ACCA

# technical factsheet 179

## Guidance on pension scheme trustees duties and responsibilities

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### 1. INTRODUCTION

This gives a brief summary of the main duties and responsibilities for trustees of pension schemes. This is based on the various pension's Acts and guidance from The Pensions Regulator.

The law requires that trustees have knowledge and understanding of the law relating to pension schemes as well as the principles relating to the funding of pension schemes and the investment of scheme assets.

Pension scheme trustees are also required to be familiar with certain scheme documents including the trust deed and rules, the statement of investment principles and the statement of funding principles.

The trustees are responsible for the proper running of the scheme – from the collection of contributions, to the investment of assets and payment of benefits.

There are three main types of pension scheme:

1. defined benefit schemes (sometimes known as final-salary schemes)
2. defined contribution schemes (sometimes known as money purchase schemes)
3. hybrid schemes (mixture of defined benefit and defined contribution benefits).

Other ways in which employers can provide retirement benefits for their employees include:

(a) setting up a group personal pension scheme; and
(b) offering a stakeholder pension scheme.

Two of the most important pieces of pension's legislation in relation to the role and duties of a trustee are the Pensions Act 1995 and the Pensions Act 2004, and the regulations made under them.

The Pensions Act 1995 reinforces trust law affecting how schemes should be run and increases the security of members' benefits.

The Pensions Act 2004 builds on this with the aims of further improving the security of members' benefits and standards of scheme administration, and strengthening the scheme funding requirements.


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The Pensions Regulator has issued codes of practice about certain requirements of the Pensions Act 2004, and may issue other codes if it wishes. The codes contain practical guidance on how to comply with the requirements in question, and set out the standards the Pension Regulator expects. If a court or tribunal is deciding whether a particular requirement has been met, they will take the code of practice into account.

The Pensions Regulator codes of practice can be found at the following address:
http://www.thepensionsregulator.gov.uk/doc-library/codes.aspx

## 2. TRUSTEES' DUTIES

Pension scheme trustees have the following duties:

1. to act in line with the trust deed and rules
2. to act in the best interests of the scheme beneficiaries
3. to act impartially
4. to act prudently, responsibly and honestly.

**Trust deed and rules**

The trust deed is a legal document that sets up and governs the scheme. The scheme rules set out more details on various issues including the benefits that will be provided, trustees' powers and procedures trustees must follow. Trustees must act in line with the terms of the trust deed and rules.

**Who are the beneficiaries?**

A 'beneficiary' is anyone who is entitled to, or who might receive, a benefit from the scheme, now or in the future. Scheme beneficiaries can include:

1. active members (employees who are building up benefits in the scheme);
2. pensioner members (people who are receiving a pension from the scheme);
3. deferred members (people who have stopped contributing to the scheme, but who still have benefits in it (for example ex-employees who have not transferred all their benefits to another pension arrangement);
4. prospective members (people who, if they go on to meet the eligibility conditions, may be entitled to join the scheme at a future date);
5. widows and widowers of members;
6. dependants of members (e.g. children or other relatives of members who financially depend on them);
7. former husbands and wives of members who, as a result of a court order on divorce have been granted pension credits within the scheme; and
8. in some circumstances the employer who, for example, may be able to receive payments from the scheme if there is a funding surplus or when the scheme is wound up.

**Acting impartially**

Trustees must consider the interests of all the classes of beneficiaries covered by the trust deed and rules and act impartially. Trustees will need to strike a balance so that they give appropriate weight to the interests of each class. Members in the same class should be treated the same. When dealing with individual beneficiaries, trustees will have to weigh the interests of that individual against the needs of all the other beneficiaries.

Trustees have a duty, when acting as trustee, to act in the interest of the scheme regardless of any other position that trustee may hold. Trustees may have various other positions such as directors/employees of the employer, members of a trade union or a beneficiary of the scheme. These positions should be kept separate and should not influence the trustees' role as trustee of the scheme.

