

DRAFT GUIDANCE NOTICE: GENERAL EXEMPTION FROM THE REQUIREMENT THAT MEMBERS OF A FUND HAVE THE RIGHT TO ELECT MEMBERS OF THE BOARD OF A FUND. SECTION 7B(1)(B) OF THE PENSION FUNDS ACT

Please note that this publication concerns a DRAFT Guidance Notice. The Guidance Notice is not final.

1. The default position

Section 7A(1) of the Pension Funds Act (“the Act”) requires every fund to have a board comprising of at least four members, at least 50 per cent of whom the fund members have the right to elect. Section 7B of the Act provides an alternative to the provisions of section 7A in certain defined circumstances. This section has historically allowed (and currently allows) the following types of funds to make application to the Registrar of Pension Funds (“the Registrar”) for exemption from the default position –

- umbrella funds;
- retirement annuity funds;
- beneficiary funds; and
- pension and provident preservation funds.

2. Rationale for exemptions

Since it was difficult for these types of funds to arrange member elections and the cost of such elections was considerable, the Registrar historically granted, on application, a maximum three year exemption from the requirement that members have the right to elect at least 50 per cent of the board. Many funds, however, failed to renew their exemptions in time, with the result that they lapsed. This Draft Guidance Notice is intended to replace the 2015 circular issued by the Registrar dealing with exemptions. All exemptions now granted by the Financial Sector Conduct Authority (“FSCA”) will be of indefinite duration.

3. Conditions attaching to the Section 7B(1)(b) exemption

The exemptions granted by the FSCA are not automatic. This means that currently exempted funds must still apply for indefinite exemption. These exemptions will be granted on a case-by-case basis taking into account the requirements in section 7B(1)(b) of the Act and section 281 of the Financial Sector Regulation Act, 2017¹.

The following conditions apply if a fund is granted a section 7B(1)(b) exemption:

- a) At least 50 per cent of the board members must be independent board members. The FSCA will consider exceptions to this condition, if good reasons are given by the fund.
- b) Where the rules of bargaining council, sectoral determination, trade union and municipal funds provide for alternative forms of member representation (other than direct member elections), such funds may request that the FSCA not impose, or relax, the above mentioned requirement to have 50 per cent of the board made up of independent board members, subject to adherence to the rules of the fund. These rules must also provide for the manner in which non-unionised members or members of minority unions, for example, will be accommodated.

¹Section 281 of the Financial Sector Regulation Act (“FSRA”) is the provision allowing an Authority such as the FSCA, subject to certain requirements, to exempt persons or a class of persons from provisions of a financial sector law.

This publication does not provide advice or legal opinion. If you have any questions/comments on the above, please contact your consultant.



- c) Before making any independent board member appointments, the board must ensure that these individuals have the requisite experience or expertise, which the fund must demonstrate, and the independent board members -
- i. must be free from any relationships that could affect his/her objectivity. *(Comment: it is not clear what this means. For example if the independent board member has worked for the sponsor in the past, is this a relationship that could affect his/her objectivity, given that there is no longer a relationship with the sponsor if he/she no longer works there? PF Circular 130 requires that independent board members should not be employees of the employer participating in the fund and neither should they be controlled by, nor in common control with the employer, the administrator or the sponsor of the fund. PF Circular 130 goes on to stipulate that the independent board member should preferably not provide any other services to the fund or the employer or sponsor, other than serving as a trustee to the fund);* and
 - ii. must never have been expelled from membership of any professional body or entity entitled to exercise disciplinary powers over him/her; and
 - iii. must never have been convicted of an offence involving dishonesty or violence *(Comment: this would need to involve an actual conviction of a crime or illegal act involving dishonesty or violence. It does not include, for example, a disciplinary finding. Boards may want to include, in contracts with independent board members, what will happen if a board member is charged with such a crime, but not been convicted or where they have been found guilty in a disciplinary hearing, or other forum, of dishonesty);* and
 - iv. must be able to provide sufficient time, expertise and resources to the fund at a reasonable cost, and will continue to do so for the duration of his/her appointment.
- d) If an independent board member is unable to comply with the requirements for independence the board must take remedial action. *Comment: this is an ongoing requirement and not simply an upfront requirement at the time the independent board member takes office. This will require a declaration to the board by the independent board member at any time that he/she does not continue to meet this requirement for independence. When appointing independent board members, funds should amend their declarations and any contractual arrangements to reflect these requirements.*
- Furthermore, the requirement, above, to take remedial action does not appear to automatically require that the independent board member's appointment must be terminated. There may be other action that can be taken by the board, for example if it is an issue that the independent board member does not have sufficient time to devote to the fund, the independent board member may be requested to demonstrate that he or she has given up certain other work in order to free up his/her time. However, (f) below requires immediate termination of the appointment of the independent board member if he/she does not comply with the requirements, and certainly not complying with requirements (i) to (ii) would surely require immediate termination.*
- e) If a board has sub-committees, similar criteria apply to the composition and the requirement for independence of the sub-committee members. That is, 50 per cent of the sub-committee must be comprised of independent trustees. *Comment: this may require amendment of rules, sub-committee mandates and changes to the composition of sub-committees.*
- f) Failure to comply with any of the conditions specified above must result in immediate termination of an independent trustee's appointment by the fund. *Comment: thus, there is no room for providing notice of termination, it must be immediate.*
- g) An independent board member must report any irregularities and concerns to the FSCA. *Comment: the Act's requirements differ from the above, requiring that a board member (whether independent or not) must on becoming aware of any material matter relating to the affairs of the pension fund which, in the opinion of the board member, may seriously prejudice the financial viability of the fund or its members, inform the Registrar (now the FSCA)² thereof in writing.*

