cannot be paid to an individual while they are an MSP or holder of a pensionable office (see rule 37(1) and rule 41). They will receive their retirement lump sum but will not receive their reduced annual pension until they are no longer an MSP or in office.

175. The rule only applies to those persons who give a valid commutation notice under rule 44(1) prior to reaching age 75. Scheme members who do not give a commutation notice, on reaching age 75, become deferred pensioners under the scheme.

Rule 45: Commuting trivial amounts

176. Rule 45 makes provision for a small pension to be commuted and paid as a one-off tax-free lump sum. The Finance Act 2004 allows a trivial commutation to be paid where the level of pension does not exceed 1% of the Lifetime Allowance. For the current year 2008/09 this equates to a pension of £825 per annum. Payment of such a sum can be paid only when the individual is between ages 60 and 75.

177. Rule 45(1) makes provision for the Fund trustees to pay on application a one-off lump sum instead of a pension provided it would qualify to be a trivial commutation lump sum as defined in the Finance Act 2004.

¹² Paragraph 1 of Schedule 29 to the Finance Act 2004

178. Rule 45(2) and (3) set out how the value of the lump sum is to be calculated. Pension benefits not in payment are described in the Finance Act 2004 as “uncrystallised benefits”. Under rule 45(2), the Fund trustees determine the value of the individual’s uncrystallised benefits which are being commuted. This is done in accordance with section 212 of the Finance Act 2004 (which sets out a basic formula relating to the value of the pension benefit). Under Rule 45(3), the scheme actuary must either certify the valuation or provide guidance and tables under which the valuation is made.

179. Rule 45(4) makes clear that the payment of a one-off lump sum extinguishes all pension rights, including those of others such as surviving partners and eligible children.

PART H EARLY RETIREMENT

180. Part H of the Schedule sets out who is eligible for early retirement and the reduction in the annual scheme pension that applies when retiring early. The rule replaces the rules contained at Part H and Schedule 4 of the 1999 pensions order.

Rule 46: Early retirement

181. Under the Finance Act 2004, the minimum pension age under which a member of a tax-registered occupational pension scheme can retire early and access their benefits is increased to 55 from 6 April 2010 (see references to “normal minimum pension age” in sections 165 and 279 of that Act).

182. Rule 46(1) makes an individual who is age 55 and over and who has not yet reached the scheme normal retirement age of 65 eligible to take early retirement. Under rule 46(1)(b) they must no longer be an MSP or the holder of a pensionable office. The requirement under the 1999 pensions order for 15 years of actual qualifying service before becoming eligible to take early retirement is not repeated in new scheme rules. Any individual with accrued pension rights is eligible provided they meet the criteria in rule 46(1).

183. Rule 46(3) disapplies the normal retirement from age 65 restriction in rule 37(1), allowing a scheme pension to be paid from the date that the early retirement notice is given under rule 46(2) or such later date as is sought and specified in the early retirement notice.

184. Rule 46(4) determines the annual scheme pension (see rule 37(1) and paragraphs 141-143 of these notes) payable to a person making an application for early retirement. It determines that the annual pension is reduced by an appropriate percentage on early retirement. The appropriate percentage is 4% for each year that the individual is retiring before reaching age 65. For example the reduction for a person retiring early at age 60 would be 20% (5 x 4%).

185. Save for the transitional provisions (see paragraphs 517-523), this calculation replaces the existing rules for calculating a pension payable on early retirement under the 1999 pensions order.

186. The application by a scheme of certain types of early retirement calculation could result in discriminatory treatment of a member or members on the grounds of age. The rules in Part H were framed in light of the equality principles in the Employment Equality (Age) Regulations 2006¹³ and on the assumption that they would apply to the scheme. These Regulations implement into domestic law Directive 2007/78/EC establishing a general framework for equal treatment in employment and occupation.

187. The Employment Equality (Age) Regulations 2006 exempt from discrimination certain rules and practices in or relating to pension schemes. In particular, paragraph 8 of Schedule 2 exempts from discrimination the actuarial calculation of any age-related benefit commencing before the lowest age at which any member can retire without a reduction. In evidence to the Committee, GAD advised that a flat 4% per annum reduction was the lowest level of reduction which would be actuarially neutral for the scheme.¹⁴ This 4% figure has therefore been used in rule 46(4) so that a calculation made under rule 46(4) will be an actuarial calculation in terms of paragraph 8 of Schedule 2 to the Employment Equality (Age) Regulations.

188. Once the reduction has been applied and pension commenced, rule 46(5) makes clear that the reduction continues for the whole duration of the pension payments.

Transitional provisions applying to early retirement

189. Paragraph 12 of Schedule 3 (see paragraphs 517-523) contains transitional provisions preserving some rights to a pension entitlement determined under the calculation rules in the 1999 pensions order.

190. The provisions apply to individuals who were participants on 6 April 2006 under the old scheme rules. Those individuals have a limited right to retire from age 50 where they have at least 15 years relevant service before the “cut-off date” of the first general election after the new rules come into effect.

PART I ILL-HEALTH

191. Part I of Schedule 1 sets out the rules which apply when a scheme member resigns or stops being an MSP or, when not an MSP, a holder of pensionable office, as a result of a health condition. These rules replace the rules contained in Part J of and paragraph 3 of Schedule 2 to the 1999 pensions order.

192. A distinction is made in the rules between “serious” and “ordinary” ill-health with an enhancement to accrued pension provision being payable to those with a serious health condition. For those with an ordinary health condition, provision is made for accrued pension to commence immediately. Provision is also made for deferred pensioners who suffer ill-health, to have accrued pension paid immediately. Rules also provide for periodic review of the health of individuals in receipt of ill-health pensions.

¹³ S.I. 2006/1031

¹⁴ Scottish Parliamentary Pension Scheme Committee, 1st Report 2008 (Session 3), paragraph 124 (SP Paper 103)

193. New provision is made for lump sum payments in lieu of pension to be made to scheme members who are diagnosed with less than 12 months to live. The rules also make changes to the existing provisions to ensure compliance with the conditions set down in the Finance Act 2004; in particular the requirements in paragraph 1 of Schedule 28 relating to the permanence of, and the effect on the ability to work caused by, a health impairment.

Rule 47: Serious ill-health pension

194. Rule 47 provides six conditions which must be met before the Fund trustees can be satisfied that an individual becomes entitled to a serious ill-health pension from the scheme. The amount of pension payable is set out in rule 50 (paragraphs 209-218).

195. Condition 1 is met where the individual has resigned or has otherwise stopped being an MSP or the holder of a pensionable office. The reason for the resignation or otherwise stopping work must be as a direct result of a health condition. In most instances, the health condition will lead directly to resignation but the condition may also be met where an individual does not stand for re-election or is not re-appointed to a pensionable office as a direct result of the health condition.

196. Condition 2 requires that the individual must be a scheme member and thus be entitled to a scheme pension but for not having reached age 65. Condition 3 requires that an application for a serious ill-health pension must be made.

197. Conditions 4 and 5 relate to the health condition. That condition must be expected to be permanent and to prevent the individual from doing any gainful work now and in the future. "Work" is defined in rule 109(1) of Schedule 1 and includes work under a contract of employment, service or apprenticeship, as the holder of an office or as a self-employed person. "Gainful" takes its normal meaning and so unpaid work would not, for example, be gainful work.

198. Condition 6 requires that the application be accompanied by evidence from a doctor that the doctor is satisfied that conditions 4 and 5 are met ("doctor" is defined in rule 109(1)).

Rule 48: Ordinary ill-health pension

199. Rule 48 lists six conditions which must be met before the Fund trustees can be satisfied that an individual becomes entitled to an ordinary ill-health pension. The amount of pension payable is set out in rule 51 (paragraph 219).

200. Conditions 1, 2 and 3 are the same as those for serious ill-health pensions (see paragraphs 197-198).

201. Conditions 4 and 5 relate to the health condition that the individual is suffering from. That condition must be expected to be permanent and the Fund trustees need to be satisfied that it will prevent the individual from adequately performing the duties of an

MSP or office-holder now and in the future. The health condition is likely to be less serious than for a serious ill-health pension in rule 47 in that it is not a condition that prevents the individual from doing other gainful work. Condition 4(b) envisages that the other gainful work will be less demanding or of a different nature, although this will be a matter for the Fund trustees to be satisfied about in the individual case.

202. Condition 6 requires that the application is accompanied by evidence that a doctor is satisfied that the health conditions in conditions 4(a) (relative to the duties of an MSP or office-holder) and 5 are met.

Rule 49: Deferred pensioner's ill-health pension

203. Rule 49 lists seven conditions which must be met before the Fund trustees can be satisfied that a deferred pensioner becomes entitled to an ill-health pension. The amount of pension payable is set out in rule 52. A deferred pensioner is defined in rule 109(1) and is a former participating member under the age of 65.

204. Conditions 1, 2 and 4 are similar to conditions 2 and 3 for serious ill-health pensions (see paragraph 198).

205. Condition 3 is similar to condition 1 in rules 47 and 48 for ordinary and serious ill-health pension and requires that the deferred pensioner has stopped doing gainful work as a direct consequence of their health condition.

206. Conditions 5, 6 and 7 are the same as conditions 4, 5 and 6 for serious ill-health pension (see paragraphs 199-200).

Rule 50: Amount of serious ill-health pension

207. Rule 50 sets out how the amount of serious ill-health pension payable is calculated. Separate calculations are made depending upon whether the individual is an MSP (rule 50(1)) or an office-holder only (rule 50(2)).

208. An uplift in benefits is payable under this rule, applied to the portion of salary attributable to that of an MSP. For MSPs who also have reckonable service as an office-holder, that service is not enhanced but the accrued pension becomes payable immediately (without reduction) along with the enhanced MSP portion of pension.

209. Part F of Schedule 1 (Pensions) provides for the calculation of the MSP pension and office-holder pensions together, making the annual scheme pension payable at the normal scheme retirement age of 65. (See rules 37 – 41 and paragraphs 141-165). Part F is applied to an individual entitled to a serious ill-health pension, subject to the modifications in rule 50(1).

210. Rule 50(1)(a) requires that the individual applying for a serious ill-health pension is treated as if they were age 65 on the “relevant day”. Rule 50(3) defines “relevant day” as being the day on which the individual resigned or otherwise stopped being an MSP or office-holder.

211. Rule 50(1)(b) increases the reckonable service as an MSP of an individual who is entitled to a serious ill-health pension. The increase is on the basis that the MSP would have remained an MSP until their 65th birthday and is equal to the period between the relevant date and the date of the MSP’s 65th birthday. For example, for an MSP who falls ill aged 50, the increase in reckonable service would be 15 years (to age 65).

212. Rule 50(1)(c) applies if the individual is a dual mandate MSP in the relevant period (see rule 94 and paragraph 400). In such circumstances the individual’s salary will have been reduced under section 82(2) of the 1998 Act. To ensure that the pension payable is related to that reduction in salary, the increase in the period of reckonable service under rule 50(1)(b) is reduced by the same proportion. For example, if the salary reduction is two-thirds, a dual mandate MSP who falls ill aged 50 will have the increase in reckonable service calculated under rule 50(1)(b) of 15 years (to age 65) reduced by two-thirds to 5 years. The reduced reckonable service is applied to the basic MSP salary.

213. Rule 50(1)(d) provides that the rate of scheme member contributions for the increased period of reckonable service under rule 50(1)(b) is that which applies on the relevant day. For example, if on the relevant day the individual is making higher rate scheme member contributions that rate will be used to calculate the increased reckonable service under rule 50(1)(b) is applied.

214. Rule 50(1)(e) makes clear that the enhancement of reckonable service under rule 50(1)(b) does not apply to reckonable service as an office-holder. The amount of serious ill-health pension payable in respect of office-holder service, if any, will be based upon the amount of reckonable service accrued to the relevant day. That pension will be payable immediately, without any reduction for early payment, in addition to the MSP ill-health pension.

215. Rule 50(2) makes provision in relation to those who only have reckonable service as an office-holder (the current Lord Advocate and Solicitor General for Scotland are not MSPs). Rule 50(2)(a) makes similar provision for them to that made for MSPs under rule 50(1)(a) (paragraph 212).

216. Rule 50(2)(b) provides a formula to calculate the increase to the amount of pension payable. The period of enhancement of reckonable service applying to those who only have reckonable service as an office-holder is calculated in identical manner to that for an MSP (see paragraph 213), but the salary that is applied is restricted to the annual salary payable to an MSP on the relevant day. To take the earlier example, if an office-holder only falls ill aged 50, the increase in reckonable service would be 15 years (to age 65), with the salary used in the calculations being the salary payable to an MSP on the relevant day. As in the case of an MSP, the rate of accrual is linked to the scheme member contributions at the relevant day (see paragraph 215).

Rule 51: Amount of ordinary ill-health pension

217. Rule 51 provides for the amount of ordinary ill-health pension payable. The individual applying for an ordinary ill-health pension is treated as if they were age 65 on the date they resigned or otherwise stopped being an MSP or, where they were not an MSP, the holder of a pensionable office. The amount of pension is then calculated under rule 37 (see paragraphs 141-143) and is based on the actual accrued reckonable service. In effect, the amount of pension payable is not reduced although the individual has not reached age 65.

Rule 52: Amount of deferred pensioner's ill-health pension

218. Rule 52 provides for the amount of deferred pensioner's ill-health pension payable. The individual applying for a deferred pensioner's ill-health pension is treated as if they were age 65 on the date the application for the pension was made. The amount of pension is then calculated under rule 37 (see paragraphs 141-143) and is based on accrued reckonable service. The final salary of the deferred pensioner is the final salary paid to them while in post, increased in accordance with an Order made under paragraph 2(1) of Schedule 3 to the Pension Schemes Act 1993. In effect, pension accrued to the date of entitlement is paid immediately, without any reduction because the individual has not reached age 65.

Rule 53: Review of ill-health pension entitlements

219. Rule 53 makes provision for review by the Fund trustees of an individual's entitlement to an ill-health pension. Rule 53(1) enables a review to be carried out at any time and at such intervals as the Fund trustees determine until the individual reaches age 65.

220. Under rule 53(2), the Fund trustees can require a pensioner to provide evidence from a doctor on their state of health.

221. Rule 53(3) sets out the powers of the Fund trustees if, following a review, they are satisfied that the individual is no longer prevented from doing gainful work by reason of his or her state of health. If so satisfied, the Fund trustees can either determine that the individual is no longer entitled to an ill-health pension (rule 53(3)(a)) or, where the individual is entitled to a serious ill-health pension, that they should be entitled to an ordinary ill-health pension (rule 53(3)(b)). In the latter case, the Fund trustees would have to remain satisfied that the individual would not be able to perform the duties of an MSP or holder of a pensionable office.

222. Rule 53(4) provides that the Fund trustees may determine that, if a person refuses to undergo a medical examination under rule 54 (see paragraph 226) or fails to cooperate with a review, they are no longer entitled to an ill-health pension.

223. Rule 53(5)(a) provides that, where the Fund trustees have made a determination under rule 53 that the individual is no longer entitled to an ill-health pension, the pension payments are to stop. It also provides that, where the Fund trustees have determined that

the individual is entitled to an ordinary ill-health pension, the pension payments are to be reduced. Under Rule 53(5)(b), when an ill-health pension is stopped or reduced the individual is treated as if they had never been entitled to an ill-health pension. The effect of rule 53(5)(b) is that when the individual next becomes entitled to receive a scheme pension no account is taken of the previous ill-health entitlement. This is similar to the provision in rule 41(3) (see paragraphs 162-165).

Rule 54: Medical examinations

224. Rule 54 allows the Fund trustees to require an applicant for an ill-health pension or an individual whose entitlement is being reviewed (under rule 53) to be examined by a doctor. The Fund trustees will bear the cost of any such examination (payment for which will be made from the Pension Fund under rule 3(1)(b)) unless they determine that the costs should be borne by the examinee.

Rule 55: Ill-health lump sums: life expectancy of less than one year

225. In terms of paragraph 4 of Schedule 29 to the Finance Act 2004, a serious ill-health lump sum benefit may be made from registered pension schemes instead of a pension, provided certain conditions are met. Rule 55 provides for such a payment and lists the conditions applicable.

226. Rule 55(1) lists the conditions which must be met before the individual becomes entitled to be paid an ill-health lump sum. The individual must make an application (condition 1), no longer be an MSP or holder of a pensionable office (condition 2) and have reckonable service in the pension scheme (condition 3).

227. Condition 4 requires that the conditions in paragraph 4 of Schedule 29 to the Finance Act 2004 are met. Those conditions require: that the Fund trustees receive medical evidence that the member is expected to live for less than one year; that all or part of the member's Lifetime Allowance is available (see paragraph 4); it is paid in respect of an uncrystallised arrangement (see paragraph 180); payment extinguishes all of the member's entitlement to benefits from the scheme (see paragraph 233); and (see paragraph 272) the member is under 75 years of age.

228. Rule 55(2) sets out the amount payable as an ill-health lump sum which is five times the annual scheme pension, and sets out how that pension is calculated for these purposes.