Conflicts of interest may affect not only trustees but also directors of the employer, agents, professional advisers and others. Many trustees have a stake in the scheme or its sponsoring employer. If not managed effectively, decisions may be taken that put the interests of the beneficiaries at risk, or subsequently prove to be invalid. The failure to deal properly with a conflict of interest could result in a trustee's actions being set aside and/or personal liability for the trustees. Trustees who are directors of the employer will also need to consider requirements of the Companies Act 2006 (in particular CA 2006 section 175 relates to "duty to avoid conflicts of interest). Conflicts should be appropriately identified, monitored and managed.

**Acting prudently, responsibly and honestly**

The duty to act prudently means trustees must act in a way that a prudent person would act in their own affairs. In doing so, trustees must use any skills and expertise they have. This duty is particularly relevant when selecting and dealing with the scheme's investments and to setting assumptions to be used in calculating the liabilities of the scheme. Although this is not to say that all investments must be as low risk as possible or that all assumptions should be as prudent as possible.

When reaching a decision trustees must consider the circumstances impartially, taking account of all the relevant facts and ignoring irrelevant facts. It is usually good practice to record the factors that influenced the decision.
Trustees should take professional advice on any matters which they do not understand and on technical issues which may affect the scheme.
Trustees should not make any personal profit at the expense of the fund. The Pensions Act 1995 makes it clear that scheme members can be trustees and they can benefit personally from decisions made by the board of trustees as long as this will benefit members generally or a specific class of members.

## 3. TRUSTEES' LIABILITY

Trustees may be personally liable for any loss caused to the scheme as a result of a breach of trust. A breach of trust can happen when:

1. trustees carry out an act which they are not authorised to do under the trust deed and rules (unless agreed by the court or directed by the Pensions Regulator)
2. a trustee fails to do something which he should have done under the trust deed and rules
3. a trustee does not perform one or more of the duties that they have under trust law or pension law or do not perform them with sufficient care.

Trustees can be personally liable for any loss which is caused to the scheme as a result of the trustees' breach of trust. Even after ceasing to act, trustees are still liable for the decisions they took when they were a trustee. Trustees have 'joint and several liability'. This means that any trustees can be held responsible for a breach of trust committed by another trustee.

Trustees who become aware of a breach of trust committed before they become a trustee of the scheme may be held liable for it if they take no action to correct the breach, even though it happened before their appointment.

If the Pensions Regulator or a court fines a trustee as a result of a breach, that trustee can neither pay the fine out of the scheme's assets nor use the scheme's assets to pay the premiums for a policy insuring the trustee against the fines.

It may be possible to obtain indemnity from the employer or insurance to cover the trustee in case of a breach of trust.

## 4. WORKING WITH THE EMPLOYER

Trustees should put procedures in place to ensure that the employer keeps them informed about its financial position and of any plans that will change or impact upon the pension scheme. The employer must tell the trustees, within one month, if something happens which is likely to be of material significance to the scheme or the scheme's professional advisers.

It is against the law for a trustee to be dismissed or detrimentally treated for carrying out their duties or using their powers properly. If a trustee is dismissed they have the right to complain to an employment tribunal. The Employment Rights Act 1996 provides this protection for trustees who work for the employer.

If the employer deals with the administration of the scheme, the information which the employer should make available to the trustees includes, who administers the scheme and the terms on which they do it.

The employer (and any previous employer involved with the scheme), and any actuary or auditor of the scheme must give the trustees any information that they need as a trustee or they reasonably need for their professional advisers.

## 5. PROVIDING INFORMATION TO THE PENSIONS REGULATOR

Trustees need to provide information to the Pensions Regulator in three circumstances as follows:

- providing information for the register and the scheme returns on a regular basis
- providing information when particular scheme or employer-related events occur
- providing information if certain breaches of the law occur.

1. It is a legal requirement for all work-based pension schemes that are registered with HM Revenue and Customs and have more than one member to also register with The Pensions Regulator. Schemes must be registered within three months of registering with HMRC. Trustees are responsible for this registration process. The Pensions Regulator keeps a register of pension schemes, holding information about the scheme and the employer. Trustees must provide this information and notify the regulator of changes to the scheme.
   The Pensions Regulator has a duty to issues a scheme return to all schemes on the register on a regular basis. Defined benefit and large defined contribution schemes will receive a return annually while smaller defined contribution schemes may wait up to three years between returns. The trustees are responsible for completing the returns which should be returned to The Pensions Regulator within 30 working days.

