SQUIRE PATTON BOGGS

Pensions Quick Guide

HOW TO... Conduct Trustee Business During the COVID-19 Pandemic

Like many others, pension trustees are facing practical challenges to their usual governance processes during periods of social distancing and lockdown. Two key challenges are how to continue with effective decision-making and how to validly execute documents. In this quick guide, we take a look at how trustees can manage those challenges.

How Can Trustees Continue to Make Decisions?

Most trustee business will need to continue whether or not there are restrictions on the holding of meetings in person. There are some decisions that trustees already take between meetings and they will continue in the usual way, whether by telephone or email. But what about those decisions that are reserved for trustee meetings, such as whether to approve a scheme amendment and the documentation for effecting that amendment?

Trustees should check their deed and rules. Are they broad enough to allow decisions to be taken by way of telephone or videoconference? Is there some other means of decision-making, such as all trustees agreeing in writing? Most deed and rules permit written resolutions and, in which case, email exchanges might provide a useful way for formalising decisions taken by telephone or videoconference. If the rules are drafted in a restrictive manner, requiring decisions to be taken at a meeting held in person, perhaps a rule amendment could sort out the problem? The trustees will need to consider whether they can make such a change, whether they can do so retrospectively and who else might need to be involved to achieve it. For example, do they need employer agreement or actuarial input?

Whatever means of communication is used for the passing of resolutions and sharing papers and data, trustees must make sure they have considered how to protect the privacy of their process.

How Relaxed Are the Formalities When Holding a Virtual Meeting?

Even where a meeting is being held virtually by telephone or videoconference, the formalities for calling and holding a meeting should be observed. This includes giving the correct notice for calling the meeting and decisions being taken by the correct proportion of trustees specified under the deed and rules (which is often either a majority of trustees present at the meeting or a minimum number of the trustees). In particular, it will be important to ensure that the meeting is quorate. See our quick guide on How to Run a Trustee Meeting for further tips.

How Can Trustees Protect Against a Meeting Being Inquorate?

In these challenging times, contingency plans should be put in place as a matter of urgency to ensure that quorate meetings can still be held in the event that one or all of the trustees becomes unable to act. Possible options include:

- Amending the scheme to reduce the quorum requirements down to two if the quorum is currently three or more trustees
- Each trustee granting a power of attorney to someone else to act in the event of their incapacity
- The appointment of additional trustees
- The appointment of a corporate professional trustee (that has several directors) in addition to, or instead of, the existing trustee board for a specified period

What if There Is No Quorum?

If one or more of the trustees is incapacitated so that a quorate meeting is no longer possible, the only fail-safe option would be for additional trustees to be appointed. The trust deed and rules will set out who has the power to appoint additional trustees. In most cases, the appointment must be made by deed. If it is not possible to appoint additional trustees, for whatever reason, the remaining trustee(s) should take advice. If a trustee acts alone, pending ratification of their actions by the full trustee board, they are likely to be acting in breach of the trust deed and rules. This could mean that they find themselves on the receiving end of a breach of trust claim if they take a decision that is later challenged.

✓	Check the decision-making provisions in the trust deed and rules.
✓	Check the directors' decision-making provisions of any corporate trustee.
✓	Check the security of any virtual systems that will be used for decision-making, such as videoconferencing.
✓	Consider as soon as possible how to avoid inquorate decision-making.
✗	Do not assume all decisions can/should be taken by way of email.

What if the Trustees Need to Sign Documents?

Wherever possible, documents should be executed in the usual manner. In the pensions world, it is usual for hard copy documents to be signed/executed with "wet ink" signatures. This is because wet ink signatures are considered the best type of signatures evidentially (if there is a dispute in court about the validity of the document). Additionally, pension documents, especially scheme documents, endure for many more years than the average commercial document.

However, it is possible to create a legally binding document by way of a virtual signing. This is where a contract is formed, or a deed is executed, by using electronic means. There are many different methods of achieving this. The two that we recommend both involve one person co-ordinating the signatures to the document and adding the date when all the signatures have been gathered.

- The co-ordinator emails a copy of the final form document to each party who is required to sign the document. Each party prints off a copy of the complete document, signs it and scans the **whole document** back to the same person.
- If printing the whole document proves tricky, it is acceptable to print the signature pages only, sign and scan those back to the person who is co-ordinating the execution of the document, **but** a complete copy of the document (either in Word or PDF format) must also be attached to the email returning the signed signature pages.

Remember to ensure that all parties have first agreed to a virtual signing.

What if I Do Not Have Printing and Scanning Facilities?

In its November 2019 report, the Law Commission confirmed that an electronic signature is capable in law of being used to execute a document (including a deed) provided that (i) the person signing the document intends to authenticate the document, and (ii) any formalities relating to the execution of that document are satisfied.

An electronic signature can take one of the following forms:

- Digital signature (that is, a public key encryption system involving a certification authority)
- Scanned manuscript signature
- Typing of a name, for example, at the end of a document
- Clicking on a website button

Typing your name into a document and emailing the full document back to the co-ordinator could, therefore, constitute a valid signature in the event that you do not have scanning and printing facilities.