229. Under rule 55(2)(a), for those over age 65 it is the amount of scheme pension that would otherwise be payable to the individual. That amount would be calculated as set out in Part F of Schedule 1 (rules 37 and 38, see paragraphs 141-152).

230. For persons under age 65, rule 55(2)(b) provides that the amount of annual scheme pension is calculated as if the individual were entitled to a serious ill-health pension (see paragraphs 196-200).

231. Rule 55(3) provides that payment of the ill-health lump sum extinguishes all of the recipient's rights to receive scheme benefits.

PART J SURVIVING PARTNERS AND CHILDREN

232. Part J of Schedule 1 covers the pension entitlement of surviving partners and children of current or former MSPs or office-holders who were at the time of their death a scheme member, scheme pensioner or deferred pensioner. The rules covering these pensions comply with the rules in section 167 and Part 2 of Schedule 28 of the Finance Act 2004 (which set out the rules relating to payment of pension death benefits by a registered pension scheme). The rules in Part J replace the rules contained at Part K of the 1999 pensions order.

Rule 56: Meaning of scheme pension entitlement

233. In order to calculate a surviving partner or child's entitlement to pension, it is first necessary to determine what pension would have been due to the deceased had they survived. The amount of pension that would have been payable depends upon what type of scheme member the deceased was at the time of their death. Rule 56 refers to this as "scheme pension entitlement" and sets out how this is calculated for each type of scheme member.

234. Rule 56(2) sets out how scheme pension entitlement is calculated for persons who die while a participating member. Rule 56(2)(a) determines that, for a participating member who died aged 65, or over this is based on the prospective annual scheme pension that would have been payable had the deceased retired on the day of their death (i.e. was no longer an MSP or office-holder on that day). For an MSP this would be the pension payable under rule 38 and for an office-holder the pension payable under rule 39. Rule 56(2)(b) determines that for a participating member who died under age 65, the prospective annual scheme pension is the annual pension that would have been payable had the deceased become entitled to a serious ill-health pension on the day of their death. For an MSP this would be the pension calculated under rule 50(1) and for an office-holder the pension calculated under rule 50(2).

235. Rule 56(3) determines the scheme pension entitlement for an individual who died while being a deferred pensioner. Under (a) the scheme pension entitlement for a deferred pensioner over 65 is the annual pension that had already been accrued up to the date of death including any reckonable service between ages 65 and 75. For those under 65, (b) determines the scheme pension entitlement is the annual pension that has already been accrued up to the date of death and would have been payable if the person was 65 on that date. For an MSP this would be the pension calculated under rule 38 and for an office-holder the pension calculated under rule 39.

236. Rule 56(4) sets out scheme pension entitlement for those in receipt of a scheme pension and makes clear that any reduction in the pension payable as a result of payment of a retirement lump sum is to be ignored for the purposes of survivor benefits. Under (a) for a scheme pensioner who died and took a retirement lump sum under rule 43(2), scheme pension entitlement is the annual pension that would have been payable at the date

of death had it not been reduced under commutation rule 43(2). For a scheme pensioner who died and did not take a retirement lump sum, scheme pension entitlement is the annual pension in payment on the date of their death.

237. Rule 56(7) covers former participating members whose pension rights had been extinguished by taking an ill-health lump sum under rule 55(3) before they died (see paragraph 233). Scheme pension entitlement is the pension that would have been payable if the deceased had received a serious ill-health pension. For an MSP this would be the pension calculated under rule 50(1) and for an office-holder the pension calculated under rule 50(2).

237(a) Rule 56(5) deals with the treatment of scheme pensioners whose pension has been suspended under rule 41 on their becoming an MSP or the holder of a pensionable office. Under rule 56(5A) these scheme members are to be treated as if they were scheme pensioners immediately before their death for the purposes of calculating scheme pension entitlement. The suspension of pension under rule 41 is treated as having been lifted immediately before death. Any additional scheme pension entitlement as a participating member is calculated separately.

238. In the case of an individual aged 75 or over who died whilst their pension was reduced to nil (under rule 44(2)), rule 56(7) determines that the prospective pension is calculated as if the deceased was a deferred pensioner on their date of death (see paragraph 237). Therefore, the scheme pension entitlement used to calculate the survivor benefits ignores the lump sum commutation taken by such an individual.

Chapter 2 Partners' pensions

239. Chapter 2 of Part J sets out the rules covering partner pensions and trivial lump sum payments.

Rule 57: Partner

240. Rule 57 provides the definition of a qualifying partner. Under rule 57(1) the deceased's partner may be a spouse, civil partner or a person who qualifies under rule 57(2) as an "unmarried partner".

241. For an unmarried partner to qualify for a partner's pension rule 57(2) determines that the deceased must have notified the Fund trustees in writing of their unmarried partner at least six months immediately before their death. The trustees must also be satisfied based on the evidence they have received that:

- (i) The deceased had lived together with their unmarried partner as if husband and wife or civil partners for a period of at least 2 years before the death. The reference to living together as husband and wife or as civil partners mirrors the relationship test in section 25 of the Family Law (Scotland) Act 2006;
- (ii) the parties were in an exclusive relationship and neither the deceased or their unmarried partner had lived with any other person in such a relationship or with a spouse or civil partner during the 2 year period;
- (iii) during the 2 year period the unmarried partner was financially dependant on the deceased or they were mutually financially dependant – to meet a requirement of the Finance Act 2004 at Schedule 28 (paragraph 15(3)); and
- (iv) Immediately before the deceased's death the deceased and their unmarried partner must not have been prevented by law from marrying or becoming civil partners. As such both parties must not have been the spouse or civil partner of any person and neither party should have been prevented by law from marrying or becoming civil partners because of their age, mental capacity, relationship or other legal restriction.

Rule 58: Partner's pension

242. Rule 58 sets out the qualification conditions for payment of a partner's pension. Rule 58(1) allows for a partner's pension to be payable following the death of a participating member, deferred pensioner or scheme pensioner. Rule 58(2) determines that a partner's pension is $\frac{5}{8}$ ^{ths} of the deceased's prospective pension entitlement as described in paragraphs 235-240.

243. Under rule 69, the partner's pension is suspended for any 5 year guarantee period as a partner will receive a larger entitlement of the deceased's pension if they qualify for a payment under the 5 year guarantee provisions (see Part L).

Rule 59: Enhancement of initial partner's pension

244. Rule 59 provides for an enhancement of a partner's pension for three months following the death of a participating member or pensioner to the level of income the member was receiving at that time, in order to give the partner time to adjust financially to the loss of the partner's income.

245. Rule 59(1) and (4) provide that the amount payable for any part of the three month period is increased where the amount A determined by rule 59(2) is less than the amount B determined by rule 59(3).

246. The amount A in rule 59(2) is the amount of pension that is due to be paid to the surviving partner during the three month period. To that amount is added any children's pension to be paid to that partner for the benefit of an eligible child during that period.

247. Amount B in rule 59(3) depends upon whether the deceased was a participating member (i.e. a serving MSP or office-holder) or a scheme pensioner at the time of their death. If a scheme member then B is the salary they would have received during the three

month period. If a scheme pensioner, B is the amount of scheme pension they would have received during that period.

248. Under rule 59(4) the partner's pension is increased during the three month period by the difference between amount A and amount B.

249. Rule 59(5) sets out how a participating member who is also a scheme pensioner (whose pension payments are suspended under rule 41 on becoming an MSP or the holder of a pensionable office) is to be treated for the purposes of rule 59. Such a member is to be treated as a participating member for the purposes of this rule.

Rule 60: Duration of partner's pension

250. Rule 60 determines when a partner's pension commences and the application and payment details required. Rule 60(1) determines that a partner's pension is payable from the day after the deceased partner died. Rule 60(2) states that payments to a partner need not begin unless the trustees receive notice of entitlement or any relevant information required to arrange payment, for example, details of any other pensions in payment in order to calculate any tax liability if the Lifetime Allowance limit is breached. The Fund trustees also require banking or other payment details.

251. Rule 60(3) makes clear that a partner's pension is paid for life. This applies regardless of whether the deceased's partner subsequently marries, becomes a civil partner or co-habits with another person. Rule 60(4) provides for periodic payments of the pension which is usually monthly in arrears.

Rule 61: Partner's trivial lump sum

252. Rule 61 provides an option, instead of periodic instalments, for certain partner's pensions to be commuted and paid as a partner's trivial lump sum known as a "trivial commutation lump sum death benefit".¹⁵ It is a one off tax-free lump sum paid instead of a monthly pension. Under the Finance Act 2004 a trivial lump sum cannot be paid in respect of a deceased person who was aged 75 or over,¹⁶ and the amount paid must not exceed 1% of the Lifetime Allowance. For the year 2008/09, this equates to a pension of £825 per annum.

253. Rule 61(1) makes provision for a partner's trivial lump sum requiring that:

- the partner applies in writing to the trustees for a trivial lump sum instead of an annual pension;
- no payment has been made to the partner in respect of a partner's pension or a death in service lump sum;
- the partner is not entitled to a 5 year guarantee pension under rule 69; and
- the trustees be satisfied that the trivial lump sum payment would be a trivial commutation lump sum death benefit under Schedule 29 to the Finance Act 2004.

¹⁵ Defined in paragraph 20 of Schedule 29 to the Finance Act 2004

¹⁶ Schedule 29 to the Finance Act 2004

254. Under subparagraph (2), the Fund trustees determine the amount of the partner's trivial lump sum. Rule 61(3) determines that the amount must be certified by the scheme actuary or calculated in accordance with guidance and tables provided by the scheme actuary.

255. Rule 61(4) makes clear that payment of a one off trivial lump sum extinguishes the partner's rights to all other benefits under the scheme in respect of the deceased.

Chapter 3 Children's pensions

256. Chapter 3 sets out the rules covering eligibility for and payment of children's pensions.

Rule 62: Children's pensions

257. Rule 62(1) determines that a children's pension may be payable in the event of the death of a participating member, scheme pensioner or deferred pensioner.

258. Rule 62(2), (3) and (4) determine that, where a partner's pension is payable, the total children's pension payable will be a quarter of the deceased's scheme pension entitlement (as calculated under rule 56, see paragraphs 235-240) if there is one child and $\frac{3}{8}$ ^{ths} if there are two or more children (Amount A). Where no partner's pension is payable the total amount is higher, being $\frac{5}{16}$ ^{ths} of the deceased's scheme pension entitlement for one child or $\frac{5}{8}$ ^{ths} for two or more children (Amount B).

Rule 63: Eligible children

259. Rule 63 sets out the definition of a child. Under rule 63(1), a child includes an adopted child and a stepchild (providing that when the deceased died the stepchild was financially dependant on the deceased or dependant on the deceased due to physical or mental impairment).

260. Rule 63(2) sets out conditions, one of which must be met for a child to be an "eligible child" at any given time. One of the conditions must always apply although it need not always be the same one.

Condition 1 requires the child to be born and under aged 17.

Condition 2 is directed at older children aged over 17 but under 23 and includes a financial dependency test. It is primarily directed at those in continuing education but could apply in other circumstances. The child must have been financially dependent on the deceased on death or under age 17. To continue to qualify, the Fund trustees must be satisfied that any child would have been financially dependent on the deceased had they survived.

Condition 3 applies to any child who, because of physical or mental impairment, was dependant on the deceased when they died. To qualify for ongoing payments, the Fund trustees must remain satisfied that the dependency would have continued had the deceased survived.

Rule 64: Payment of children's pension

261. Under rule 64(1), a children's pension is payable during any period a child qualifies under rules 62 and 63. A children's pension would normally be paid to the surviving parent, but rule 64(2) gives the Fund trustees discretion to decide who should receive the children's pension (or any part of it).

262. Rule 64(3) requires that, where a children's pension is paid to someone other than a qualifying child, the whole pension must be used for the benefit of the child(ren), unless the Fund trustees direct that the proportions are to be different. This may occur where there are a number of eligible children, given that the total amount does not increase although there are more than two eligible children.

263. Rule 64(4) gives the Fund trustees power to recover payment of a children's pension from the recipient in the event that the recipient is not using it for the benefit of the child. The trustees could take other action to ensure that the money is applied for the benefit of the intended beneficiary. They can seek to recover amounts not used for the child, including reducing future pension payable to the recipient. In addition, rule 64(5) gives the Fund trustees discretion to withhold a children's pension if it is not being used for their benefit. Any withheld amounts can be paid when the Fund trustees are satisfied that the pension will be used for its intended purpose.

264. Under rule 64(6)(a), the Fund trustees need not commence payment of a children's pension until they have received notification of the child's entitlement. This could be the child's birth or adoption certificate or evidence of financial dependency. Under rule 64(6)(b), the Fund trustees also require details of any other pensions in payment, in order to calculate any tax liability if the Lifetime Allowance is exceeded. The Fund trustees would also require details to allow payments to be made, such as home address and bank details.

265. Under rule 64(7), the pension will be paid monthly in arrears or by any other payment frequency of no longer than one year, as determined by the Fund trustees.

Transitional provisions – partner's and children's pensions

266. Paragraphs 11 and 13 of Schedule 3 contain transitional provisions for entitlement to partner's and children's pensions.

267. Pensions for individuals will be calculated under the new rules, save where covered by the transitional and saving provisions in Schedule 3. Under paragraph 10, the old rules will apply in respect of a pensioner member i.e. a scheme pensioner. Without paragraph 11, the new provision for an unmarried partner's pension made under rule 57

(2) would not apply to pensioners or survivors of deceased pensioners. Paragraph 11 applies this new provision to such individuals. Thus eligible unmarried partners of existing scheme pensioners and deceased pensioners qualify under rule 57.

268. The provisions of paragraph 13 apply to those who have 15 years of qualifying service at the date the new rules come into force. If they subsequently take early retirement, for the purposes of calculating a partner's and/or children's pension, the paragraph provides for the disregard of any reduction made to the pension as a result of taking early retirement.

PART K LUMP SUM DEATH BENEFITS

269. Part K of Schedule 1 sets out rules which make provision for payment of lump-sum benefit payments in the event of the death of any participating member before retirement. They also make provision for a payment to the personal representatives of a deferred pensioner who dies leaving no surviving partner or eligible child. These rules replace Part L of the 1999 pensions order.

Rule 65: Death in service lump sum

270. Rule 65 provides that the Fund trustees may pay a tax-free lump sum on the death of any participating member. ("participating member" is defined in rule 109(1) as an individual who is an MSP member or an office-holder member (or both)). The sum is payable to the deceased's nominee (see rule 66 and paragraphs 274-276) or, if there is no nominee, to the deceased's personal representatives. For a person dying domiciled in Scotland, this will be the deceased's executors.

271. The sum is payable provided that the Fund trustees are satisfied that it would be a "defined benefits lump sum death benefit" for the purposes of the Finance Act 2004.¹⁷ A lump sum death benefit qualifies as a defined benefits lump sum death benefit where a participating member is under 75 years, the benefit arrangement is specified in the scheme rules and payment is made within two years of the Fund trustees being aware of the date of death. In addition, the death benefit must not be in respect of a trivial commutation, or relate to pension protection or winding up benefits.

272. Rule 65(2) sets the amount of the lump sum as the greater of four times the participating member's annual salary at the time of death or a refund of the contributions paid by that member with compound interest added at 4% per annum (see rule 109(3)). Salary is defined in rule 109(1) and consists of the amount paid under the 1998 Act to an MSP and/or the amount being paid to the office-holder for holding a particular office, taking account of deductions where the participating member is a dual mandate MSP.

Rule 66: Nominations for death in service lump sum

273. Rule 66 allows a participating member to nominate who is to receive any lump sum death benefit payable under rule 65. Under rule 66(1), the participating member does

¹⁷ Finance Act c.12 Schedule 29 Part 2, paragraphs 13, 14, 20 and 21

this by giving such written notice as may be required to the Fund trustees and may nominate any person or two or more persons to receive the lump sum, specifying the proportion to be paid to each. Rule 66(2) allows a nomination once made to be withdrawn at any time by subsequent written notice.

274. The Fund trustees are obliged to comply with any nomination properly made unless rule 66(3) applies. Rule 66(3) makes nominations of a partner invalid if the nominee is no longer a partner at the date of death, perhaps following a divorce or other separation agreement. Under rule 66(3)(b), the Fund trustees may also determine that a nomination is invalid if in their opinion it would not be reasonably practicable to make such a payment. This could arise, for example, if the whereabouts of a nominee are unknown and perhaps remain unknown despite reasonable inquiries having been made.

275. Where the Fund trustees determine that a nomination is invalid, rule 66(4) determines that the applicable proportion of the lump sum is paid to the deceased's personal representatives for distribution as part of their estate.

Rule 67: Deferred pensioner lump sum

276. Rule 67 makes provision for payment of a lump sum refund of contributions on the death of a person under 75 who was a deferred pensioner and entitled to a scheme pension on reaching that age. The lump sum is paid where that person leaves no surviving partner or eligible child. A definition of "deferred pensioner" is provided in rule 109(1).