2. The Pensions Act 2004 places a duty on the trustees of schemes, and employers, to notify The Pensions Regulator when certain events occur. Regulations made under section 69 of the Pensions Act 2004 set out which events have to be notified. Some events only need to be reported if the scheme is funded below the Pension Protection Fund buy out level whereas other events need to be reported irrespective of the funding level of the scheme. Notifiable events are explained in a code of practice issued by the Pensions Regulator which can be found at the following address:
   http://www.thepensionsregulator.gov.uk/codes/code-notifiable-events.aspx

3. The Pensions Regulator has produced guidance on reporting breaches of the law which can be found at the following address:
   http://www.thepensionsregulator.gov.uk/codes/code-reporting-breaches.aspx

## 6. PROVIDING INFORMATION TO MEMBERS

The trustees of most pension schemes have to make information available about the scheme to members, prospective members, husbands and wives of members and prospective members, other people entitled to benefits under the scheme and independent recognised trade unions. Some information needs to be produced annually such as the annual report which should be available within seven months of the end of each scheme year. Other information should be provided automatically or if it is requested.

## 7. SCHEME ADVISERS

By law trustees are required to appoint various professional advisers to assist in running the scheme. The Pensions Act 1995 requires the trustees to appoint certain professional advisers to carry out specific tasks in relation to the scheme. Trustees can only rely on advice from professional advisers who have been properly appointed. The principal types of professional advisers are as follows:

(a) auditors will need to be appointed if the scheme requires an audit
(b) schemes with a defined benefit element must have a scheme actuary to provide advice on all aspects of the funding of the scheme.

The scheme may also have the following advisers:

(c) an investment adviser (to give advice about the type of investments to hold)
(d) a fund manager and (to deal with the investment of the scheme's assets)
(e) a custodian (to safely hold the scheme investments)
(f) a legal adviser.

## 8. SCHEME FUNDING

The current statutory funding framework, which replaced the minimum funding requirement, came into force on 30 December 2005. Under the requirements each scheme must meet the 'statutory funding objective' to have sufficient and appropriate assets to cover its technical provisions. Technical provisions are an estimate, based on actuarial principles, of the assets needed to cover the schemes liabilities which will be payable in the future.

Technical provisions are calculated by the scheme actuary using an accrued benefits funding method and assumptions chosen by the trustees, after taking the actuary's advice and usually obtaining the employer's agreement.
The scheme funding provisions require the trustees to:

1. Prepare a statement of funding principles;
2. Obtain regular actuarial valuations and reports;
3. Put in place a recovery plan addressing any funding shortfall; and
4. Keep scheme members informed about their scheme's funding position by issuing regular summary funding statements.

Trustees need to ensure that the contribution rates are sufficient to provide the benefits under the rules of the scheme. They also need to ensure that these contributions are paid into the scheme at the correct time. The law requires that employers must hand employees' pension contributions over to the trustees within 19 days of the end of the calendar month when they were taken from employees pay, including any additional voluntary contributions (AVCs). If they are not, the trustees may have to report this to the regulator. The Pensions Regulator has issued guidance to say that only failures which are materially significant should be reported to them.

The Pensions Regulator has produced a code of practice "Funding defined benefits" which explains this in more detail, this can be found at the following address:
http://www.thepensionsregulator.gov.uk/codes/code-funding-defined-benefits.aspx

## 9. SCHEME INVESTMENTS

The trustees (except trustees of wholly fully insured schemes) are responsible for deciding the investment strategy to be adopted by the scheme. Trustees may be able to invest in different investments such as equities, government stocks, property, hedge funds and derivatives depending on the terms in the scheme deeds and rules. The trustees should take advice from professional advisers such as the scheme actuary and investment consultants before deciding upon an investment strategy.

When deciding upon an investment strategy the trustees must consider:

1. any limitations on investments contained in the trust deed and rules, and other legal requirements
2. trustees have a fiduciary duty to choose investments that are in the best financial interests of the scheme members
3. the suitability of different asset classes to meet the needs of the scheme and future liabilities
4. the risks involved in different types of investment and the possible returns that may be achieved; and
5. appropriate diversification of the scheme's investments.

