

THE NAPF GUIDE TO
INVESTMENT MANAGEMENT AGREEMENTS
MARCH 2015

IN ASSOCIATION WITH

C/M/S

Law . Tax

We are delighted to make this new guide to investment management agreements available to trustees and their advisers.

Investment management agreements are just that: agreements between you and your investment managers regarding the services they will provide. We hope this guide will help you come to agreements that work better for you and for your managers. If you are looking to hire a new investment manager, we recommend it as a roadmap to the relationship that should be consulted before embarking on a beauty parade. Knowing what is likely to be negotiable, and what sorts of terms other trustees are looking for will help you frame your questions for prospective managers.

And of course, once the investment manager has been chosen, we believe the guide will be valuable when you negotiate the terms on which the relationship will go forward.

We are very grateful to CMS, who have shared with us in this guide their insights gained through years of negotiating these agreements on behalf of trustees.



Graham Vidler
Director of External Affairs, NAPF

This document sets out some key principles only and is not intended to be an exhaustive guide to drafting and agreeing any contract. You should not place reliance on this document and the information contained within it. We recommend that you seek appropriate advice for negotiating and agreeing the terms of any investment. You should also refer to your obligations and powers under the Trust Deed and Rules when entering into any investment.

CONTENTS

Introduction	4
Entering into an IMA	5
The terms of a typical IMA	8
Schedules	17

1. INTRODUCTION

Pension fund trustees have important responsibilities when entering into investments on behalf of their schemes. This includes responsibility for the terms which apply under the documentation for each investment made.

It follows that trustees should be aware of the typical key provisions in the documentation of investment agreements, and understand where there may be some room for negotiation.

The National Association of Pension Funds has collaborated with International law firm CMS Cameron McKenna in producing this guide to investment management agreements. It draws on CMS' extensive experience of negotiating on behalf of its pension fund trustee clients.

This guide covers:

- the key terms of an Investment Management Agreement (or "IMA") with a discretionary investment manager; and
- some issues to consider when entering into an IMA.

This guide does not cover fiduciary management or delegated investment management services. Additional issues need to be considered for these arrangements.

This guide also does not cover the sorts of documentation used when trustees invest in a pooled investment fund such as a life policy, unit trust, open-ended investment company, limited partnership or investment trust. For these, rather than negotiating a bespoke agreement, the trustees usually invest in the fund on standard terms. It is the fund that appoints the investment manager to manage the entire fund on behalf of investors collectively.

2. ENTERING INTO AN IMA

2.1 Investment management – overview

An IMA documents the relationship between an investor, here a pension scheme trustee, and the manager it has selected to manage its assets on a discretionary basis. Several managers may be appointed to manage different parts of the scheme assets.

The manager invests the pension scheme's money on behalf of the trustee. However, within agreed parameters, the manager has discretion to acquire and dispose of investments without further reference to the trustees.

The key parameters for what the manager is permitted to do are usually set out in the "Investment Guidelines" included in a schedule (usually Schedule 1) at the back of the IMA. These set out:

- the investment objectives which the trustees want the manager to achieve;
- the strategy to achieve those objectives; and
- the restrictions that the manager must adhere to when investing the trustees' assets.

The Investment Association has a standard-form IMA that can be tailored to some extent by applying or dis-applying certain sections in the schedule. However, the standard-form agreement is not widely used because managers prefer to use their own bespoke in-house versions. This results in a wide variety of (often very manager-friendly) agreements in use in the market.

While negotiating an IMA is quite labour-intensive compared, for example, to investing in a pooled fund, it does allow the trustees a great deal of flexibility because **the terms of the IMA can be tailored to reflect the trustees' exact requirements**. It is common for this tailoring to focus on the Investment Guidelines, but it is important that trustees ensure the legal terms of the IMA also match their requirements. **This Guide should help trustees identify the key contractual terms and understand where there is most scope for flexibility when negotiating the IMA terms.**

Derivatives: The IMA may permit the manager to enter into over-the-counter (OTC) derivative contracts on behalf of the trustees in order to improve access to certain investment markets or to hedge various liabilities, the most common being interest rate risk, inflation risk and FX (foreign exchange) risk. The derivatives will be governed by a separate agreement with the counterparty. This may be documented (using an industry-standard "ISDA" agreement) directly negotiated between the counterparty and the trustees, or under an agency agreement negotiated by the manager acting as agent for the trustees. The terms of an ISDA are outside the scope of this Guide, but where derivatives are to be used, managers usually undertake under their IMA to comply with EU-wide reporting and monitoring obligations on the trustees' behalf. For more, see the NAPF publication "Derivatives made simple".