277. Rule 67(1) makes provision for the Fund trustees to make a payment in the above circumstances, provided that they are satisfied that the payment would be a "defined benefits lump sum death benefit" (see paragraph 295). Payment is made to the personal representatives of the deceased.

278. The amount payable is determined by rule 67(2) as being the amount of scheme member contributions paid by the deferred pensioner with compound interest added at 4% per annum (see rule 109(3)).

PART L 5 YEAR GUARANTEE

279. Part L of Schedule 1 sets out rules which create a "guarantee" period of 5 years running from the date that a scheme pensioner is entitled to receive a pension from the scheme. They replace the rules in Part M of the 1999 pensions order and take account of tax changes under the Finance Act 2004. The effect of the 5 year "guarantee" is that where death occurs before pension has been paid for five years, a surviving spouse or civil partner (surviving partner) receives the same amount of pension that would have been payable to the scheme pensioner until that five year period ends. The amount payable is reduced by the amount of any pension payable for an eligible child or children during that period.

280. Where a scheme pensioner dies under age 75 with no surviving partner within five years of being entitled to a pension, Part L makes provision for payment of a lump sum

death benefit to that person's personal representatives equivalent to the balance of five years' pension payments. For those who die in the same circumstances but aged over 75, a lump sum death benefit is not allowable under tax rules. Provision is therefore made for pension payments to continue for the balance of the 5 year guarantee period to the deceased's personal representatives. In either case, if a pension is payable for eligible children the amount payable is reduced.

Rule 68: Initial pension period

281. While scheme pensions (except those to children) are payable for life, rule 68 introduces a 5 year guarantee period for payment of pension by reference to a scheme pensioner's "initial pension period". Where a scheme pensioner dies within five years of becoming entitled to a pension, the pension will be paid for the balance of the five-year period after death.

282. Rule 68 makes provision to disregard a period of up to five years where pension payments are suspended under either of rules 41 or 44 where a scheme pensioner is re-elected as an MSP or office-holder. If such a person with up to five years suspended service dies during suspension or after their pension recommences, the guarantee operates for the balance of the five year period after subtracting the payments made prior to suspension.

283. Only five years of suspended pension is disregarded in terms of this rule. The reason for that restriction relates to underlying tax restrictions in the Finance Act 2004.¹⁸ The Act sets out a maximum period of ten years where such a guarantee can apply. Any guarantee can only apply for ten years from the date that entitlement to pension first commences. For a scheme pensioner, the ten year period runs from the date of first entitlement to a pension, irrespective of the fact that pension is suspended. If subsequent service as an MSP or office-holder exceeds five years, that excess period added to the period during which pension was first paid continues to reduce the guarantee period until ten years from initial entitlement have elapsed. After that time no further guarantee can apply even if pension was paid for less than five years.

Rule 69: Guaranteed pensions for surviving partner

284. Rule 69 makes provision in relation to scheme pensioners who die during their initial pension period leaving a surviving partner.

285. The Finance Act 2004¹⁹ requires that, under such a guarantee provision, instalments of pension continue until the end of the guarantee period and it prevents any outstanding instalments being paid as a lump sum.

286. Rule 69(a) provides that the surviving partner's pension is suspended for the remainder of the guarantee period. Rule 69(b) provides that, during that time, they are to be paid the full pension that would have been paid to the deceased.

¹⁸ Pension Rule 2 in section 165 and paragraphs 2(3)(a) and 3(1)(c) of Schedule 28 to the Finance Act 2004

¹⁹ Section 165(1) and Schedule 28 paragraph 2(3)(a) to the Finance Act 2004

287. However, where a children's pension is also payable in respect of the deceased pensioner, the amount payable to the surviving partner is reduced under rule 69(2)(b). The amount is reduced by the amount of children's pension paid during the initial pension period, except for the period covered by rule 69(2)(a). During the initial three-month period following death, the reduction only applies if the children's pension is paid to the surviving partner. Where any children's pension is paid to an eligible child or a person other than the surviving partner, the reduction does not apply, in order to ensure that the three month enhancement of pension guarantee for a surviving partner under rule 59 continues to apply.

288. As a consequence of the restrictions in the Finance Act 2004, rule 69(3) makes provision in the event that the surviving partner also dies during the 5 year guarantee period. In that event, the remaining pension payments under the guarantee period continue to be made, paid to the surviving partner's personal representatives.

Rule 70: Guaranteed lump sum where scheme pensioner dies aged under 75 with no surviving partner

289. If a pension is guaranteed under the new tax regime, then it must be paid as an instalment pension until the end of the "guarantee period" which the Finance Act 2004 refers to as "term certain". A pension paid to a person with no surviving partner cannot therefore (as was the case under the previous tax regime) be commuted following the member's death to a lump sum in respect of the remaining instalments due under a 5 year guarantee.

290. However, under the Finance Act 2004²⁰ a pension scheme can provide a tax-free lump sum in addition to, or instead of, a guarantee on scheme pension, provided such a payment is a defined-benefits lump-sum death benefit in terms of that legislation. Rule 70 makes provision for such a benefit where a scheme pensioner aged under 75 dies leaving no surviving partner. The rule is expressed in similar terms to the 5 year guarantee under the old tax rules. Such a lump sum is tax-free up to the deceased scheme pensioner's remaining Lifetime Allowance.

291. Rule 70(1) makes provision for payment of a guaranteed lump sum on the death of a scheme pensioner before the end of their initial pension period (see paragraph 281). The scheme pensioner must be under age 75 when they died and leave no surviving partner. Provided the trustees are satisfied that the lump sum qualifies as a defined-benefits lump-sum death benefit, a lump sum may be paid to the personal representatives of the deceased.

292. Rule 70(2) sets out the amount of the guaranteed lump sum that is payable. The amount is equal to the amount of scheme pension that would have been payable to the deceased until the end of the guaranteed period, less the amount that the Fund trustees estimate will be payable during that period to children of the deceased. Such an adjustment may be made more than once if necessary.

²⁰ Finance Act 2004 c.12, section 167(3) and Schedule 29 paragraph 13

293. Rule 70(3) and (4) provides for additional lump sums to be paid by the trustees where the initial deductions for children's pension under rule 70(2)(b) were over-estimated. In those circumstances an additional lump sum is to be paid equal to the difference between the amount paid and the amount which the Fund trustees estimated should have been paid, taking their revised estimate for children's pension into account.

Rule 71: Guaranteed pension where scheme pensioner dies aged 75 or over with no surviving partner

294. The Finance Act 2004 under the provisions (see paragraph 272 and footnote 17) restricts payments of "defined benefits lump sum death benefit" to pension scheme members who have not reached age 75. This affects what can be paid under the 5 year guarantee for those who die leaving no surviving partner who are aged over 75 years. Rule 71 makes provision for payments in such circumstances.

295. Rule 71(1) provides for a scheme pension to be paid following the death of a scheme pensioner aged 75 or over for the remainder of their initial pension period when they do not leave a surviving partner. The instalments of pension continue to the end of the initial pension period, payable to the 'deceased's personal representatives.

296. Under rule 71(2), any instalments of pension paid under this rule will be reduced by the amount of any children's pension paid during the same period.

Transitional provisions – 5 year guarantee

297. Provision is made in Schedule 3 at paragraphs 14-15 to protect the entitlement of existing scheme members under the 1999 scheme rules. In respect of those members, paragraph 13 provides for lump sums up to the equivalent of five years pension payments to continue to be paid in the event of the death of a deceased scheme pensioner over 75 with no surviving partner. Paragraph 14 protects the entitlement of a deferred pensioner's personal representatives to receive a refund of contributions where the deceased had no surviving partner or children (a "deferred pensioner lump sum under N" of the 1999 scheme rules).

PART M SHORT SERVICE REFUNDS

298. Part M of Schedule 1 sets out the rules for paying a refund of contributions from the pension scheme. Any amount refunded under Part M requires to be a short service refund lump sum as defined under paragraph 5 of Schedule 29 to the Finance Act 2004. These rules replace article N1 of the 1999 pensions order.

Rule 72: Payment of short service refunds

299. Under rule 72(1), a refund is available to former scheme members with fewer than three calendar months reckonable service who apply for a refund at any time prior to becoming a scheme pensioner. A refund cannot be made in respect of office-holder or MSP service only. Under rule 72(2), the refund payable is the amount of contributions paid by the individual, less any amount paid to HMRC under section 55(2) of the 1993

Act for the contributions equivalent premium (CEP) for that individual. The CEP is the amount required to buy back service in the second state pension scheme for the refund period, as the scheme is contracted-out of the second state pension scheme.

Rule 73: Extinction of scheme benefits

300. This rule determines that the payment of a short service refund lump sum extinguishes all pension rights including those of others such as surviving partners and eligible children.

Deductions of tax from refunds

301. Rule 99 is also relevant to Part M as it provides that any short service refund lump sum payable under Part M should be reduced to cover any tax paid by the Fund trustees in respect of the refund in accordance with section 205 of the Finance Act 2004.

Transitional provisions – short service refunds

302. Article N1 of the 1999 pensions order provides for refunds where the individual has less than two years service. Under rules 23(3) and 24(2) of Schedule 1, rights in the scheme now vest after three months. This allows short service benefits to be available prior to the two year service requirement of section 71 of the 1993 Act, but consequently refunds are only available to former members of the scheme with less than three months' service. Transitional provision for current members is made at paragraph 16 of Schedule 3 allowing existing scheme participants to request a refund of contributions, if they have accrued less than two years total reckonable service.

PART N TRANSFERS

303. Part N of Schedule 1 sets out the rules governing transfers into and out of the Pension Fund. These rules replace the rules contained at Part P of the 1999 pensions order.

304. Transfers into and out of pension schemes are governed by UK pension and tax legislation. Part N is therefore drafted to be compatible with and complementary to this legislation. Chapters 4 and 5 of Part IV of the Pension Schemes Act 1993 (c48) provide rights for members of schemes to transfer the cash equivalent of their rights under a scheme. Some of these rights result in direct legislative obligations on the Fund trustees, which are not repeated in Part N. Part N should therefore be read in conjunction with Part IV of the Pension Schemes Act 1993 and accompanying secondary legislation.

305. Sections 164 and 169 of the Finance Act 2004 only allow a registered pension scheme to make recognised transfer payments only to another registered scheme or to a qualifying recognised overseas pension scheme, which is taken into account in the rules.

Chapter 1

Transfers Out

Rule 74: Statement of entitlement

306. Rule 74 sets out the definition of a “transferable sum” from the scheme as being that set out in a “statement of entitlement” which the Fund trustees are required to provide under section 93A of the Pension Schemes Act 1993. Under that section, the trustees or managers of a scheme must, on the application of any member, provide the member with a written statement, which is referred to as a “statement of entitlement”. This sets out the amount of the cash equivalent at the guarantee date (see paragraph 312) of any benefits which have accrued to or in respect of the member under the applicable rules.

307. The Fund trustees will calculate the amount of the cash equivalent transfer value in accordance with the 1993 Act and, more specifically, the relevant regulations made under it.²¹

308. Rule 74(2) provides for additional transfer rights to those set out in the 1993 Act. The 1993 Act only requires transfers and statements of entitlement for individuals up to one year prior to the normal retirement age. SPPS transfers can be made after the scheme’s normal retirement age of 65 (a member can contribute to the SPPS up to age 75). Rule 74(2) allows this rule to apply to those aged 64 or over, provided they stopped being a participating member of the scheme no longer than six months ago. Therefore, transfers out are possible for serving MSPs and office-holders over 64 where they have opted out of the scheme under rules 23 or 24.

Rule 75: Transfers to other pension schemes

309. Rule 75 sets out the conditions to be met in order for a transferable sum to be transferred from the Pension Fund. A transfer must be made if these conditions are met. An individual must not be a participating member or scheme pensioner and must have a total reckonable service of at least three months (conditions 1 and 2). An individual with less than three months’ service is entitled to a refund of contributions rather than a transfer sum. Under Chapter 4 of Part IV of the 1993 Act, the right to a transfer value is required where there is more than two years’ service. More limited rights apply where there is between three months and two years’ service under Chapter 5 of Part IV. As the new scheme rules provide transfer rights to all with more than three months’ service, the requirements of Chapter 5 are exceeded.

310. Under condition 3, the Fund trustees must have provided the individual with a “statement of entitlement”. This will precede the fulfilment of condition 4 which requires an individual to give the Fund trustees a “transfer-out notice” specifying how the transferable sum is to be transferred, i.e. the destination and any other information that the Fund trustees may reasonably require.

²¹ The Occupational Pension Schemes (Transfer Values) Regulations 1996 (S.I. 1996/1847)

311. The “statement of entitlement” uses a guarantee date, which is the date at which the value of the cash equivalent transferring sum is calculated. An individual must provide notice of transfer-out within three months of the guarantee date (condition 6), as well as within six months of stopping being a participating member or becoming 64, whichever is the later (condition 5).

312. The way in which the transfer is to be made must be permitted by section 95(2) of the 1993 Act (condition 7). This means that the trustees or managers of the receiving scheme must be willing and able to accept the transfer and their scheme must meet prescribed requirements.²² In addition, the transfer should be a “recognised transfer” as per sections 164 and 169 of the Finance Act 2004 (i.e. another registered scheme or a qualifying overseas scheme under the tax legislation) and not prohibited by any other enactment (condition 8).

Rule 76: Enhancement of transferable sum

313. Rule 76 provides for the minimum amount of a transferable sum to be no less than the total of an individual’s contributions, any transfer-in sums and monies used to purchase added years. This rule is provided as a protection should any calculation of a transferring sum lead to a sum smaller than the total of these contributions paid into the Pension Fund by any individual.

314. Schedule 3 paragraph 17(1) makes transitional arrangements in relation to any contributions or payments made and any transfers received under the 1999 scheme rules. Any such monies are to be included within the calculation.

Rule 77: Reduction of transferable sum

315. Rule 77 is a requirement to cover guaranteed minimum pension (GMP) rules (see section 8 of the 1993 Act).²³ Rule 77 provides that accrued rights to a guaranteed minimum pension or accrued rights attributable to service in contracted-out employment can be deducted by Fund trustees from any sums transferred out of the SPPS and retained in the scheme. This power would be used should section 96(2) of the 1993 Act apply to require rights to be retained in the SPPS, broadly where a receiving scheme is not willing or able to accept benefits attributable to a GMP or contracted-out employment.

Rule 78: Transfer payment

316. Rule 78 sets out the time limit for the payment of a transferable sum as being no later than the individual’s 65th birthday or, if later, the day falling six months after the transfer notice was given.

²² See Regulation 12 of the Occupational Pension Schemes (Transfer Values) Regulations 1996 (S.I. 1996/1847)

²³ Between 1978 and 2002 part of an earner’s National Insurance Contributions (NICs) went toward State Earnings Relation Pension Scheme (SERPS) unless they were a member of a contracted-out occupational pension scheme. Between April 1978 and April 1997 members of contracted-out pension schemes were guaranteed not to have a smaller pension than they would have received under SERPS.

317. Rule 78(2) governs a transfer payment that is made more than six months after the guarantee date. The guarantee date is the date used to calculate the amount of the transferable sum to be paid. Should the payment be delayed by more than six months, the transfer sum is to be increased to either (a) the amount the transfer sum would have been if the guarantee date was the transfer date, or (b) the original transfer sum plus the amount of daily interest.

Rule 79: Time limits

318. Whilst the rules provide time limits for the payment of a transferable sum from the scheme, there may be exceptional circumstances where it would not be acceptable to prevent a transfer payment being made outside these time limits. Rule 79 allows the Fund trustees some discretion to extend time limits should they think it reasonable to do so.

Rule 80: Extinction of scheme benefits

319. Rule 80 specifies the effect that a transfer has on an ex-'scheme member's rights in the scheme. These are extinguished once a transfer payment has been made. An exception to this applies where rule 77 required the Fund trustees to retain part of a transfer value to cover GMP rights or rights attributed to contracted-out employment.

Chapter 2

Transfers-in

Rule 81: Transfer-in

320. Rule 81 sets out the conditions that must be met in order for the Fund trustees to accept a transfer sum from another pension scheme. A participating member must provide a "transfer-in notice" setting out the amount of the transfer-in sum and the pension scheme which is making the payment (condition 1). Section 95 of the 1993 Act requires other schemes to give transfer values up to one year prior to normal retirement age, which will be a maximum of 64 for most schemes. The new scheme rules restrict transfers-in to a corresponding age limit so that this notice must be provided before the individual's 64th birthday (condition 2).

321. The participating member must have at least three months of total reckonable service (condition 3), as prior to this period they do not yet have vested rights in the scheme and may be entitled to a short service refund (Part M). The Finance Act 2004,²⁴ refunds in excess of a member's contributions under the pension scheme would be an unauthorised payment. The three month minimum in the scheme rules prevents a transfer in and then a refund, which would be an unauthorised payment.