Having established the investment strategy the trustees should prepare the scheme's statement of investment principles (SIP). The SIP sets out the principles governing how decisions about investments must be made. The trustees need to review the SIP regularly (at least every three years) and whenever there has been a significant change in investment policy. When the SIP is drawn up and revised the trustees must obtain and consider the written advice from a person who they reasonably believe to have the appropriate knowledge and experience of financial matters and investment management and to consult with the employer. 'Consultation' means considering the employer's views carefully however the trustees do not need to agree with the employer or carry out their wishes.

Pensions law allows trustees to delegate day-to-day investment decisions to an investment manager (fund manager) who is authorised under the Financial Services and Markets Act 2000 and who has been properly appointed. The trustees will remain responsible for the investment strategy which the fund manager must follow. However the trustees will not be personally liable for any mistakes the fund manager makes as long as the trustees ensure that the fund manager has the appropriate knowledge and experience for managing the scheme investments and they carry out their work competently and in line with the trustees policy for choosing investments as set out in the Statement of Investment Principles (SIP).

The trustees should set up appropriate procedures to review their performance and charges.

There are legal requirements to comply with when choosing investments, and regulations set out how trustees or fund managers must exercise their investment powers. Trustees can only invest in the business of the employer in limited circumstances. For most schemes, trustees cannot normally invest more than 5 per cent of the scheme's assets in

employer-related investments. ‘Employer-related’ investments (often called ‘self-investment’) includes shares in the employer’s business and acquiring property used in the business, such as the premises from which the business operates. Any such investment can only be justified by the expected return to the scheme, which must be at least as good as could be produced by another comparable investment. Certain employer-related investments are not allowed at all, these include:

(a) loans to the employer;
(b) guarantees over loans or other financial arrangements involving the employer and connected or associated people;
(c) transactions at less than their normal market value; and
(d) certain loan arrangements with third parties which involve the employer.

Certain employer related investments are restricted (to no more than 5% of the scheme assets) and other certain employment related investments are not allowed at all.

Trustees have a duty to make sure that the scheme’s investments are held securely on their behalf. This includes share certificates, title deeds to property, and any other documents of title showing which assets belong to the pension scheme. Trustees may appoint custodians to hold the scheme’s assets. If they do so the custodian should be chosen carefully after considering such matters as adequate insurance.

## 10. ADMINISTRATIVE PROCEDURES

Trustees must establish, operate and maintain adequate internal control mechanisms for the purpose of monitoring that the scheme is being effectively administered and managed in the interests of the members and beneficiaries under the scheme rules. This includes:

1. taking decisions about the scheme (following the trust deed and scheme rules)
2. keeping proper records and holding original documents
3. updating the trust deed and rules when necessary
4. resolving disputes with scheme members.

Keeping proper records includes records of the trustees meetings and records about scheme members and transactions. Scheme records are trustee property and all these documents are open to review and inspection by all the trustees. The trustees must make the records, and other relevant information, available if the scheme’s professional advisers request them (so they can carry out their duties). The trustees must also make them available if the Pensions Regulator, the Pensions Ombudsman, the Board of the Pension Protection Fund or a court request them.

## 11. AUDITOR’S STATEMENT AND AUDITED ACCOUNTS

The trustees of most pension schemes need to get a statement every year from the scheme auditor confirming whether or not, in the auditor’s opinion, contributions have been paid in line with the scheme’s ‘payment schedule’ (in the case of a defined contribution scheme) or ‘schedule of contributions’ (in the case of a defined benefit or hybrid scheme).

If the statement is negative or qualified, the scheme auditor must give reasons why.

For many schemes, the scheme auditor will also need to audit the scheme accounts. The accounts usually form part of the annual report about the scheme. The trustees are responsible for preparing the accounts (although an adviser may help in this process) and the scheme auditor will audit those accounts.

The accounts must be prepared in accordance with the Statement of Recommended Practice (SORP) for pension schemes, and must show a true and fair view of:

1. the financial transactions of the scheme during the scheme year
2. the amount and disposition of the assets at the end of the scheme year
3. the liabilities of the scheme, other than the liabilities to pay pensions and benefits after the end of the scheme year.

The accounts should be prepared and audited, if appropriate, within seven months of the end of the scheme year.