² The FSRA provides that the definition of "Registrar" in the Act should be read to mean the Authority (which is the FSCA).



- h) The fund rules must provide for a quorum of at least four board members, including the independent trustees, and that no decision of the board will be binding on it unless that decision was supported by no fewer than:-
- 50% of the board members, of which no fewer than 70% are independent; and
 - if a decision is taken by round-robin resolution, it is ratified by the board at its next meeting.

Comment: this may require rule amendments. In addition, where funds use round-robin resolution there should be a standing item on meeting agendas to ratify such resolutions.

Comment: the draft Notice does not say that this applies to sub-committee meetings as well. However, given that the composition requirements are the same for board and sub-committees as regards independent board members, the FSCA may expect similar quorum and resolution requirements for sub-committees.

- i) Depending on the size of an umbrella fund, the Authority will consider it necessary that management committees³ at employer, sector or regional level be established, so that there is sufficient transparency and participation in the decision making process of funds.
- j) The board must adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the fund over time, which must be combined with a timeous, regular and relevant communication strategy for the fund and its members.

The Authority may add, delete, vary or in any other manner change or amend the conditions attached to exemptions and it may also withdraw an exemption. *Comment: we can expect to see the FSCA refine its requirements for independent board members over time.*

Before funds apply for a section 7B(1)(b) exemption they should ensure that they are able to comply with the above-mentioned conditions, failing which the FSCA may not grant the application.

4. Furnishing of information by an umbrella fund

- 4.1 Upon receipt of an exemption, the fund must, within thirty days of the appointment of an independent board member(s), furnish to the FSCA in writing stipulated information about, and contact details of, the independent board member, including history of employment and positions of trust.
- 4.2 If, after considering the information provided about the independent board member and any other relevant information, the FSCA informs the fund that it is not satisfied that the independent board member is a fit and proper person to occupy a position of trust in relation to the fund, the fund's sponsor must procure the immediate termination of the board member's appointment. *Comment: it would be preferable to write this into any contract entered into between the fund and the independent board member.*
- 4.3 The board must declare at each year end its adherence to the principles of Good Governance, Code of Conduct and Code of Ethics issued as a guide to the boards by the Authority from time to time. *Comment: boards will need to consider changes to the wording of their annual disclosures and standard board member contract templates. PF Circular 130 requires that each board must have a Code of Conduct in which it outlines and confirms its duties and obligations. Additionally, every fund should require of each board member that he or she completes an acceptance of duties form and, at least annually or at such greater frequency as the board may require, a declaration of interests.*

The Authority will take appropriate regulatory action in the event of any failure by the fund and its board to adhere to any of the provisions stipulated in the Notice.

³ Management committees may take the form of committees of an umbrella fund, which are intended to assist the board of management to liaise better with members and employers, thus ensuring adequate and timeous communication, interaction and understanding of matters which impact these stakeholders.