

The Pension Regulator's consultation document on its guidance to "Conflicts of interest"

A response by

The National Association of Pension Funds

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Introduction

1. The NAPF is the leading voice of workplace pensions in the UK, with over 1300 members, between them providing pensions to over 10 million working people. NAPF Member schemes hold assets of some £800bn.
2. The NAPF welcomes the opportunity to respond to the consultation by the Pensions Regulator (TPR). *While we see merit in TPR providing high-level guidance in this important area for pension scheme trustee boards, we do have a number of substantive concerns regarding the content and length of the proposed material.*
3. *When producing its guidance on conflicts of interest, we would urge TPR to remember that its objectives and those of trustees may not always be completely aligned. The primary responsibility of trustees is to implement the terms and discretions of the trust – while, of course, complying with all relevant legal requirements. On the other hand, TPR's objectives include not only protecting members' benefits, but also minimising calls on the PPF. In light of this, there may be occasions, for example with regard to scheme funding, where TPR and scheme trustees may hold different views on whether a conflict of interest exists.*

NAPF Comments – High-Level

4. We have the following concerns which we hope TPR can address before issuing the guidance in full.
 - 4.1. We would have expected to see more recognition of the commonality of interests between trustees and employers, which applies to the vast majority of circumstances they face in running their pension schemes. We believe that the main focus of the guidance should be on identifying, managing and monitoring conflicts in the limited circumstances in which they do arise. There is a danger of the guidance giving the impression that conflicts of interest are an almost all pervasive risk in the area of scheme governance. We would like to see some acknowledgement that this is not the case.
 - 4.2. Personal responsibility and integrity are important and abundant qualities in individuals working as trustees, advisers and pensions staff. All trustees will have potential conflicts but while this may give rise to differences of opinion and vigorous discussion, the occurrence of any actual conflicts of interest is limited.
 - 4.3. As the document stands, there is a great deal of emphasis on seeking legal advice – with at least 30 references made to such action. We feel that this may make trustees unnecessarily reluctant to make decisions themselves in managing conflicts of interest when they are quite capable of doing so. If possible, we would like to see the number of references reduced.

- 4.4. The guidance appears overly long, repetitive and not appropriate as a practical form of guidance for managing a process for the monitoring of conflicts of interest.
- 4.5. There are errors in the document from a legal perspective - for example the notion that there is a common law duty of disclosure of information (para 88), or that trustees have a duty only to act in the best interests of members. It is actually key to the proper exercise of trustee duties that a trustee acts in accordance with the purpose of the trust, to provide the benefits promised by the employer in a cost-effective manner, as set out in the trust documentation. This may or may not be in total accord with TPR's statutory objectives but it certainly means that the trustee should work wherever possible closely with the employer.

NAPF Comments on Specific Principles

5. We would also like to make the following comments on the specific principles set out in the paper.
 - 5.1. Principle 1 – While we agree it would be sensible that the guidance includes examples of when conflicts of interest may arise, we suggest that TPR makes every effort to ensure that the examples are practical. A case in point is the list of “examples” in para 35. The list demonstrates the difficulty of distinguishing in practice between a board which has differences of opinion and a board with actual conflicts of interest that need managing “out”. So, for example, a “director or senior employee”, should in fact be “any employee”. However, there is a risk that the list becomes too long to be useful - precisely because the normal position would be that the holding of these other roles does not in itself mean there is necessarily a conflict of interest; the terms of the trust, properly managed, mean that all parties are required to work for the same purpose. Where conflicts of interest do become ‘actual’, the process of recognising where this is a conflict of interest and not a difference of opinion, is critical. The guidance however does not seem to address this adequately.
 - 5.2. Principle 3 - We would support a process identifying (exceptional) conflicts of interest and maintenance of a register.
 - 5.3. Principle 4 - We are surprised by the statement in para 79 that a trustee who abstains while remaining present may unduly influence or even invalidate the outcome or discussion. We think this very unlikely in practice.
 - 5.4. Principle 5 - Professional advisers have their own rigorous professional requirements for conflict of interest management, disclosure and the use of separate teams, together with considerable case law on conflict for advisers. We do not think it helpful for TPR to seek to impose similar requirements but which are not identical.

Other Comments

6. Finally, we have no comments to make on the specific questions asked in Appendix E of the consultation paper, other than to observe that large schemes are already very conscious of this area and small schemes will benefit from guidance only if it is pitched at an easy-to-digest and simple-to-use level.