

PENSIONS ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Pension scheme membership for jobholders

Chapter 5: Duty to establish a pension scheme

Section 67: Duty to establish a pension scheme

156. *Section 67* places a duty on the Secretary of State to establish a pension scheme. That scheme will be a trust, which is generally how occupational pension schemes are established. All trusts are run by trustees. The corporate trustee established by *section 75* must be a trustee of the scheme when the scheme is established (see *section 68(1)*). There may be other trustees. The trustees will be required as a matter of trust law to act within the terms of the trust in the best interests of its beneficiaries.
157. The trustees must ensure that the scheme is tax registered under Chapter 2 of Part 4 of the FA 2004, which will allow tax relief on pension contributions and investment returns. In general terms, members will be able to access their savings in the same way as members of any other tax registered money purchase pension scheme – including by taking a tax free lump sum. The scheme must be an automatic enrolment scheme (see *section 17*) in relation to any jobholder who is employed by a participating employer and who must be enrolled under *section 3* (automatic enrolment), *section 5* (automatic re-enrolment), *section 7* (jobholder's right to opt in) or *section 9* (workers without qualifying earnings).
158. The scheme must be established by order made by statutory instrument which under *section 143* will be subject to the draft affirmative resolution procedure (that is, a draft must be laid before, and approved by, both Houses of Parliament before it can be made). This Order will set out the legal framework of the scheme and is the equivalent of a trust deed. In addition, the scheme may have a separate set of Rules, also equivalent to part of the trust deed, for its operation. These Rules will not be subject to a formal Parliamentary procedure but must be compatible with the Order and cannot be made about certain provisions of the scheme, listed at *subsection (12)*.

Section 68: Scheme orders: general

159. *Section 68* sets out the general provisions which must, or may, be in the Order. The Order must provide for the trustee corporation established by *section 75*, to be a trustee when the scheme comes into force.
160. The Order may:
- allow for any provision of the Trustee Act 2000 to apply as if the Order and Rules were a trust instrument. This is one way in which it will be possible to ensure that existing UK trust law will also apply to the scheme established under *section 67*.

- give the trustees the power to make Rules. This would allow trustees to make further provisions in connection with the day-to-day operation and running of the scheme.
- limit the trustees' power to make Rules in prescribed circumstances and or subject it to conditions. This will enable the Secretary of State to ensure that matters of wider public policy continue to be given effect, or to set out procedural safeguards for the making of rules by the trustee.
- provide for protection of the trustees against liability, where appropriate, arising from the administration of the scheme.

Section 69: Consultation of members and employers

161. *Section 69* provides that the scheme order must require the trustees of the scheme to make arrangements for consulting the scheme members and participating employers about the ongoing operation, development and amendment of the scheme. These arrangements must include the establishment of members' and employers' panels to represent the interests of members of the scheme and participating employers.
162. The trustees will have decisions to make about the operation of the scheme. These will include decisions on how the scheme should be developed and whether it should be amended. The trustees will have to consult the scheme members and employers about these decisions. To help with the consultation, the trustees will have to create panels to represent the members and employers. The make-up and functions of these panels could be set out in the Order or under it (e.g., in Rules). The members' panel could be allowed to propose people for appointment as members of the trustee corporation. The panel could use those proposals to help ensure that their interests are represented. (This would be in the spirit of the provisions for member nominated trustees and directors in the PA 2004.)
163. The Order will also be able to allow for payments to be made to panel members from scheme funds. This could include payment for their time and expenses.
164. A scheme created under section 67 could potentially cover a very wide and diverse range of employers and employees, making it difficult for the trustees to keep in touch with all their opinions. The members' and employers' panels will act as representative bodies to keep the trustees informed and provide feedback about how the scheme is working. The trustees will consult both panels before any changes are made to the scheme.