322. Condition 4 requires payment to be made from a pension scheme which is either registered or a qualifying recognised overseas pension scheme for the purposes of Part 4 of the Finance Act 2004. The transfer-in amount should be sufficient to cover any

²⁴ Paragraph 5(2) of Schedule 29 to the Finance Act 2004

entitlement to a guaranteed minimum pension that arose from the transfer-in (condition 5), (see paragraph 316). Condition 6 is a linkage to the restriction imposed by rule 83 (see paragraph 328).

323. Condition 7 provides the Fund trustees with power to impose further conditions on transfers-in should they require. For example, there may be further requirements from the amendments to the 1993 Act or to the Occupational Pension Schemes (Transfer Values) Regulations 1996²⁵ or to other legislation which places obligations on trustees before accepting transfer values. Equally there may be factual information which the Fund trustees require before they accept the transfer.

324. As a transitional arrangement, Schedule 3 paragraph 17(2) disapplies condition 2 (where notice of transfer-in must be given before the scheme member's 64th birthday) for 12 months from the new rules day for current participating members.

Rule 82: Effect of transfer-in

325. Rule 82 sets out how the transfer-in sum is used to provide benefits in the SPPS. Reckonable service in the SPPS is increased by any sum transferred in. Where the participating member is an MSP member, only their reckonable service as an MSP (see rule 33) is increased, even if they are also an office-holder. The increase is an amount to be determined by the Fund trustees. If the participating member is an office-holder but not an MSP, reckonable service as an office-holder (see rule 34) is similarly increased by an amount decided by the Fund trustees and will apply to the office-holder post held at the time at which transfer in is made.

326. Any increased level of service is calculated as being a period when the higher rate scheme member contributions were made, with the result that they will count towards the higher accrual rate of 1/40th of salary for the purposes of final calculation of pension. Fund trustees must determine by how much an individual's reckonable service will be increased as at the date of transfer-in, in accordance with guidance and tables provided by the scheme actuary for this purpose.

Rule 83: Limitation on transfers-in

327. Rule 83 provides that a transfer-in will not be accepted if, when taken with an individual's anticipated reckonable service, it would increase the annual MSP or office-holder reckonable service to such a level that the annual MSP pension cap (rule 38(2)) or annual office-holder pension cap (rule 39(4)) would be exceeded.

328. Rule 83(2) provides that anticipated service should be calculated as being the service the MSP or office-holder would obtain if he or she remained in post until the next ordinary general election day. Therefore, the Fund trustees would add the member's prior service and the amount of time prior to the next election before deciding if this, added to the proposed increase from the transfer, would exceed the relevant pension cap.

²⁵ S.I. 1996/1847

PART O ADDED YEARS

329. Part O of Schedule 1 sets out rules covering how participating members can enhance their pension benefits by buying extra years of service to add to their actual length of reckonable service. The cost of purchasing added years is determined by an actuarial calculation and in practice will be fixed as a percentage of salary. The amount of an instalment required to buy a fixed amount of additional reckonable service depends on the member's age. Purchase may be made by lump sum or by way of monthly instalments. "Members pay the full cost of any added years that they purchase.

330. These rules replace the rules contained in Part Q and Schedule 5 of the 1999 pensions order.

Rule 84: Added years

331. Rule 84 allows a participating member to increase the length of their pensionable reckonable service by buying added years. It also specifies that added years may be bought as complete years or as fractions of a year calculated in days.

332. Rules 84(3) and 84(4) recognise that a participating member may be an MSP only, an MSP who is also an office-holder or an office-holder who is not an MSP (the Lord Advocate and the Solicitor General are office-holders but may not necessarily be MSPs). Rule 84(3) specifies that an MSP member (who may also be an office-holder) can only buy added years based on their service and salary as an MSP. Rule 84(4) specifies that an office-holder may buy added years but only if that person is not an MSP and in this case the added years would be added to their office-holder reckonable service and be based on their office-holder salary.

Rule 85: Buying added years by instalments

333. Rule 85 sets out the rules for buying and paying by instalments.

334. In most cases, payment by instalment is likely to be by deductions from the participating member's salary by the SPCB who will pay that deduction to the trustees. The trustees, however, have power to require another method for making the contributions (to cover, for example, payments by an office-holder who is not in receipt of a salary from the SPCB). In the case of arrears of payment, it will be for the trustees to determine how the arrears should be paid.

335. Rule 85(1) sets out five conditions that must be met before the Fund trustees can accept an application. The person making the application must be a participating member and make an application to the Fund trustees.

336. The participating member must state how many years or fractions of years are being sought. The participating member need not state the amount to be paid as this will be calculated by the scheme actuary or by the Fund trustees using information and tables provided by the actuary as set out in rule 85(4).

337. There is no upper age limit by which the participating member must make an application to buy added years. Normal retirement age is 65 years, so the cost calculations and the periodic calculations are normally determined with reference to that age as outlined in condition 2. For participating members who choose to work and remain as an MSP or office-holder past age 65 years and who decide to purchase added years, the only option is to make periodical payments until the next general election.

338. Condition 3 requires the participating member to satisfy the Fund trustees that they are in good health. In practice this may mean that the participating member states that they know of no current health condition that would be likely to present an impediment in continuing to carry out their duties. Condition 4 of the rule specifies that the participating member must also produce any other information or evidence that the trustees may reasonably require in relation to the application. This may include further evidence in relation to the application conditions, for example medical evidence.

339. Condition 5 specifies that the Fund trustees cannot accept an application if it breaches the limitations in rule 89. The limitations are set out in detail at rule 89 and are based on HMRC requirements and include prevention of an increase taking the individual above the annual MSP or office-holder pension cap and an annual limitation of 20% of salary. (see paragraphs 358-366).

340. Once an application has been accepted, rule 85(2) states that the participating member cannot cancel or retract the application. Rule 85(3) states that the person responsible for paying the participating member's salary has to deduct an amount determined under this rule from each salary payment. The instalments are to be paid to the Fund trustees. Instalments are paid from the first day of the month after the application has been accepted. The last instalment is paid at the end of the period that has been calculated and notified to the participating member.

341. As set out in rule 85(5), once all instalments have been paid, the participating member's period of reckonable service will be increased by the number of added years that they have bought. Rule 85(5) also clarifies that, if the participating member has bought added years in their capacity as an MSP, it is the number of years in that post that is increased. If the participating member has bought added years in their capacity as an office-holder, it is the number of years in that capacity that is increased.

342. Rule 85(6) requires the purchase of added years to be calculated with reference to the higher rate ($1/40^{\text{th}}$) accrual rate.

343. Rule 85(7) specifies that for a participating member who is an office-holder but not an MSP, the extra years bought are added to reckonable service in the office held while the purchase is being made (rule 39(3) allows for separate calculations for different offices held). See also rule 86(1)(b) in relation to the position when an office-holder stops holding the position before completing all payment instalments.

Rule 86: Interruption of service

344. There are a number of ways in which a participant's service can be interrupted. Rule 86 makes provision for this and sets out the effect it has on the purchase of added years. Rule 86(1) covers two situations where added years are being purchased by instalments. The first is where an MSP stops being an MSP. The second is where an office-holder who is not also an MSP stops holding office or where an office-holder who is not also an MSP becomes an MSP.

345. Rule 86(2) specifies that, when any of the situations in rule 86(1) occurs, no further instalments are payable. Rule 86 also sets out the calculation of the amount of added years to be added to reckonable service. Under rule 86(2)(a), if the person dies or is entitled to a serious ill-health pension (under Part I), the scheme member is awarded all of the extra years that he or she had been buying. The outstanding balance of the years is treated as if fully purchased and credited in full as reckonable service.

346. Rule 86(2)(b) covers what happens in other cases when service is interrupted (e.g. leaving on ceasing to be an MSP, early retirement or ill-health retirement which is at the reduced benefit level, and including the case where an office-holder is not an MSP but becomes an MSP). The rule provides a calculation for a proportionate amount of the added years to be included in the scheme member's pension. This calculation is expressed as the number of added years that the scheme member applied to purchase by periodic contributions multiplied by the period (to the nearest day) during which the contributions have been paid. The resultant figure is divided by the total period over which the contributions would have been payable. The amount of reckonable service added is the proportion of the amount originally applied for.

Rule 87: Resumption of service as MSP member

347. While some interruptions to service are final, rule 87 makes provision in relation to interruption of service which is of a temporary nature and where the scheme member subsequently rejoins the scheme as a participating MSP member.

348. When service is interrupted but later restarts, an MSP member may resume paying towards the purchase of added years in certain circumstances. In other circumstances, an MSP member may, within three months of rejoining the scheme, apply to restart paying instalments at the previously determined rate.

349. Rule 87(2) sets out the effect that restarting has on reckonable service and the amount and duration of instalments. Under rule 87(2)(a), instalments resume at the previous amount and continue until the end of the original period. By virtue of rule 87(2)(b), the reckonable service added in respect of the original payments is removed and recalculated when the final instalment is paid or, if earlier, when the individual next leaves the scheme.

Rule 88: Buying added years by lump sum

350. A participating member may also - or alternatively - buy added years at any time by applying to the Fund trustees and making a lump sum payment. Rule 88 sets out the rules for buying and paying by a lump sum.

351. Rule 88(1) sets out four conditions which must be met before the Fund trustees can accept an application. These conditions are the same as conditions 1, 3, 4 and 5 of rule 85(1) (see paragraphs 336-340). The one exception is that for lump sum applications the age restrictions on condition 2 of rule 85(1) do not apply in recognition that purchase will be by a single payment.

352. Rule 88(2) requires that a participating member has to pay the relevant lump sum within six months of the date of acceptance by the Fund trustees of the application. If, after an application has been agreed by Fund trustees, the payment is not received on time, the application to buy the added years becomes invalid.

353. The amount to be paid, as described in rule 88(3) and (4), is calculated by the Fund trustees and must be certified by the scheme actuary or made in accordance with any guidance or tables produced by the scheme actuary.

354. When the lump sum has been paid, as set out in rule 88(5), the participating member's period of service will be increased by the number of added years just bought. Rule 88(5) goes on to clarify that if the participating member has bought added years in their capacity as an MSP, then it is the number of years in that post that is increased. If the participating member has bought added years in their capacity as an office-holder, then it is the number of years in that post that is increased.

355. Rule 88(6) requires the purchase of added years to be calculated with reference to the higher (1/40^{ths}) accrual rate.

356. Rule 88(7) specifies that, for a participating member who is an office-holder but not an MSP, the extra years bought are added to reckonable service in that office held when purchase is being made. (Rule 39(3) allows for separate calculations for different offices held.)

Rule 89: Limitations on buying added years

357. The amount of pension benefits that can be accrued as a participating member are restricted to the amount of the MSP "annual MSP pension cap" (see rule 38(2)) or "annual office-holder pension cap" (see rule 39(4)) as appropriate. Rule 89 places limitations on the buying of added years to prevent reckonable service increased under this Part from exceeding the scheme maximums.

358. Rule 89 also places similar restrictions in situations where an Annual or Lifetime Allowance would arise because the relevant limits would be exceeded by the proposed purchase of added years. Finally, the rule also places an upper restriction of 20% of salary payments on the amount of contribution any participating member may make in a single tax year.

359. Under rule 89(1)(a), the Fund trustees must reject an application to buy added years if the MSP's length of service enhanced by the proposed added years would take the MSP's entitlements over the limit of the annual MSP pension cap. Similarly, under rule

89(1)(b), an application must be rejected if an office-holder's length of service enhanced by the proposed added years would take the office-holder's entitlements over the limit of the annual office-holder pension cap.

360. The pension caps are specified in rules 38(2) and 39(4) (see paragraphs 150-155) as two-thirds of the final salary. The amount of the pensionable service required to exceed the cap will depend on whether pension is being accrued at the lower or higher contribution rate (1/50th or 1/40th) per annum (or a combination of both). Where the amount of pensionable service exceeds the cap, the pension is restricted to the two-thirds limit.

361. Rule 89(2) specifies how "anticipated reckonable service" is calculated. Reckonable service is dealt with under Part E.

362. Rule 89(2)(a) defines "anticipated reckonable service" as the service an MSP would obtain if they continued in post, making scheme member contributions at their existing rate. Under (2)(a)(i), the continuation in post is taken to be until the final instalment payment for the added years is made. Under rule 89(2)(a)(ii), when purchasing added years by a lump sum, the continuation in post is taken to be until the date of the next ordinary general election.

363. Rule 89(2)(b) makes identical rules to rule 89(2)(a) in relation to office-holder members, except that the Fund trustees are given an additional discretion to determine the end date when payment is by a lump sum. That date could be earlier or later than the next ordinary general election depending upon the circumstances at the time.

364. Rule 89(3) requires the Fund trustees to reject an application if specified limits would be breached. The first two limits at rule 89(3)(a) and (b) relate to the Annual or Lifetime Allowance. The third limit at rule 89(3)(c) restricts the total amount of scheme member contributions in a tax year to a maximum of 20% of salary payments. That limit includes scheme member contributions and amounts paid for added years.

365. In making a decision under rule 89, the Fund trustees may seek advice from appropriate professional sources such as the scheme actuary using powers at rule 16.

Rule 90: Multiple applications

366. Rule 90 entitles a participating member to make more than one application to the Fund trustees to buy added years. The Fund trustees can accept subsequent applications made by a participating member provided the application meets all the criteria set out in this Part.

367. The rule applies to applications to make payments by instalments or by lump sum. Subsequent applications need not specify the same payment method as a previous application.

368. In the event that a participating member is already paying for added years over a period of time by instalments and makes a subsequent successful application to buy more years paid for over a period of time by instalments, the periods of time when the payments are being made may overlap.

PART P PENSION SHARING

369. Part P of the Schedule sets out the rules which will apply where the trustees have to deal with a pension sharing order in respect of the divorce, or the dissolution of the civil partnership, of a member.

370. Pension sharing on divorce or nullity of marriage was introduced by the 1999 Act. Pension sharing was introduced to facilitate a clean-break divorce by enabling the capital value of a pension to be split at the time of divorce. It was extended to be available on the dissolution or annulment of a civil partnership by the Civil Partnership Act 2004 (c.33).

371. Before pension sharing under the 1999 Act, pension assets could still be taken into account for financial provision on divorce. The courts could offset pension assets against other marital assets divided or, following the commencement of section 166 of the 1995 Act, issue an earmarking order. Earmarking orders require a pension scheme to pay an amount direct to the ex-spouse who is not a member but only when the actual pension scheme member's entitlement arises.

372. The principle of pension sharing is that it gives an ex-spouse or civil partner individual stand-alone pension rights. This takes the form of a pension credit, representing a proportion of the capital value of the scheme member's shareable pension on divorce or dissolution. The pension scheme then has to discharge its liability in respect of a pension credit granted by a pension sharing order, the manner of discharge depending on the type of scheme and its rules.

Overriding legislation

373. The overriding pension sharing legislation introduced by or made under the 1999 Act broadly provides for pension schemes to give information to allow a pension sharing order to be considered and thereafter to implement any consequent pension sharing order. The split in the pension sharing order may be determined by the courts or by the parties in a joint minute of agreement which takes effect on divorce or dissolution.

374. There are no existing pension sharing provisions in the rules in the 1999 Pensions Order. However, the SPCB managers would still be required to comply with the terms of any pension sharing order in accordance with the overriding legislation.

Summary of Part P

375. Part P makes rules complementary to the overriding legislation. The provisions in Part P are designed to facilitate the transfer of the notional capital value specified in the order into separate scheme rights for the scheme member's ex-spouse or civil partner

(rules 91 and 93). There are also some modifications following the consequent reduction (under section 31 of the 1999 Act) of the pension rights of the MSP or office-holder scheme member (rule 92).

Provision of information, charging and apportionment of capital value

376. Prior to a pension sharing order, the managers or trustees give information on the notional capital value of a member's pension to enable the parties to a divorce or dissolution to consider a pension sharing order. As the requirements on trustees to supply information to members and their spouses or civil partners are set out in the Pensions on Divorce etc. (Provision of Information) Regulations 2000 Regulations,²⁶ they are not repeated in Part P. Similarly, the rules on the calculation of the capital value of the pension rights are prescribed in the Divorce etc. (Pensions) (Scotland) Regulations 2000²⁷ and not repeated in Part P. These Regulations already provide for the calculation of either the value of the pension in payment or the value of the benefits accrued to date where the pension is not yet in payment.

377. Also relevant to but not requiring specific coverage in Part P are the Regulations allowing the trustees to charge for the provision of information and for the implementation of pension sharing. The Pension Sharing on Divorce etc. (Charging) Regulations²⁸ are made under section 41 of the 1999 Act. They specify that the charges are those reasonably incurred by the trustees directly related to an individual case and in accordance with a schedule of charges provided in advance. Charges are payable by the scheme member who is most closely involved with the request and can be recovered by reducing benefits.

378. Once the parties are in receipt of information on the capital values, they or the court will decide if a pension sharing order is appropriate. Any order will specify the proportion of the value that is to be used to create a pension benefit for the former spouse or partner.