The exemptions from the requirement to appoint auditors are listed in regulation 3 of 'The Occupational Pension Schemes (Scheme Administration) Regulations 1996' Statutory Instrument 1996 number 1715 which can be found at the following address:

http://www.legislation.gov.uk/uksi/1996/1715/contents/made

The trustees of most schemes must make their annual report available within seven months of the end of each scheme year. This is a report on how the scheme has been managed and any changes which have happened in the year. It includes changes to the benefits provided by the scheme as well as changes in who is involved in running the scheme. The report must include, among other information the following:

(a) a copy of the audited accounts and auditor's report;
(b) details of the trustees and how they are appointed and removed;
(c) details of the scheme's professional advisers and fund managers;
(d) an investment report, including how the investments have performed;
(e) the number and breakdown of scheme members;
(f) the number of other people entitled to benefits under the scheme;
(g) details of pension increases for defined benefit schemes and how they are worked out;
(h) an address for enquiries; and
(i) the actuary's certification of the adequacy of the schedule of contributions.

Trustees of most schemes must have formal arrangements in place for considering complaints about their scheme. This is known as the 'internal dispute resolution' (IDR) procedure. It is for the trustees to arrange and implement an appropriate IDR procedure.

The IDR procedure covers disputes between the trustees and:

1. the members (active, pensioner and deferred members);
2. prospective members;
3. a widow, widower or someone else entitled to benefits as a result of a member's death;
4. individuals who were recently in one of these categories; and
5. individuals who claim to be in one of these categories.

The law requires the trustees to make a decision on a matter in dispute and communicate it to the applicant within a reasonable period. The Pensions Regulator's code of practice suggests that the reasonable period should be four months. If the person making the complaint is not happy with the trustee's decision, or if they consider that the IDR procedure is not operating properly, they may take the matter to the Pensions Ombudsman. The person making the complaint can contact the Pension Advisory Service at any time about their complaint.

## 12. SCHEME BEING WOUND UP

If the trustees decide to wind up the pension scheme they will need to consider a number of additional points in addition to the normal matters involved in running the pension scheme.

Trustees should check the trust deed and rules if they are considering winding up the scheme. The most common reason for winding up a scheme is when an employer becomes insolvent and stops making contributions to the scheme. The trust deed and rules will usually state that the scheme should be wound up in this situation.
The law requires the trustees to inform the members that the scheme has started to wind up within one month of taking the decision and then update them of progress annually thereafter. The trustees also have the duty to inform the Pensions Regulator:

1. that the scheme has started to wind up;
2. as soon as reasonably practicable that the scheme has wound up;
3. if the scheme has not been wound up within two years, provide an initial report and annual report thereafter.

Records must be kept of the trustees' decision to wind up the scheme. The trustees are responsible for ensuring that the scheme assets are identified and protected, and that the wind up is completed as quickly as possible. The government published a report in 2006 (Speeding up winding up occupational pension schemes) that stated it was reasonable to expect that the key activities of winding up will be completed within two years. The key activities include:

(a) identifying and obtaining any debt on the employer;

(b) identifying individual members' share of the assets;
(c) securing pensioner benefits;
(d) conducting a final actuarial valuation of the scheme; and
(e) issuing option letters to members.

If an insolvency practitioner or the official receiver is appointed to act as liquidator or receiver for the employer, by law they are required to tell the trustees of the pension scheme, the Pensions Regulator and the Board of the Pension Protection Fund that they have started to act for the employer. In this situation the Pensions Regulator has the power to appoint a statutory independent trustee from the Pensions Regulator's register of independent trustees. The existing trustees will still be required to carry out their duties although the statutory independent trustee will take over the exercise of their discretionary powers.

Trustees of a scheme with a defined benefit element where the employer suffers an insolvency event will need to check whether the scheme satisfies the conditions for entry.

The Pensions Regulator has produced a Trustee Guide which contains more details on trustee's duties and responsibilities which can be found at the following address:
http://www.thepensionsregulator.gov.uk/guidance/guidance-for-trustees.aspx

In relation to Conflicts of interest The Pensions Regulator has issued the following detailed guidance:
http://www.thepensionsregulator.gov.uk/guidance/guidance-conflicts-of-interest.aspx