Section 70: Contribution limits

165. This section requires the Secretary of State to set out in the Order the maximum amount a member of the scheme established under section 67 can contribute (including the employer contribution and tax relief) in a tax year. This allows the Order to set a contribution limit of £3,600 (by reference to the level of earnings in 2005). It would also allow the Order to provide, for example, a higher limit in the first year of the scheme and for the contribution limit to be uprated in line with earnings.
166. The power will enable the Secretary of State to include in the Order:
- what a contribution is;
 - when a contribution is to be treated as made;
 - how contributions are treated where the maximum is exceeded;
 - the value of any amount to be repaid in respect of excess contributions (whether the same or more or less than the contribution, because of investment or otherwise), and;

- who makes the refund payments and to whom.
167. *Subsection (3)* allows the Secretary of State to set out in an Order more than one contribution limit. The Order could allow, for example, a lump sum contribution limit over the member's lifetime.
168. *Subsection (4)* enables the Secretary of State to remove the requirement to have a contribution limit in the scheme established under section 67. This allows *section 70* to be repealed if, for example, a review is carried out which concludes that a contribution limit is not appropriate for a scheme under section 67.

Section 71: Procedure for scheme orders

169. *Section 71* sets out the procedure for consulting on and seeking consent to changes to the scheme Order (see the note to section 67). When a trustee is in place (i.e., once the scheme has been established), subsequent changes to the Order may be made by the Secretary of State only if he has the consent of the trustee. Trustees must consult the members' and employers' panels before giving consent.
170. Examples of what could be included in the Order are: the structure of members' charges; access to the scheme for the self employed; the way that members will be able to access their savings; the provision of payments to members' and employers' panel members; a default fund for members who do not wish to choose where their contributions are invested.

Section 72: Procedure for rules

171. *Section 72* sets out the procedure for publication and consultation on proposed scheme Rules.
172. A draft of the proposed Rules must be published by the person proposing to make them and comments invited. That person – which will be the Secretary of State or trustees – must then consider any comments received and publish a summary of the comments, together with a response. If the Rules are made, they must be published in a way designed to bring them to the attention of interested parties.
173. The trustees will have to consult the members' and employers' panels before making any Rules or giving their consent to changes to the Rules proposed by the Secretary of State. The Secretary of State will not be able to make any change to the Rules without the consent of the trustees.
174. Although the Rules will not be subject to a formal Parliamentary procedure, the effect of this section is that they must be open to debate by interested parties.

Section 73: Application of enactments

175. *Section 73* sets out how the scheme should be treated within current legislation to ensure that the scheme is established and can run as intended. It ensures that the scheme will not be treated as a public service scheme under the PSA 1993 and FA 2004. It also sets out that the Interpretation Act 1978 will apply to rules as if they were in a deed (which would be appropriate to other occupational schemes) rather than made under an enactment (provisions of the personal accounts scheme order).

Section 74: Review

176. This section requires the Secretary of State to appoint a person to carry out a review of two aspects of the scheme established under section 67 that are designed to focus it on the target market specifically: namely the policy on contribution limits and restricting pension fund transfers to and from the scheme. It also allows the Secretary of State to bring other topics within the review's scope.

*These notes refer to the Pensions Act 2008 (c.30)
which received Royal Assent on 26 November 2008*

177. *Subsection (2)* requires the Secretary of State to appoint the person on or after (i) 1st of January 2017 or (ii) at the end of five years beginning with the first day on which contributions are paid to the scheme by or on behalf of members, whichever is the later.
178. The section also requires the person to prepare a report of the review and send a copy of it to the Secretary of State, and the Secretary of State is under an obligation to lay before Parliament a copy of that report (*subsections (3) and (4)*).

Section 75: Trustee corporation

179. *Section 75* establishes the trustee corporation which under section 68(1) must be appointed trustee of the scheme. The name of the corporation will be determined by the Secretary of State by statutory instrument. This will allow for completion of research on names that are most appropriate for both the scheme and the trustee corporation.
180. This section also provides for the corporation not to be regarded as the servant or agent of the Crown and not to enjoy any status, immunity or privilege of the Crown, nor can property it holds (including property held in its capacity as trustee) be considered to belong to the Crown.
181. This section introduces Schedule 1 which details the provisions relating to the members, proceedings and funding of the trustee corporation.