Implementation of pension sharing order – internal and external transfers

379. The Fund trustees must discharge liability for a pension credit under a pension sharing order within the four month period specified in section 34 of the 1999 Act. As they are trustees of a funded occupational pension scheme, paragraph 1 of Schedule 5 to the 1999 Act provides how the trustees can discharge their liability. They may implement an external transfer of the value of a person's pension credit to another scheme which meets the "qualifying arrangement" test. Alternatively, they may allow an internal transfer, that is allow the ex-spouse or civil partner to become a "pension credit member" in the scheme.

380. The Fund trustees' procedure for implementing these rights needs to follow the procedure under paragraph 1 of Schedule 5 to the 1999 Act and the Pension Sharing (Implementation and Discharge of Liability) Regulations 2000.²⁹ Again, given the

²⁶ S.I. 2000/1048

²⁷ S.S.I. 2000/112

²⁸ S.I. 2000/1049

²⁹ S.I. 2000/1053

detailed provisions elsewhere, specific rules on implementation procedure are not provided in Part P.

381. Following the procedure for an external transfer will discharge the Fund trustees' obligations as regards the ex-spouse or civil partner. However, if the pension sharing order is to be implemented by an internal transfer, that is the creation of a separate pension credit for the ex-spouse or civil partner in the scheme, there are ongoing rights within the scheme for the Fund trustees to govern. Rule 91 therefore provides for these rights for the scheme within the context of the general law.

Rule 91: Rights of pension credit member

382. Rule 91(1) defines a "pension credit member" as being a person on whom pension rights have been conferred within the scheme by the Fund trustees - that is, an internal transfer in accordance with paragraph 1(2) of Schedule 5 to the 1999 Act.

383. The 1999 Act inserted a new Part IVA, Chapter 1 (sections 101A to 101E) into the 1993 Act to set out the minimum benefits that require to be given to pension credit members. There are also detailed provisions on pension credits benefits for trustees to follow in the Pension Sharing (Pension Credit Benefit) Regulations 2000³⁰ and the Pension Sharing (Safeguarded Rights) Regulations 2000.³¹

384. These rules will be met by the Fund trustees and are supplemented to the extent necessary for this scheme by rule 91(2) which sets out the benefits to which a pension credit member is entitled under the scheme. It is for the Fund trustees to determine these benefits and rule 91(2) lists the range of benefits which may be conferred. The range is wider than the minimum requirements in Chapter 1 of Part IVA of the 1993 Act.

385. Rule 91(2)(a) sets the normal retirement age at 65 in line with that for other scheme members and rule 91(2)(b) allows for commutation of a portion, subject to the revenue maximum of 25%, of the pension into a lump sum payment. Rule 91(c) allows early retirement from age 60 onwards. Age 60 is the earliest age permitted for pension credit members under the pension sharing legislation.³²

386. Commutation of pension acquired under a pension sharing arrangement is not permitted prior to normal benefit age (65) except in the circumstances covered by rule 91(2)(d) and (e).³³ These are serious ill-health, when life expectancy is anticipated at less than one year, or where the pension is a trivial amount.³⁴

387. Payment of a pension once commenced continues for the life of the recipient. Rule 91(2)(f) guarantees payments of pension for a minimum period of five years. In the event

³⁰ S.I. 2000/1054

³¹ S.I. 2000/1055 for "safeguarded rights" as provided for by section 68 of the 1993 Act

³² Section 101C of the 1993 Act as inserted by section 37 of the 1999 Act

³³ Section 101C of the 1993 Act and Regulations 3 and 4, S.I. 2000/1054

³⁴ Trivial amount for these purposes currently specified in Part 1 of Schedule 29 to the Finance Act 2004 (c.12) as 1% of the standard lifetime allowance (currently £1.6 million)

of the death of the pension sharing credit member within five years of pension commencing, payments to the surviving partner, dependent children or personal representatives would continue until the end of that period.

388. If the pension credit member dies before pension commences, rule 91(2)(g) entitles their surviving partner, dependent children or personal representatives to receive a lump-sum payment. The amount payable is based on a 25% proportion of the value of the pension that the pension credit member would have been entitled to. ’

389. Rule 91(3) requires that benefits as a pension credit member are separate to any other benefits under the scheme. Rule 91(3) prevents benefits being combined and would only apply in the event that a pension credit member is also entitled to benefits as a scheme member due to their own service as an MSP or office-holder.

390. Rule 91(4) also applies when a person entitled to benefit as a pension credit member also has a separate entitlement to scheme benefits due to their own service. In the event that those separate scheme benefits are discharged by either payment of a trivial lump sum or a refund of contributions, the pension sharing benefits remain unaffected.

Rule 92: Specific rules applying to a pension debit member

391. In addition to making the internal or external transfer for the pension credit of the ex-spouse or civil partner, the Fund trustees need to make a corresponding reduction of the rights of the other party. This reduction is made under section 31 of the 1999 Act. Rule 92 makes provision for the circumstances of the scheme within this general law.

392. Rule 92(1) provides a definition of a “pension debit member” as being an individual whose scheme benefits have been reduced in accordance with section 31 of the 1999 Act, as a consequence of a pension sharing order.

393. A pension debit member’s benefits are reduced so that the amount of benefit will be less when the pension comes into payment or when the death benefit is paid. The reduction reflects the appropriate reduction in benefits, except in the circumstances set out in rule 92(2).

394. Rule 92(2) provides that any reduction does not affect the pension debit member’s “scheme pension entitlement” for the purposes of calculating any pensions due under Chapter 3 of Part J of these rules (Surviving partners and children’). Scheme pension entitlement is not reduced for the purpose of calculating surviving partners’ and childrens’ pensions where there has been a pension debit following a pension sharing order’.

395. Rule 92(4) makes provision for a reduction in the amount payable on Death-in-Service but only in relation to the alternative calculation for refund of scheme member contributions paid (see rules 65(2) and 67(2)) when this is higher than the salary multiple. Rule 92(4) makes it clear that the reduction is applied in accordance with the provisions of the 1999 Act.

396. Rule 92(3) prevents a member whose benefits have been reduced by a pension sharing order from buying back those benefits through the purchase of added years beyond any purchases that they could have made had the order not been made. The general added year restrictions are the “annual MSP pension cap” or “annual office-holder pension cap” (see rules 38(2) and 39(4)) which limit maximum pension entitlement to two-thirds of final salary and the annual purchase limit to 20% of salary or the Annual Allowance (see rule 89(3)(c)). For a pension debit member, these limits will be applied ignoring the pension debit reduction.

Rule 93: Death before implementation of pension credit

397. Rule 93 applies when a pension credit member dies in the period before the Fund trustees have discharged the pension credit order either by making an external transfer to a separate scheme or an internal transfer by conferring pension credit member rights on the individual. In these circumstances the default position of the general law is stated in the Pension Sharing (Implementation and Discharge of Liability) Regulations 2000³⁵ to be the retention of the entire value of the pension credit by the scheme trustees. However, this can be varied and the rules provide that the Fund trustees may pay a lump sum to the individual’s personal representatives up to a maximum of 25% of the value of the pension credit.

PART Q DUAL MANDATE MSPS

398. Part Q of Schedule 1 sets out the rules for calculating the pension entitlement of “dual mandate MSPs”. These provisions replace the rules contained at Part F4 (1), (2) and (3) of the 1999 pensions order.

Rule 94: Dual mandate MSPs

399. Rule 94 defines a “dual mandate MSP” as a serving MSP who is or has been a paid member of the UK Parliament (an MP) or the European Parliament (MEP) at the same time as being an MSP and had a reduction in MSP salary under section 82(2) of the 1998 Act. The amount of a dual member’s final salary is reduced to one-third of an MSP salary.

Rule 95: Pension reduction for dual mandate MSPs

400. Rule 95 sets out the adjustments which are to be made when calculating the amount of pension due from the scheme in respect of dual mandate MSPs. These adjustments are to be made to the formula contained in rule 38(1) of the Schedule. This formula is used to calculate the amount of annual MSP pension.

401. The adjustments that are to be made are contained in rule 95 (a)–(c).

402. Rule 95(a) provides that any reduction in final salary by virtue of section 82(2) of the 1998 Act is to be ignored.

³⁵ S.I. 2000/1053

403. Rule 95(b) applies when determining “A” in the formula contained in rule 38(1). During any period that a dual mandate MSP member made lower rate scheme member contributions from MSP salary payments (the pension of which is accruing at 1/50th per annum). “A” is to be reduced by the same proportion as the MSP’s salary was reduced during that period in accordance with section 82(2) of the 1998 Act.

404. Rule 95(c) applies when determining “B” in the formula contained in rule 38(1). During any period that a dual mandate MSP member made higher rate scheme member contributions from MSP salary payments (the pension of which is accruing at 1/40th per annum). “B” is to be reduced by the same proportion as the MSP’s salary was reduced during that period in accordance with section 82(2) of the 1998 Act.

405. The adjustments made by rule 95 have the effect of reducing the amount of pension accrued during periods of dual membership by the same proportion as the member’s salary is reduced under section 82(2) of the 1998 Act.

PART R TAXES

406. Part R of Schedule 1 relates to the tax rules which apply to registered pension schemes under Part 4 of the Finance Act 2004. Under section 160 of that Act, a registered scheme is only authorised to make specified payments to or in respect of members. Other payments are “unauthorised payments” and attract charges, meaning that the Fund trustees as scheme administrator may become liable to pay tax charges in respect of such payments (see section 160(5)). The scheme administrator may also become liable to pay tax charges if an otherwise authorised payment is made when the recipient or member’s individual tax allowance exceeds the Lifetime Allowance.

407. Part R enables the Fund trustees to recover tax charges by deduction from an individual’s pension benefits. The Fund trustees may also reduce or withhold an individual’s pension benefits where payment would result in an unauthorised payment and, therefore, charges under the Finance Act 2004. While the provisions in this Part were not included in the scheme rules in the 1999 pensions order, the ability of the manager to withhold payments otherwise attracting an unauthorised payment charge was available as a result of the Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006³⁶. As scheme rules having the same effect are now included in this part, S.I. 2006/364 is disapplied by virtue of paragraph 23 of Schedule 3.

Rule 96: Finance Act 2004 terms

408. Rule 96 provides a definition of the following key terms referred to under Part R:

- i. “the 2004 Act” means the Finance Act 2004 which introduced a new tax regime for registered pension schemes from 6 April 2006;
- ii. “event” is a benefit crystallisation event which happens when an individual becomes entitled to a pension benefit. That benefit, together with payment of any other pension benefits, are aggregated together to ensure they do not

³⁶ S.I. 2006/364

- exceed the Lifetime Allowance limit. There are eight benefit crystallisation events listed in section 216 of the Finance Act 2004;
- iii. “lifetime allowance charge” is a tax charge on the individual where the total of their pension entitlements exceed their Lifetime Allowance limit. The Scheme administrator and member are jointly liable for the charge;
 - iv. “scheme administrator” is the Fund trustees of the scheme for the purpose of identifying joint liability with an individual for any lifetime allowance charges under section 217 of the Finance Act 2004 (sections 270-274 of the Finance Act 2004 provide further detail on the exact liabilities that apply);
 - v. “unauthorised charge” is defined as two possible tax charges which apply where a payment is made out of the Pension Scheme Fund which is not one authorised to be made under section 164 of the Finance Act 2004. These are the unauthorised payment charge and the unauthorised payments surcharge (see sections 208-210 of the 2004 Finance Act 2004).

Rule 97: Payment of lifetime allowance charge by scheme administrator

409. A Lifetime Allowance charge becomes payable as a result of payments from the scheme on a benefit crystallisation which exceeds the individual’s Lifetime Allowance. The individual receiving the benefit and the scheme administrator are jointly and severally liable for payment under section 217 of the Finance Act 2004.

410. Rule 97(1) makes provision for the Fund trustees to pay a lifetime allowance charge on behalf of the member. Under rule 97(2) the trustees may only make payment of the charge if instructed to do so by the individual on or before the date the charge arises. The individual must pay the amount of the charge to the Fund trustees on or before that date.

Rule 98: Payment of lifetime allowance charge from Pension Fund

411. Rule 98(1) determines that, in the absence of the appropriate instruction and payment under rule 97(2), the Fund trustees must pay the lifetime allowance charge from the Pension Fund. Where the charge arises on the Fund because of a transfer of benefits to a qualifying recognised overseas pension scheme (benefit crystallisation event 8 under section 216 of the Finance Act 2004), rule 98(2)(a) requires the Fund trustees to deduct an amount equivalent to the transfer value. For all other crystallisation events, rule 98(2)(b) requires the trustees to deduct the amount charged on the Fund from the individual’s pension benefits.

412. Rule 98(3) requires that any reduction in benefits must, in the scheme actuary’s opinion, reflect the amount of the charge paid under rule 97.

Rule 99: Deductions for tax arising on lump sum payments

413. Under the Finance Act 2004, a short service refund lump sum charge arises where a short service refund lump sum is paid by a registered pension scheme. Part M provides the rules for payment of short service refunds. There is a tax charge on these payments which is calculated in accordance with section 205 of the Finance Act 2004. Rule 99

makes provision for the charge to be deducted from any short service lump sum before it is paid to an individual. In effect, the deduction is equivalent to the income tax relief originally granted on the scheme member's contributions.

Rule 100: Reduction of benefits which would otherwise attract unauthorised charge

414. Rule 100 makes provision for the reduction of an individual's benefits where payment of those benefits by the Pension Fund would attract an unauthorised charge (i.e. an unauthorised payment charge or an unauthorised payment surcharge under the Finance Act 2004). Rule 100 seeks to prevent an unauthorised charge from occurring.

415. Rule 100(a) applies in the event that an unauthorised charge would arise in respect of any payment made from the Pension Fund. Rule 100(a) requires the Fund trustees to reduce the amount payable from the Pension Fund to an amount which is just below the threshold which attracts this charge.

416. Where no reduction is possible under (a), rule 100(b) requires the Fund trustees to withhold any payment to the individual in accordance with rule 101.

Rule 101: Prohibition of payments which would give rise to liability for certain taxes

417. Rule 101 places further restrictions on payments to individuals in the event that payments from the Pension Fund would give rise to a liability on the scheme for a scheme sanction charge or a de-registration charge.

418. A scheme sanction charge under section 239 of the Finance Act 2004 arises where a registered pension scheme makes an unauthorised payment. The scheme administrator is liable to pay the scheme sanction charge.

419. A de-registration charge under section 242 of the Finance Act 2004 is an income tax charge which applies if HMRC withdraws the registration of a registered pension scheme. The de-registration charge is 40% of the total of the amount of the assets held by the scheme immediately before it ceased to be a registered pension scheme. Deregistration and the charge could apply when more than 25% of a scheme's fund is paid as unauthorised payments in any 12 month period.

420. Rule 101 prevents any payment which would otherwise be paid from the Pension Fund where that payment would give rise to a scheme sanction charge or a de-registration charge.

PART 5 ACCOUNTS, AUDIT AND ACTUARIAL REPORTS

421. The 1995 Act and the Pensions Act 2004 set out requirements that occupational pension schemes must follow in relation to the keeping and auditing of accounts and the obtaining of actuarial reports. These requirements are applicable to the scheme.

422. Occupational pension schemes should be administered efficiently and demonstrate legal compliance. Annual accounts and audit provide evidence of the health of the Pension Fund and how it is being managed. Together with actuarial reports, they provide information about investment, cost savings or system improvements and point towards the best path for future development.

423. Part S of Schedule 1 supplements the general rules applicable to all occupational pension schemes in relation to the keeping and audit of accounts and preparation of actuarial reports.

Rule 102: Accounts and audit

424. Rule 102(1) requires the Fund trustees to keep proper accounts relating to the scheme. The rule specifies that an annual statement of account must be produced for each financial year. The financial year ends on 31 March (see rule 109(1)). Reference should also be made to the requirements of the 1995 Act (section 49 and Regulations made thereunder) which set out responsibilities in relation to record keeping, requiring records to be kept in a prescribed form and manner and for a prescribed period.

425. Rule 102(2)(a) provides that the Fund trustees must arrange for an audit of the annual accounts within seven months of the end of each financial year. They are able to appoint auditors as required by and subject to the overriding general requirements of occupational pension schemes including those under section 47 of the 1995 Act and relevant statutory instruments.³⁷

426. Rule 102(2)(b) requires that a copy of the annual accounts and audit report are laid before the Parliament, also within seven months of the end of each financial year.³⁸

Rule 103: Actuarial reports

Actuaries

427. An actuary is a person qualified to calculate commercial risks and probabilities involving uncertain future events, especially in the context of insurance and life assurance calculations such as premiums, reserves, dividends and annuity rates.

Actuarial valuations

428. In relation to a pension scheme, an actuarial valuation is an assessment, usually carried out every three years, by the Pension Fund actuary, to work out what money needs to be put into the pension scheme in the future to ensure that the pensions can be paid.