What Type of Electronic Signature Should Trustees Use?

When considering which form of electronic signature to use, it is important to distinguish between the fact that an electronic signature satisfies a legal requirement for a document to be "signed", which is admissible in evidence in legal proceedings, and the evidential weight that may be given to that signature if there is a dispute about, for example, who, in fact, signed the document, whether they intended to be bound, or about the content of the document.

For example, a scanned wet ink signature would often provide more evidential weight than if the name of the party were simply typed into a document as a means of signing it.

Are There Extra Formalities for Executing a Deed?

If the document being executed is to be a deed, it will be important to consider both "signing" and "delivery" (fortunately, under modern law, we do not generally need to consider "sealing", as well). In other words, you need to be able to prove that the person signing the deed intended it to take effect, and when – the usual way of evidencing delivery is to include specific wording in the deed that clarifies the point at which the deed is treated as being delivered.

There is still a need to consider requirements for the witnessing of certain signatures. Section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 44 of the Companies Act 2006 require a deed being executed by an individual to be "signed … in the presence of a witness who attests the signature". This means that a witness must be physically present when the document is signed and they must insert their own signature into the same document to confirm that, even on a virtual signing (although the witness's signature could be applied electronically). It is not currently possible to witness a signature remotely via videoconference.

See our quick guide for information generally on how to execute a deed.

What if Only Members of My Household Are Available to Witness My Signature?

The signing of a deed is witnessed in order to provide an additional layer of verification in the event that the validity of the signature of a party is challenged. A witness to a signature cannot be another party to the deed.

A witness is intended to act as reliable evidence of due execution. While in an ideal world, therefore, a witness would be independent of the party signing the document so that their reliability is beyond dispute, a witness can be a member of the party's household (except where the document is a will or a lasting power of attorney). If due execution of the document were contested in court, however, the court would have to decide how much weight to place on the fact that the witness was also a member of the household of the person whose signature they were attesting.

Can a Pension Scheme Beneficiary Act as a Witness?

Generally, a person who is interested in the "transaction" should not act as a witness. The suitability of a pension scheme beneficiary as a witness, therefore, would need to be considered on a case-by-case basis and advice should be sought.

What Special Considerations Are There Where There Is a Corporate Trustee?

- Where there is a sole corporate trustee, the format for the running of the meeting will be determined by the articles of association of the trustee company. In particular, the articles of association will need to be checked for notice requirements, quorum and the directors' decision-making process. If these need to be amended, advice should be taken. It will also be necessary to bear in mind the interaction between the articles of association and the rules of the scheme. If this gets complicated, you might need to seek legal advice.
- One option to safeguard against a meeting being inquorate (if the articles of association permit) would be for each director to appoint an alternate to act in their place at directors' meetings. In order for this to work, the alternate would need to be an individual who is not already a director, as it is generally the number of persons actually present that is counted, rather than the number of persons on whose behalf someone is authorised to act. Any process set out in the articles of association would need to be followed.
- If there is a corporate trustee and one or more directors are incapacitated so that it is no longer possible to have a quorate meeting, it will probably be necessary to appoint additional directors in order to resolve the issue. An alternative option would be to look at whether the articles permit the company to have a sole director and, if so, whether the incapacitated directors are able to resign (or be removed from office) during their period of incapacity, leaving a sole director to act alone.
- If a corporate trustee is executing a deed, this must be in line with the company's articles of association. The Companies Act 2006 sets out the different methods by which a company may execute a deed, and the articles of association of a company will generally adopt one or more of those methods. If the deed must be executed by two directors, or a director and the secretary, those officers should execute the **same** document.
- The articles of a corporate trustee might take advantage of the Companies Act 2006 provisions allowing execution by one director and a witness. The signature of the director must be witnessed by a second individual who is present when the director signs the document.
- Note that a director cannot grant a power of attorney to act in their capacity as an officeholder of the company, but the **corporate trustee** could appoint an attorney to execute documents on its behalf.

Some Practical Points

Do...	Don't...
Do consider early on how trustees will make decisions during periods of social distancing and lockdown. Check the scheme's trust deed and rules and/or the trustee company's articles of association to identify what will be possible and put a plan in place.	**Don't** assume that all documents can be executed via electronic means. Some documents, for example, must be executed with a wet ink signature before they can be registered with HM Land Registry.
Do act now to put measures in place to ensure that trustees can execute documents (when necessary) if one or more trustees is incapacitated.	**Don't** worry if some of the measures suggested in this document seem impossible for whatever reason. It is likely that most decisions will be capable of ratification after the event, and most contracts (although not deeds) will be capable of being legally formed via an email exchange. Take advice.
Do take advice if in doubt. There is usually a way around most problems if thought about sufficiently in advance.	**Don't** forget that not all audio and videoconferencing facilities provide a secure means of discussing trustee business. Allow time to identify the best option for your circumstances.

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What Are the Consequences of Failing to Comply?

Failure to act in accordance with a scheme's trust deed and rules could put a trustee in breach of trust, potentially resulting in personal liability for that trustee.

If care is not taken to ensure that any deed is validly executed (especially by way of a virtual signing), this could invalidate the provisions of the deed.

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