³⁷ See Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) Regulations 1996 (S.I. 1996/1975) which include provisions as to the form and content of the auditor's statement (Regulation 3 and the schedule to the Regulations). See also the Registered Pension Schemes (Audited Accounts) (Specified Persons) Regulations 2005 (S.I. 2005/3456) which specify classes of people who can and cannot audit tax registered schemes

³⁸ Chapter 14 of the Standing Orders of the Scottish Parliament sets out the Rules for laying reports and documents before the Scottish Parliament

429. Rule 103(1) defines the “scheme actuary” as the person appointed by the Fund trustees under section 47(1)(b) of the 1995 Act. That provision requires that an actuary is appointed for every occupational pension scheme by the trustees or managers. Reference should be made to the Occupational Pension Schemes (Scheme Administration) Regulations 1996,³⁹ specifically Regulation 4(1)(b) which provides that the qualifications of an eligible actuary must be either a Fellow of the Institute of Actuaries, or the Faculty of Actuaries or approved by the Secretary of State.

430. Rule 103(2) requires that the Fund trustees must obtain actuarial valuations at intervals of at least every three years. In addition to this mandatory valuation, the rule also enables the Fund trustees to request a valuation at any time.

431. The content of the actuarial report is set out in rule 103(3). It must include an overview of the general financial position of the Pension Fund and an actuarial valuation of the assets and liabilities. The scheme actuary must also recommend a contribution rate to be paid under rule 32(2)(a). The recommended rate must be shown as a percentage of the participating member salary payments.

432. Rule 103(4) provides that a copy of each actuarial report must be laid before the Parliament by the Fund trustees within three months of the Fund trustees obtaining it.

PART T MISCELLANEOUS

433. Part T of Schedule 1 sets out miscellaneous provisions covering resolution of disputes, entitlement to a guaranteed minimum pension for a transfer-in sum, restriction on assignments, surrenders and commutations of pension benefits, small payments for deceased individuals without confirmation or other proof of title and formal communications. These provisions replace the rules contained in Part T of the 1999 pensions order as well as making new provision in other areas.

Rule 104: Dispute resolution procedure

434. Section 50 of the 1995 Act as amended by section 273 of the Pensions Act 2004 sets out requirements relating to the resolution of disputes. It provides that trustees of an occupational pension scheme must ensure that dispute resolution arrangements are made and implemented. The section sets out the types of dispute to which the dispute resolution arrangements apply. The section further provides for the procedure of the dispute resolution arrangements and provides for civil penalties to apply to trustees who fail to take reasonable steps to make or implement dispute resolution arrangements.

435. The Fund trustees are therefore required to put in place the necessary arrangements for the resolution of disputes.

Rule 105: Guaranteed minimum pension

³⁹ S.I. 1996/1715

436. Rule 105 makes provision for guaranteed minimum pensions (GMP).

437. GMP is related to the State Earnings Related Pension Scheme (SERPS). SERPS was an additional state pension scheme which was related to earnings, running from 6 April 1978 to 5 April 2002. A person who was in employment may have paid National Insurance Contributions (NICs) into SERPS. However, if they were also a member of a contracted-out occupational pension scheme, they did not pay this part of their NICs and therefore did not earn a pension under SERPS.

438. Between April 1978 and April 1997, members of contracted-out pension schemes were guaranteed not to have a smaller pension from their contracted-out occupational scheme than they would have received under SERPS. If an occupational pension entitlement is less than a GMP entitlement, the occupational pension is increased to match a minimum pension entitlement from the relevant GMP service.

439. As GMP only applied until 1997, no GMP will have directly accrued under the scheme which commenced for the Parliament in 1999. An obligation to pay a GMP entitlement under the scheme will only arise in relation to “transfer-in sums” (see Chapter 2 of Part N for transfers-in).

440. Rule 105(1) makes provision for payment of GMP to any entitled person in accordance with sections 14 to 16 of the Pension Schemes Act 1993. It provides that the pension is paid for the rest of the individual’s life at a rate equivalent to a weekly rate of not less than the guaranteed minimum. The entitlement is from “pensionable age” as defined in section 181 of the 1993 Act, for GMP purposes 60 for women and 65 for men.

441. Rule 105(2) and (3) cover where GMP entitlement potentially arises earlier than the scheme’s normal retirement age. The right to GMP entitlement from “pensionable age” is read with section 13(4) of the 1993 Act which allows for postponement where employment continues. Rule 105(2) therefore provides that payment of a person’s GMP is postponed where the individual is an MSP or still an office-holder on the day it becomes payable.

442. Rule 105(3) allows a postponement described in rule 105(2) to last either until the individual is no longer an MSP or office-holder, or for up to five years from pensionable age where the person is still in office, whichever is the earlier. The postponement may be for a longer period with the consent of the individual.

443. Transitional provision is made at paragraph 20 of Schedule 3 in relation to transfer-in sums received under article P6 of the 1999 scheme rules (see paragraphs 555-556).

Rule 106: Restriction on assignability etc.

444. Rule 106 makes provision in relation to the inalienability of pension benefits.

445. Section 91 of the 1995 Act provides generally for the inalienability of occupational pensions, except to the extent permitted by law. Any pension rights and benefits due under the pension scheme shall not be assignable or chargeable with debts or other liabilities. There are some exceptions to inalienability set out at section 91(5). These exceptions are not mandatory on pension schemes. Rule 106 disapplies the exceptions at paragraphs (a) assignment, (b) surrender and (c) commutation. Assignment, surrender and commutations are therefore not permitted in respect of scheme benefits, other than where the scheme rules specifically permit.

Rule 107: Payments due in respect of deceased individuals

446. Rule 107 provides for the ability to pay small amounts of a deceased individual's scheme entitlement without confirmation or other proof of the title. This applies where the sum due does not exceed the amount specified in an order made in accordance with section 6 of the Administration of Estates (Small Payments) Act 1965 (c.32). The current limit is £5,000 in terms of the Administration of Estates (Small Payments) (Increase of Limit) Order 1984.⁴⁰ The 1965 Act does not automatically apply to enactments made under the 1998 Act. Rule 107 is necessary to apply the 1965 Act.

447. Under rule 107(1), the scheme entitlement is the sum of any outstanding amounts due to the deceased at the time of death and any amounts payable to the deceased's personal representatives.

448. Rule 107(2) provides that the Fund trustees are able to make such small payments under this rule without the requirement for confirmation or other proof of title. Payment may be made to the deceased individual's representative or to any person appearing to the Fund trustees to be beneficially entitled to the estate.

449. Rule 107(3) places liability on the recipient of the payment to account for the amount paid. The Fund trustees are not liable to account for the payment. This is significant in the event that a payment made under this rule is subject to challenge by any other claimant.

Rule 108: Formal communications

450. Rule 108 sets out the requirements for formal communications used in relation to the Act. Provision is made in relation to the form and delivery of communications. This includes provision for the use of electronic media.

451. A formal communication is defined in rule 108(1) as any notice, application, request or certification made or given for any purpose under the Act.

452. Rule 108(2) requires that any formal communication described in rule 108(1) must be in writing.

⁴⁰ S.I. 1984/539

453. Rule 108(3) makes provision for the delivery of formal communications. Rule 108(3)(a) provides that a communication is considered to be made or given if it is delivered or sent by post to the relevant address. The rule lists the relevant addresses. Communications for the Fund trustees or any MSP should be sent to the Parliament. For holders of a qualifying office who are not MSPs, the address is the office-holder's principal office. In any other case, the relevant address is the usual or last known abode of the person to whom the communication is being sent.

454. Rule 108(3)(b) provides that communications sent in any other way than as described in rule 108(3)(a) are to be considered as made or given if the sender reasonably thinks that the communication will be delivered on the same or next day. This includes electronic communications.

455. Rule 108(4) makes provision for formal communications sent by electronic means. Under this provision, electronic communications are to be treated as being in writing provided that the communication is legible and capable of being used for future reference.

456. Rule 108(5) makes further provision in relation to rule 108(3)(b). It creates a presumption that the formal communication referred to in that rule is considered as having been delivered on the day after it is sent, unless it can be proved otherwise. Where the next day would fall on a weekend or bank holiday in Scotland, the communication is considered as having been delivered on the next weekday which is not a bank holiday. Scottish bank holidays are defined at paragraph 2 of Schedule 1 of the Banking and Financial Dealings Act 1971 (c.80).

PART U KEY TERMS

457. Part U of Schedule 1 contains an interpretation rule and an Index.

458. Rule 109(1) contains definitions of terms used throughout the Act. Most have been referred to earlier in these notes where a reference to their meaning is needed. These definitions are primarily for the purposes of the scheme rules set out in Schedule 1 but some of the terms are also used for Schedule 2 (see paragraph 5 of Schedule 2) and Schedule 3 (see paragraph 1(2) of Schedule 3). Note that section 4 of the Act also defines some terms for the purposes of the whole Act.

459. The defined terms list is supplemented by rule 109(2) which ensures that references to amount of scheme pension are read as including enhancements or reductions to basic entitlement caused by other rules such as lump sum, early retirement and ill-health. Rule 109(3) defines the interest rate for the purpose of rules providing for refunds of contributions with interest.

460. Rule 110 contains a list of defined words and expressions used within the Act and details of the rule in Schedule 1 in which they are defined or otherwise explained.

SCHEDULE 2 GRANTS PAYABLE ON LEAVING OFFICE

461. As indicated earlier the SSRB report in November 1998, in addition to pensions and pay, covered resettlement grants, ill-health retirement grants and severance arrangements. In relation to gratuities to individuals ceasing to be Members of the Scottish Parliament, it recommended similar provisions to those at Westminster:

- a resettlement grant payable to an MSP who at the election does not stand for re-election or who stands but is not re-elected;
- an ill-health retirement grant payable to an MSP who resigns because of ill-health before attaining age 65. The level of grant is specified as equal to the level of resettlement grant which would have been available had the Member not been re-elected rather than resigning on health grounds; and
- a severance payment payable to relevant remunerated office-holders under age 65 who cease to hold those offices.

462. These recommendations were taken forward in the Grants Order which is replaced by the provisions in Schedule 2 (see article 2 of the Grants Order which anticipated the replacement of that Order with provisions such as those made under section 81(3) of the 1998 Act).

463. While payments of the grants are not made from the Pension Fund, there is a linkage to the ill-health retirement criteria (see rules 47 and 48 of Schedule 1). Membership of the pension scheme is not, however, a criterion for payment of one of the grants but replacement of the 1999 pensions order offered a suitable opportunity to replace the Grants Order.

464. Schedule 2, introduced by section 2 (see paragraph 26), sets out the provisions in relation to grants payable to individuals after they have served as MSPs and office-holders. Specifically, provision is made for the payment of an MSP resettlement grant, MSP ill-health retirement grant and office-holder resettlement grant. The provisions replace those in the Grants Order.

Paragraph 1: MSP resettlement grant

465. Paragraph 1 makes provision for an MSP resettlement grant payable to MSPs who are not returned after an election under the 1998 Act. The grant is designed to assist with the cost of adjusting to non-parliamentary life.

466. Paragraph 1(1) requires that a grant is payable by the SPCB to an individual who has been but is no longer an MSP. To qualify for the grant an individual must have been an MSP when the Parliament was dissolved and not be returned as an MSP at the general election which followed that dissolution. If these circumstances are met, a grant is paid automatically. An MSP will qualify if they were an MSP immediately prior to a general election for the Scottish Parliament and either (i) does not stand for re-election, or (ii) stands for re-election and is not returned. No MSP resettlement grant is payable to an MSP

who voluntarily resigns during the course of a parliamentary session, for example for business reasons.

467. The purpose of the grant is to assist the MSP with the costs of adjusting to non-parliamentary life and, therefore, a resettlement grant is only payable to the MSP. It cannot be paid to another person and paragraph 1(2) makes clear that the grant does not form part of an MSP's moveable estate and cannot be paid to an MSP's personal representatives in the event that the MSP dies before the relevant election.

Paragraph 2: MSP ill-health retirement grant

468. Paragraph 2 makes provision for the payment of an MSP ill-health retirement grant. The SPCB must pay the grant, upon application, where the MSP resigns during a parliamentary session in direct consequence of a health condition which prevented the MSP from carrying out their duties as an MSP.

469. An ill-health retirement grant is only payable where the MSP resigns during the parliamentary session (paragraph 2(1)(a)). If an MSP stands down after an election for ill-health reasons they will be entitled to an MSP resettlement grant (paragraph 1). An MSP is not entitled to receive both a resettlement grant and an ill-health retirement grant.

470. An ill-health retirement grant is not payable automatically. Paragraph 2 provides that an application must be made in writing to the SPCB. The SPCB must be satisfied that the resignation is a direct consequence of the ill-health and that the member would not, as a result, be able to continue to perform their duties as an MSP adequately.

471. Paragraph 2(2) enables the SPCB to request that the member who has applied for the grant provides medical evidence from a doctor about the health condition. Additionally, paragraph 2(2) enables the SPCB to require the MSP to be examined by a doctor nominated by it. It is for the SPCB to decide who is to pay for any examination carried out by the nominated doctor and where that examination should take place. It is anticipated that, where an examination is carried out under paragraph 2(2)(b), a copy of any report prepared on the examination will be given to the applicant. The SPCB could, for example, satisfy itself as to an individual's state of health using similar considerations to those set out in Part I of the pension scheme.

Paragraph 3: Amount of MSP grants

472. Paragraph 3 sets out the calculations which determine the amount of the MSP resettlement and the MSP ill-health retirement grants. Both grants are calculated in the same way.

473. Paragraph 3(1) provides that, subject to a minimum of 50%, the amount of grant payable is the percentage of the annual salary paid when the MSP ceased being an MSP, which is equal to one month's salary for each complete continuous year of service as an MSP. The maximum period of service counted is 12 years.

474. Paragraph 3(2) reduces the period of service taken into account in the calculation of the grant payment to MSPs who were also in receipt of a salary as a member of the House of Commons or the European Parliament (“dual mandate MSP”) at any time during that period. The effect of paragraph 3(2) is to reduce the relevant period of service by the same proportion that their MSP salary was reduced during that period. The current proportion is a reduction of salary by two-thirds,⁴¹ so, for example, if an MSP had been a dual mandate Member for three years, the period counted for calculation of a grant would be reduced by two years.

475. Under the Grants Order, periods of service of dual mandate MSPs are not treated differently to other MSPs. Paragraph 3(3) is a transitional provision which ensures that periods of service already accrued by those MSPs currently serving in the Parliament and accrued until the first general election after that paragraph comes into force, will not be reduced in accordance with paragraph 3(2).

Paragraph 4: Office-holder resettlement grant

476. Paragraph 4 provides for an office-holder resettlement grant. An office-holder’s resettlement grant is payable to office-holders when they stop being an office-holder. The grant is similar to the MSP resettlement grant and is designed to help bridge the gap while the office-holder adjusts to a lower income or re-establishes commercial or voluntary interests which may have had to be relinquished to avoid any conflict of interest whilst in office.

477. Paragraph 4(1) requires that the SPCB pays the grant, and that it must be paid when an office-holder ceases to hold pensionable office and has not held another pensionable office within 90 days of leaving office. The office-holder does not have to apply for the grant.

478. The pensionable offices (defined in rule 22(2) of Schedule 1) are that of Presiding Officer, deputy Presiding Officer, one of the Scottish Ministers (this includes the First Minister, Deputy First Minister, the Lord Advocate and the Solicitor General) or a junior Scottish Minister.

479. Paragraph 4(2) sets out how the office-holder grant is calculated. The amount of grant to be paid to holders of the offices of Presiding Officer and First Minister is calculated in a different manner to those of all other office-holders.

480. Paragraph 4(2)(a) determines the amount of grant payable to the First Minister and Presiding Officer. It is calculated in a similar manner to the MSP resettlement and ill-health retirement grant. The amount of grant payable is based on the additional annual salary for holding that post and the length of service as an office-holder. The grant equates to one month of salary for each complete year of service, subject to a minimum amount of

⁴¹ Scottish Parliament. *Official Report*, 21 March 2002, Col 10598
<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-02/sor0321-01.htm>

50% and a maximum amount of 100%. The formula at paragraph 4(2)(a) calculates the amount of grant.

481. Other office-holders receive a lump sum equal to 25% of the office-holder salary. The MSP salary is not included in the calculation which is based on the salary for the specified post.⁴²

482. Paragraph 4(3)(a) prevents the payment of the grant to the office-holder's personal representatives in the event of death in service while holding that office. It also prevents payment of the grant to the office-holder's personal representatives if the office-holder dies within 90 days of leaving that office.

483. Paragraph 4(3)(b) prevents payment of the office-holder resettlement grant to the individuals who hold the posts of Presiding Officer and First Minister when these provisions come into force or to any former holders of these posts. Individuals who qualify for the Presiding Officer and First Minister pension (as set out in the 1999 pensions order) will not be entitled to the payment of this grant.

Treatment of grants for tax purposes

484. As the schedule is provision for the payments of grants in accordance with section 81(3) of the 1998 Act, section 291 of the Income Tax (Earnings and Pensions) Act 2003 (c.1) ("the 2003 Act") applies. In relation to MSP and office-holder resettlement grants, this means they are not treated as earnings for tax purposes. They are classed as termination payments and, under Chapter 3 of Part 6 of the 2003 Act, the first £30,000 is exempt from income tax. In the event that a grant is made in excess of £30,000, any amount over and above the first £30,000 is taxed as earned income. In relation to ill-health retirement grants, section 406 of the 2003 Act prevents these grants from being treated as earnings, with the payment being wholly exempt from income tax. There is no tax threshold.

SCHEDULE 3 TRANSITIONAL PROVISIONS AND SAVINGS

485. Apart from enabling powers that come into effect at Royal Assent, the new scheme rules in the Act come into effect on new rules day (section 5(3) of the Act) but will be subject to transitional and saving arrangements (section 1(3)). Schedule 3 provides for the transition from the existing Scottish Parliamentary Pension Scheme rules in the 1999 pensions order to the new scheme rules in Schedule 1. It also saves some provisions of the 1999 pensions order, for example the separate pension scheme for First Ministers and Presiding Officers which is comprised in Part S of the 1999 pensions order, albeit that it is saved only in respect of present and past incumbents.

486. As regards the scheme, section 1(1) of the Act provides that it is continued and is the same scheme as constituted by the 1999 pensions order but is to be operated under different rules (as set out in the Act). This approach has been preferred in the Act as opposed to the more complex alternative of creating a new scheme, transferring from and

⁴² See definition of salary in rule 109 of Schedule 1

winding up the old scheme. The preferred approach sets the scene for the transitional arrangements as set out in Schedule 3.

Paragraph 1: Introductory

487. Subparagraph 1(1) sets out the interpretation of “new rules day”, “new scheme rules” and “1999 scheme rules.” “New scheme rules” and “1999 scheme rules” refer respectively to the rules contained in the Act and the existing scheme rules in the 1999 pensions order.

488. Most of the Act provisions come into force on new rules day (see section 5(3) of the Act). That date is defined as the first day of the month following six months after Royal Assent. (The first day of the month avoids any administrative difficulties which would arise in collecting contributions from scheme members at two rates in respect of one salary payment).

489. The interpretation of other words and phrases used in this schedule can be found in section 4 of the Act and at Part U of Schedule 1.

Paragraph 2: Pension Fund

490. Article A3 of the 1999 pensions order specifies that the Order (and, therefore the scheme) will only apply until new legislation, made using the powers under section 81(3) the 1998 Act, comes into force. However, paragraph 2 ensures that the Pension Fund will continue by specifying that article B1 of the Order remains in force so far as it establishes the Pension Fund. See also paragraph 22 of Schedule 3 in relation to continuation of other 1999 scheme rules.

Paragraph 3: Scheme membership

491. Paragraph 3 prevents a current (or any former) Presiding Officer and a current (or any former) First Minister participating in the scheme as an office-holder member on new rules day or thereafter. Such persons are all in receipt of or entitled to special pension arrangements under Part S of the 1999 scheme rules (one half of the salary payable in respect of the office when the person ceases to hold that office). Under the Act there is no such special provision for future Presiding Officers or First Ministers, who are instead treated as office-holders and allowed to join the scheme in terms of rule 22 of Schedule 1. This transitional provision prevents individuals from being entitled under both old and new arrangements.

Paragraph 4: Scheme member contributions

492. Paragraph 4 sets out the transitional arrangements for existing participating members who wish to continue paying lower rate contributions from new rules day. Under rule 5(1)(d) this provision comes into effect on Royal Assent ensuring that participating members have sufficient time to comply with the notification procedure required under this provision well in advance of new rules day. An existing participating member is defined in subparagraph 4(1) as a person who is a scheme participant under the

1999 pensions order and who would become an MSP member or office-holder member (or both) on new rules day.

493. The Act allows participating members to make contributions towards their pensions at one of two rates: either the higher rate of 11% of salary or the lower rate of 6% of salary (see rules 28 and 109). Rule 28 presumes that the participating member will make contributions at the higher rate. Existing participating members are currently under the 1999 scheme rules making contributions to the Pension Fund at 6% (equivalent to the new lower rate). Subparagraph 4(2) provides that an existing participating member may continue to make contributions at the lower rate when the new rules come into force only if the member notifies the SPCB. In terms of subparagraph 4(3), notification must be in writing (see rule 108(1)) and must be received by the SPCB at least 14 days before new rules day.

494. Notification under paragraph 4 is made to the SPCB as the current managers and administrators of the Pension Fund. Once Fund trustees are appointed (under Schedule 1, Part B of the Act), the SPCB is obliged by subparagraph (4) to inform the Fund trustees of every valid notice that it has received from existing participating members.

495. After new rules day the provisions of rule 29 in relation to altering scheme member contributions apply to all participating members, including those covered by this provision can only thereafter change the contribution rate within three months of a subsequent election or appointment (see paragraphs 114-117).

Paragraph 5: Contributions from the SPCB

496. Each financial year, the SPCB pays a sum of money into the Pension Fund (see article D3(1) of the 1999 pensions order). The Government Actuary is required by article D3(2) of the 1999 pensions order to make a recommendation on the amount of contribution required. The SPCB then determines the level of contributions to be met (currently 20.3% of salary).

497. Paragraph 5 specifies that the existing determination as to the contribution rate payable from the SCF (put in place by article D3(2)) will continue to have effect as if it had been made under rule 32 of Schedule 1 to the Act. In subsequent years, and following recommendations from the scheme actuary, the provisions of rule 32 will apply.

Paragraph 6: Reckonable service as an MSP

498. Provision is made in paragraph 6 for service under the 1999 pensions order to be recognised and carried forward for the purpose of calculating reckonable service and the amount of pension payable under the new scheme rules.

499. Subparagraph (1) specifies who the provisions of paragraph 6 apply to. That is those who were participating members making contributions to the Fund from their salary under article A1(2) of the 1999 pensions order. It excludes any who at the new rules day were pensioner members.

500. The pension entitlement for all such previous service will be calculated under the new scheme rules in Schedule 1. Subparagraph (2) sets out how the previous “aggregate period of reckonable service as a participating member” is to be carried forward into the new scheme rules. The “aggregate period of reckonable service as a participating member” is defined at article E2 of the 1999 pensions order. It is the actual period of reckonable service as a participating member together with any increases in reckonable service attributable to sums received by way of a transfer in value or by buying added years. The aggregate period of reckonable service is to be treated as if it was reckonable service as an MSP (see Schedule 1, rule 33). That service is treated under subparagraph (2)(b) as having accrued as a result of making contributions at the lower rate of 6% of salary.

501. Subparagraph (3) makes provision in relation to buying added years not yet fully purchased. Subparagraph (3)(a) applies where an individual, having had an application to buy added years by instalments accepted by the SPCB before the new scheme rules come into effect, is still in the process of paying for those years. In such a case no part of the added years being purchased is included within the aggregate period of reckonable service under subparagraph (2).

502. Alternatively, under subparagraph (3)(b), a participating member may have had an application to buy added years by paying a lump sum accepted by the SPCB before the new scheme rules come into effect but not yet have made payment on new rules day. In such a case no part of the prospective added years falls within the aggregate period of reckonable service under subparagraph (2).

503. In each case the added period of service, when fully paid for, is counted as reckonable service under the new scheme rules set out in Schedule 1 Part E of the Act (see also the provisions at paragraph 18 of Schedule 3).

Paragraph 7: Reckonable service as an office-holder

504. Similar provision is made for the calculation of office-holder pensions for those who were participating office-holders under the 1999 pensions order and who at new rules day are not pensioner members entitled to their pension.

505. Subparagraph (1) specifies that the provisions of paragraph 7 apply to a participating member who was a participating office-holder (defined as a person making contributions to the Fund from their salary under article A1(2) under the 1999 pensions order) and who at the new rules day is not a pensioner member entitled to receive their pension.

506. The pension entitlement for all such previous service will be calculated under the rules in Schedule 1. Subparagraph (2) sets out how the “aggregate period of reckonable service as a participating office-holder” is to be carried forward into the new scheme rules. The “aggregate period of reckonable service as a participating officeholder” is defined at article E2 of the 1999 pensions order. It is the actual period of reckonable service as a participating office-holder together with any increase in reckonable service attributable to sums received by way of a transfer in value. (There can be no increase due to added years as this was not permissible for office-holders under the 1999 pensions order).

507. When the aggregate period of service accrued under the 1999 pensions order is calculated the pension entitlement in relation to that service is calculated, under subparagraph (2)(b). The formula treats the service as a single aggregated period and applies it to the highest office-holder salary received during any 12 months of the period. For those who are in office at the new rules day, the single aggregated period ends when they leave that office, as opposed to ending on the new rules day.

508. Where the individual was a participating office-holder for less than 12 months, the salary is calculated as the actual salary figure to be paid to the office-holder whilst in post multiplied by 365 and divided by the number of days in the post to give a salary figure for the period.

509. Once the highest office-holder salary has been calculated, it is divided by 50 (reflecting contributions made at the lower rate with pension accruing at 1/50th of salary) and multiplied by the office-holder's aggregate period of reckonable service.

Paragraph 8: Total reckonable service

510. Total reckonable service is defined in rule 35 (see paragraphs 135-137). Total reckonable service is used in relation to the calculation of entitlement to short service refunds under Part M and entitlement to transfers under Part N.

511. Paragraph 8 makes clear that "actual period of reckonable service as a participant" (see article E1 of the 1999 pensions order) is added to the calculation of total reckonable service made under rule 35. Actual period of reckonable service as a participant is the period of membership of the 1999 scheme rules during which contributions were paid. It is the aggregate of service as an MSP member or office-holder only or as both an MSP member and an office-holder.

Paragraph 9: Special provision for participants reaching age of 75 before the new rules day

511(a) Paragraph 9 makes transitional provision for participating members who will reach the age of 75 before new rules day, allowing them to commute part of their prospective pension for an immediate tax-free lump sum. Generally speaking the rules in the 1999 pensions order will apply to existing scheme members in the period between Royal Assent and new rules day (this is subject to some limited exceptions, for example, in relation to the appointment of Fund trustees under Schedule 1 and specific transitional arrangements under Schedule 3). Under the rules in the 1999 pensions order it is not possible for members approaching the age of 75 to commute part of their pension in exchange for a tax-free lump sum. The position is different in the new scheme rules, rule 44 of which allows participating members approaching the age of 75 to commute part of their pension into a tax free lump sum (see paragraphs 174 to 177).

511(b) The transitional provision at paragraph 9 takes account of the position of participating members who reach the age of 75 in the period between Royal Assent and new rules day. Such a member will remain subject to the rules in the 1999 pensions order but paragraph 9 allows him or her to commute part of his or her pension subject to notice

of this being given to the SPCB prior to the member's 75th birthday. As with the provision in rule 44 of the new scheme rules such a member will obtain a tax-free commuted sum and become a scheme pensioner, although the member's pension will be reduced to nil until he or she ceases to be an MSP or an office-holder.

511(c) Paragraph 9(1) describes the individuals to which this rule applies: an individual who is participating in the scheme in accordance with the 1999 scheme rules and who is aged under 75 at Royal Assent but will reach the age of 75 before new rules day. Paragraph 9(2) provides that such an individual may give notice, before reaching the age of 75, that he or she wishes to commute a specified part of his or her pension. By virtue of paragraph 9(3) such a notice is to be treated in the same manner as a notice under Part G of the 1999 scheme rules (which details procedures for determining the amount of the lump sum payable and the consequential reduction in pension).

511(d) Paragraph 9(4)(a) confirms that despite articles F1 and F2 of the 1999 scheme rules (which operate to prevent a current MSP or holder of a qualifying office from receiving a pension or giving a commutation notice under Part G of the 1999 scheme rules) an individual who has given notice under paragraph 9(3) will be entitled to receive a pension from the day before his or her 75th birthday. That pension will, however, be reduced to nil until such time as he or she is no longer an MSP or office-holder, in accordance with paragraph 9(4)(b).

Paragraph 10: Payment of pensions due on new rules day etc.

512. As a consequence of article A3 of the 1999 pensions order, the 1999 scheme rules would cease to have effect when provision is made under section 81(3) of the 1998 Act. The rules in the Act (the new scheme rules) are made in accordance with section 81(3) and will supersede those of the 1999 pensions order, save to the extent that the rules of the 1999 pensions order are saved by the Act.

513. Paragraph 10 specifies that the pension of any scheme pensioner under the 1999 pensions order continues to be governed by that order and not the provisions in the new rules set out in the Act. The provision preserves the entitlement expectations and pensions of existing pensioner members, albeit the SPCB's pension functions including payment obligations are transferred to the new Fund trustees.

Paragraph 11: Entitlement of partners and children after new rules day

514. Whereas paragraph 10 sets out the entitlement of pensioner members prior to the new rules day and the preservation of their rights to be governed under the scheme rules in the 1999 pensions order, paragraph 11 qualifies this for the entitlement of such an individual's partner or child. The new scheme rules (which provide for wider entitlement) will apply to all partners and children of individuals who became scheme pensioners prior to the new rules day. Thus, for example, a partner of an existing pensioner will be entitled to a partner's pension under the new scheme rules provided they meet the conditions specified in rule 57.

515. Similarly, if a person is the partner or child of a scheme member who died before the new rules come into effect, the partner or child's rights and entitlements are as set out in the new scheme rules. Thus, for example, the provisions in the 1999 pension rules which terminate spouse's pensions on remarriage will no longer apply and children's pensions can be paid until age 23 provided the conditions in Chapter 3 of Part J are met.

Paragraph 12: Early retirement

516. Paragraph 12 provides for the requirement to maintain existing rights accrued to date by some scheme members to access early retirement provisions. As a result of having at least 15 years' qualifying service under the existing 1999 scheme rules, some individuals will already have accrued rights to retire early and to have a pension calculated under the existing 1999 scheme rules. These rights are protected where they would result in an earlier entitlement or a greater benefit in comparison to the new scheme rules in the Act.

517. The provisions also take into account some existing members who have expectations of qualifying under the rules in the 1999 pensions order. All existing members will be able to count their service in Session 3 of the Parliament towards the 15 years relevant service threshold for early retirement (equivalent to the 15-year qualifying service threshold in the existing 1999 scheme rules). If they qualify, and a calculation under the 1999 scheme rules would result in a greater benefit in comparison to the new scheme rules, the existing 1999 scheme rules will apply to them. Any non-concurrent service accrued to the end of Session 3 at the House of Commons or the European Parliament will also be included in the relevant service calculation.

518. The provisions of paragraph 12 apply by virtue of subparagraphs (1)(a) and (b) to those who have been scheme participants under the 1999 pensions order and have 15 years of relevant service (akin to qualifying service under the 1999 pensions order) before the cut off date. The 15 years includes service as an MSP participating member under the 1999 pensions order and any non-concurrent service accrued as a member of the House of Commons or the European Parliament.

519. Subparagraph (1)(c) is a limited qualification provision required to take account of individuals under age 55 who may qualify for an entitlement to a pension from age 50 under the existing 1999 scheme rules, as opposed to the minimum pension age of 55 under the new scheme rules. In order for this transitional paragraph to apply to them (as well as meeting the requirement for 15 years relevant service prior to the cut off date) they need to have a protected pension age as defined in paragraph 23(8) of Schedule 36 of the Finance Act 2004. Schedule 36 allows some protection for members of pension schemes at 5 April 2006 to continue to apply past 6 April 2010.

520. Subparagraph (2)(a) modifies rule 46 to reflect an early retirement age of 50 instead of 55. As noted above, this will only apply to existing scheme members who meet the requirements of subparagraph (1), i.e. who have 15 years relevant service prior to the cut-off date and have a protected pension age in terms of paragraph 22(8) of Schedule 36 of the Finance Act 2004.

521. Subparagraph (2)(b) preserves the right to have an early retirement pension calculated under the existing 1999 scheme rules where the pension so calculated would be more beneficial. This applies to scheme members whose rights are preserved under subparagraph (1), i.e. they have 15 years relevant service prior to the cut off date (and, if under 55, meet the additional test). Such individuals are given the benefit of the better of the old or new scheme provisions covering early retirement. Under this provision, a comparison is to be made between the reduction specified in the Act at rule 46(4) and the table of reductions set out in Schedule 4 to the 1999 pensions order. The reduction to be made in the event of a scheme member taking early retirement covered by the provisions of paragraph 11 is not to exceed the relevant percentage specified in the table.

522. Subparagraph (3) defines the cut-off date for the accumulation of relevant service counting towards the minimum required for early retirement under the 1999 pensions order as the date of the first general election after new rules day.

Paragraph 13: Partner's and children's pensions

523. Paragraph 13 provides additional transitional provision and preserves existing rights in relation to the calculation of partner and children's pensions for those who take early retirement under the transitional provisions specified in paragraph 12.

524. Part J of Schedule 1 to the Act sets out the rules in relation to pensions which are to be paid to surviving partners and children who meet the relevant criteria. Rule 56 defines a member's "scheme pension entitlement" for the purpose of calculating survivor pensions. In relation to the death of scheme pensioners, subparagraph (4) of rule 56 sets out how a member's scheme pension entitlement is calculated.

525. By contrast, the 1999 scheme rules use the phrase "basic or prospective pension" with the meaning set out in article K5. In relation to a pensioner for the purpose of calculating their basic pension, any reduction as a result of a lump sum payment is ignored along with any reduction as a consequence of early retirement.

526. Paragraph 13 amends the calculation of "scheme pension entitlement" in respect of individuals who qualify for and take early retirement under the provisions of paragraph 12. Any reduction made to their accrued pension at retirement as a result of taking early retirement is to be ignored when calculating their scheme pension entitlement.

Paragraph 14: 5 year guarantee

527. Part L of Schedule 1 of the Act provides a guarantee that a scheme pension once commenced will be paid for a minimum of 5 years. Where the pensioner dies within that 5 year period and the balance is paid as a lump sum to personal representatives because there is no surviving partner, such a benefit is termed under the Finance Act 2004 as a "defined benefits lump sum death benefit" and can only be paid as a lump sum in respect of scheme pensioners who die under age 75. Rule 71 makes provision for pensioners who die within that guaranteed period aged over 75 years leaving no surviving partner by

making provision for pension payments to continue for the remainder of the guarantee period, payable to the deceased's personal representatives.

528. Paragraph 14 preserves the rights of certain pensioner members aged over 75 years as provided by M4 of the 1999 scheme rules to have paid to their personal representatives a lump sum equivalent to the balance of pension due under the 5 year guarantee period, instead of continuing pension payments. Schedule 36 to the Finance Act 2004 contains transitional provision about lump sum death benefits for existing pension scheme members at 5 April 2006. Paragraph 36 of that Schedule permits such members of a registered pension scheme aged over 75 to retain the same rights as younger pensioners to a lump sum death benefit if the member dies within the guarantee period.

529. Under paragraph 14, the Fund trustees are able to pay a lump sum where the former scheme member dies aged 75 or over with no surviving partner, provided the criteria specified in subparagraph (2) is met. The deceased must have been participating in the scheme before new rules day, and the lump sum must be a defined benefits lump sum death benefit permitted under paragraph 36 of Schedule 36 to the Finance Act 2004.

Paragraph 15: Deferred pensioner lump sums

530. Paragraph 15 makes provision to protect the rights of certain deferred pensioners to receive a refund of their contributions in the event of their death. The transitional provision only applies to deferred pensioners who participated in the scheme prior to the new rules day and who die after reaching age 65 leaving no surviving partner or eligible child. The provision preserves the rights under article N2 of the 1999 pensions order.

531. Under article N2 of the 1999 scheme rules, a refund of contributions is payable to the executors of an individual who dies without leaving a spouse or eligible child. Such a person would have to have ceased to be a participant, and thus not be entitled to a death-in-service benefit. In addition, they could not be eligible for a pension under the Scheme, thus being under 65 years of age or still serving as an MSP or office-holder (but having opted out of the scheme).

532. Under paragraph 15, a deferred pensioner at the new rules day would still qualify for a refund of contributions payment under N2 which would include old scheme contributions. The rule would not apply to scheme pensioners who would receive an entitlement in terms of rules 70 or 71.

Paragraph 16: Short service refunds

533. The existing refund of contribution provision at article N1 of the 1999 pensions order allows a refund of contributions to be made provided all the conditions are met up to the point when an individual has two years reckonable service. Rule 72(1) alters that period to one of three months. Paragraph 16 preserves the two-year period for certain individuals leaving the scheme.

534. Subparagraph 1 of paragraph 16 disapplies Condition 3 of rule 72(1) in relation to the cut-off point of three months for becoming eligible for a short service refund of contributions for those who have participated in the existing scheme before the new rules day. Such members remain entitled to a short service refund if they leave the scheme with fewer than two years of reckonable service. Subparagraph (2) provides that old scheme contributions are included in respect of short service refunds under the new rules. Rule 72(2) provides for a short service refund to be equal to the amount of scheme member contributions paid by the individual less the amount of any contributions paid by the individual under section 55(2) of the Pensions Act 1993 (c.48)).

Paragraph 17: Transfers

535. Paragraph 17(1) makes transitional arrangements in relation to aspects of the transfer rules at part N of Schedule 1. Provision is made to include within a minimum transfer payment for existing scheme member's contributions, transferred payments received or amounts paid to purchase added years under the 1999 scheme rules. Provision is also made allowing a 12-month transitional period for current members over 64 to be allowed to bring transfer values into the scheme.

536. Rule 76 of Schedule 1 provides for the minimum amount of a transferable sum to be no less than the total of an individual's contributions, any transfer-in sums received and any monies paid to purchase added years. Subparagraph (1) includes within the minimum calculation of a transfer out value under rule 76 any contributions or payments made and any transfers received or added years purchased under the 1999 pensions order.

537. Subparagraph (2) makes transitional arrangements in relation to sums transferred into the Pension Fund. Under condition 2 of rule 81, notice of an intended transfer into the scheme must be provided before the individual's 64th birthday. Subparagraph (2) disapplies that condition for 12 months from the date that these new rules come into effect.

Paragraph 18: Added years

538. Paragraph 18 makes transitional provisions covering ongoing purchase by MSP members of added years, and where applications to purchase have been accepted but the lump sum payment is not yet made at new rules day.

539. Subparagraph 18(1) sets out the circumstances when the paragraph applies. It specifies at (1)(a) that the provisions apply to an individual who is already making contributions by instalments on new rules day under Part Q and Schedule 5 of the 1999 pensions order. At (1)(b) the paragraph is also applied to an individual who has had an application to buy added years by lump sum accepted by the SPCB but has not yet made the payment (six months is allowed for payment following acceptance of the application).

540. When the situations in subparagraph (1) apply, subparagraph (2)(a) specifies that the rules applying to the purchases are to continue to be those at Part Q and Schedule 5 of the 1999 pensions order notwithstanding the terms of article A2(3) of the 1999 pensions order. That article provides that the 1999 pensions order ceases to apply when the

provisions of the Act come into effect. The conditions that were understood and agreed by the MSP at the outset are continued.

541. Under paragraph 6(3) of Schedule 3 (see paragraphs 502-504) no part of added years covered by this paragraph are included as forming part of an individual's "aggregate period of reckonable service" as a participating member under the 1999 scheme rules on new rules day. Subparagraphs 17(2)(b) and (c) make provision for the period purchased by added years covered by paragraph 17 to be added to the individual's reckonable service under Part E of Schedule 1 of the new rules after all sums are fully paid. Subparagraph (18)(2)(c) determines that the reckonable service purchased will be treated as being accrued at the lower contribution rate of 6% of salary.

542. When rule 89(3)(c)(ii) applies, the Fund trustees must reject an application to buy added years. That applies when the total of the amount of scheme member contributions to be made by an applicant to purchase added years in any tax year would exceed 20% of the salary payments to be made to the applicant in that year. Subparagraph 18(3) applies to scheme member contributions made as additional voluntary contributions (AVC's) under paragraph 4 of Schedule 6 of the 1999 scheme rules during the tax year in which the new scheme rules come into effect. The sub-paragraph ensures that any such AVC contributions are included when calculating whether the 20% limit under rule 89(3)(c)(ii) is being breached.

Paragraph 19: AVC scheme

543. Under the new tax regime from April 2006, membership of a tax-registered occupational pension scheme and concurrent contributions to another such scheme or to private personal arrangements is now permitted, subject to the Lifetime Allowance. It is no longer necessary for occupational pension members to make additional pensions savings through related Additional Voluntary Contribution (AVC) schemes and, as a consequence, the statutory requirement for occupational schemes to have an AVC facility in section 111 of the Pension Schemes Act 1993 was repealed. Although paragraph 19 makes provision for the continuation of the existing AVC scheme, the modifications set out in that paragraph prevent scheme members who are not already making AVCs from joining the AVC scheme. The basic position is that existing contributions to the AVC scheme will continue but no other or new contributions can be made. The rights purchased by these continuing contributions and by historic contributions will also be governed by the 1999 scheme rules as modified.

544. The rules in respect of the AVC scheme are set out in Part R and Schedule 6 of the 1999 pensions order. No provision is made in Schedule 1 containing the new rules to replace Part R and Schedule 6. The Act at section 1 and here at paragraph 19(1)(a) provides for a continuation of the existing scheme with new rules and new trustees responsible for administration, subject to modifications set out in paragraph 19.

545. Subparagraph (1)(a) transfers the powers and responsibilities for the management and operation of the AVC scheme from the SPCB to the Fund trustees.

546. Subparagraph (1)(b) specifies that no scheme member may become a new contributor to the AVC scheme, and revokes the provisions of the 1999 pensions order which state that a participant may become a contributor by making an application to the SPCB. The provision giving the power to the SPCB to close the scheme is also disapplied.

547. Subparagraph (1)(c) amends the provision in the 1999 pensions order which enabled a scheme participant to rejoin the AVC scheme after leaving it; the effect being that when a scheme member ceases to be a contributor to the AVC scheme that decision is final.

548. Under the 1999 pensions order, it was possible for scheme members participating in the AVC scheme to transfer a value into the scheme from certain other AVC schemes. Subparagraph (1)(d) prohibits this by ceasing the effect of paragraph 4(4) of the Schedule when the new scheme rules come into force.

549. Subparagraph (1)(e) deals with provisions relating to scheme members leaving the AVC scheme. Subparagraph 19(1)(e)(i) amends the provisions of the 1999 pensions order to bring it into line with requirements of the Finance Act 2004 for approved destinations for transfer values.

550. Subparagraph (1)(e)(ii) brings the provisions of the 1999 pensions order into line with the new scheme rules relating to short service refunds. Under the existing rules a scheme member who has paid contributions into the AVC scheme with less than two years reckonable service can request a refund. The new scheme rules revise this period of time to three months.

551. Subparagraph (1)(f) disapplies certain provisions of the 1999 pensions order insofar as these are replaced by provisions in the Act or refer to superseded legislation. Paragraph 10 of Schedule 6 relates to maximum pensions limits which are not continued in the Act.

552. Subparagraph (1)(f) also disapplies paragraph 11 of Schedule 6 of the 1999 pensions order. Paragraph 11 places a duty on the SPCB to comply with the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Additional Voluntary Contributions) Regulations 1993.⁴³ However, these Regulations have been repealed on the coming into force of Part 4 of the Finance Act 2004. Although Schedule 6 is to continue to have effect under the provision of the Act, the duty to comply with the Regulations is no longer required.

553. Payments made by scheme members to honour existing AVC contracts are paid to the administrator and then to third-party pension providers and are not paid into the Pension Fund. Sub-paragraph (2) specifies that rule 3 of the new scheme rules does not apply to benefits payable and contributions received under the AVC scheme. The AVC scheme provides for additional pension taken in the form of an annuity purchased with the

⁴³ S.I. 1993/3016

accrued sum at retirement. As the AVC scheme established under the 1999 pensions order will continue to have effect, and any agreed AVC contracts continue to operate, it will be a matter for the Fund trustees to agree any changes to the existing arrangements covering the existing contractual payments from and to scheme members and the AVC providers. The AVC scheme forms part of the SPPS and can accordingly be modified by Parliamentary resolution under section 3 of the Act.

Paragraph 20: Guaranteed minimum pension

554. Rule 105 sets out the guaranteed minimum pension entitlement which is payable to a member in relation to a transfer-in sum on reaching pensionable age in accordance with sections 14 to 16 of the 1993 Act. See paragraphs 437-444.

555. Such rights for the scheme will only arise by virtue of being attached to transfer-in sums in respect of pre-1997 service in other pensionable employment. Paragraph 20 makes it clear that any guaranteed minimum pension entitlement for scheme members includes the value of any such rights attaching to sums transferred into the scheme under the transfer provisions of the 1999 pensions order.

Paragraph 21: Presiding Officer and First Minister pension scheme

556. Part S of the 1999 pensions order established a separate pension scheme for holders of the office of First Minister or Presiding Officer. This scheme is unfunded in that payments are charged on and paid out of the Scottish Consolidated Fund, as opposed to the funded scheme (for which the Pension Fund was established by article B1 of the 1999 pensions order). The First Minister and Presiding Officer scheme is not a tax-registered scheme in terms of section 150(2) of the Finance Act 2004 and therefore, the rules for tax-registered schemes and consequent tax treatment do not apply to it (as an unregistered scheme the benefits paid under it are subject to income tax and other taxes).

557. Under the First Minister and Presiding Officer pension scheme both the First Minister and Presiding Officer are entitled to an annual pension equivalent to 50% of their office-holder salary payable from the day after ceasing to hold office, irrespective of their length of service in the post or their age. There is also provision for a pension for surviving widows, civil partners and children or any person entitled to benefits (with any pension payable based on the relevant office-holder pension entitlement).

558. Paragraph 21(1) specifies that the rules in the 1999 pensions order covering First Ministers and Presiding Officers will continue in respect of any individual who holds or has held those offices on the new rules day, i.e. those already entitled to or receiving that pension. This applies also in respect of any surviving spouses, civil partners or children relating to that individual. Corresponding transitional provision is made in paragraph 3 of Schedule 3 to exclude individuals entitled under this paragraph from also being office-holder members in the funded scheme.

559. In respect of those entitled to receive benefits, the First Minister and Presiding Officer pension scheme will continue to operate as established under the 1999 pensions order. Section 1 of the Act transfers to the Fund trustees all functions, rights, liabilities

and obligations in respect of the “Scottish Parliamentary Contributory Pension Fund” only and Schedule 1 sets out the rules of the “Scottish Parliamentary Pension Scheme” which excludes the First Minister and Presiding Officer pension scheme (see section 4). Therefore, the Fund trustees will have no duties in relation to the First Minister and Presiding Officer pension scheme. Paragraph (2) makes clear that the SPCB continues as managers of this scheme and that they determine any pension sharing benefits conferred on any individual as a result of the scheme. Paragraph (3) specifies that any reductions to benefits as a result of pension sharing orders are to be ignored when calculating the pension entitled of dependants.

560. Section 3 allows modification of the First Minister and Presiding Officer pension scheme by resolution of the Parliament.

Paragraph 22: General saving

561. The effect of article A3 of the 1999 pensions order is that the order shall only apply until this Act comes into force. Schedule 3 supersedes that dis-application for a number of specified rules within that order. Paragraph 22 ensures that any other 1999 scheme rule contained in that order continues in force in so far as is necessary in respect of the various provisions saved by Schedule 3.

Paragraph 23: Disapplication of scheme modifications

562. Following the passing of the Finance Act 2004, the HMRC Commissioners exercised the powers given to them by paragraph 3 of Schedule 36 to make regulations modifying the rules of registered pension schemes⁴⁴ to enable schemes to operate under the new tax regime prior to a formal change in their rules.

563. The modifications made by the Regulations continue in force for a transitional period until the end of the 2010-2011 tax year or until amendments are made to scheme rules which specifically state that the modifications no longer apply to the scheme rules (paragraph 3 of Schedule 36). The Act makes provision in each area covered by the Regulations and paragraph 23 accordingly specifically disapplies the 2006 modification Regulations⁴⁵ from new rules day.

⁴⁴ The Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006 (S.I. 2006/364)

⁴⁵ S.I. 2006/364

PARLIAMENTARY HISTORY

The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates which the proceedings at that Stage took place, and the references to the Official Report of those proceedings. It also shows the dates on which the Committee reports and other papers relating to the Bill were published, and the references to those reports and other papers.

PROCEEDINGS AND REPORTS	REFERENCE
Scottish Parliamentary Pension Scheme 1st report, 2008 published 29 May 2008	1st report, 2008 (SP Paper 103), Volume 1
INTRODUCTION	
Bill as Introduced – 22 September 2008	SP Bill 14 – Session 3 (2008)
STAGE 1	
(a) Finance Committee	
22nd Meeting 2008, 30 September 2008	Cols 707 - 708
23rd Meeting, 7 October 2008	Cols 732 - 737
29th October 2008, 4th Report	4th Report 2008 (Session 3), Finance Committee
(b) Subordinate Legislation Committee	
28th Meeting, 7 October 2008	Cols 379 -380
29th Meeting, 28 October 2008	Cols 388 - 389
SPICE Briefing (SB 08-60) on the Bill: Stage 1 debate, published 11 November 2008	Spice Briefing SB 08-60
(c) Consideration by the Parliament	
Stage 1 Debate – 12 November 2008	Cols 12219 -12229
STAGE 2	
Bill (as amended at Stage 2) – 3 December 2008	SP Bill 14 Session 3 (2009) (as amended at Stage 2)
STAGE 3	
Consideration by Parliament	
Stage 3 debate – 22 January 2009	Cols 14243 - 14253
Bill as passed – not produced for this Stage as no amendments were lodged.	
ROYAL ASSENT	
25 February 2009	Scottish Parliamentary Pensions Act 2009 (asp 1)