2.2 Custody of scheme assets

A manager does not hold the assets it is responsible for managing. A separate custodian is appointed to hold the assets in safekeeping and may also perform administrative duties that may be required (eg in relation to exercising voting rights on scheme investments). The “credit risk” in relation to the holding of scheme assets is therefore against the custodian rather than the manager.

The custodian performs an important role as regards reporting to the trustees and reconciling its own records against those of the investment managers. The custodian may also be appointed to provide additional services such as performance monitoring or corporate governance.

An investment manager may have a preferred custodian which it wishes the trustees to appoint, in which case the custodian terms of appointment may be included within the IMA. **However, it is now more common for the trustees to appoint their own custodian.** In particular, where trustees appoint more than one discretionary investment manager, they would typically appoint one ‘global’ custodian. In this case, the trustees are usually responsible for negotiating a Global Custody Agreement with the custodian (the terms of which are beyond the scope of this guide).

For more on custodians, see the NAPF publication “Custody made simple”.

2.3 Appointing a discretionary investment manager

When trustees make changes to their scheme’s investments, it is important that they understand whether they are appointing a discretionary investment manager or investing in a fund and the implications that has for the contractual terms between the trustees and manager.

The key terms of a manager’s IMA should be one of the factors taken into account at an early stage when differentiating between managers and putting together a shortlist or selecting a preferred manager. Once the selection has been made, the trustees’ negotiating power in relation to the IMA is reduced.

The trustees’ investment consultant will be closely involved in selecting the manager (or a shortlist of managers) and putting together the Investment Guidelines for inclusion in the IMA. Trustees should ask their investment consultant to request managers being considered for selection to provide their standard or template IMA, or to provide a “heads of terms” summarising their position on the most important contractual issues. With assistance from the trustees’ legal advisers, this will enable a comparison between managers’ documentation at an early stage and allow for the fundamental points to be discussed and agreed commercially before the selection is finalised.

Some key terms to consider during manager selection:

- liability of the manager
- liability of the trustees
- delegation by the manager
- identifying and managing conflicts
- termination rights

2.4 FCA requirements and protections

The Financial Conduct Authority (or “FCA”) regulates the provision of financial services in the UK. The management of assets belonging to another person on a discretionary basis is a “regulated activity”. This means that a manager offering this service in the UK must be authorised by the FCA and subject to FCA supervision on an ongoing basis.

The FCA imposes stringent requirements on investment managers, including the amount of capital they have to hold, the way they conduct their business with customers (eg treating their customers fairly, executing trades with a view to getting the best possible result for the customer and disclosing third party commissions), and the way they manage their business (eg the need for senior and customer-facing staff to be individually approved by the FCA and the measures they must have in place for avoiding and managing potential conflicts of interest).

Unless the trustees themselves are authorised by the FCA, they are not permitted to manage most types of assets held by pension schemes. It is therefore important that the trustees delegate all day to day management of the assets to the investment manager.

2.5 Requirements of pensions legislation

The Pensions Act 1995 contains requirements which apply to trustees and managers when investing scheme assets. It also includes requirements relating to the terms of appointment of a manager.

For example, under Section 34 of the Act, trustees can only delegate their main investment duties to someone who is authorised by the FCA to carry out that investment on their behalf. However, provided they are satisfied that the manager has the appropriate knowledge and experience for managing the investments of the scheme and the manager complies with the investment requirements under legislation, the trustees are not then liable for the acts of the manager.

It is important that the terms of the IMA oblige the manager to meet the requirements of this legislation and also comply with the necessary terms for the manager’s appointment (see pages 8-9).

3. THE TERMS OF A TYPICAL IMA

3.1 Overview

This section summarises the typical clauses found in an investment management agreement, set out in approximately the order in which they would usually appear. The investment consultant will be heavily involved in negotiating the Investment Guidelines and the fee arrangements.

The most important “legal” clauses from a commercial perspective are usually:

liability of the trustee – ensure this is limited to the value of the assets under management, or failing that, the value of the scheme assets;

liability of the manager – ensure this is in line with market standard provisions;

delegation arrangements – ensure that the manager has appropriate systems and controls to select, appoint and monitor delegates, and that the manager retains liability for their acts and omissions;

conflicts – require the manager to ensure that any conflicts which exist in the investment process are properly managed; and

termination rights – ensure that the trustees have maximum flexibility and that the manager has to give sufficient notice of termination for the trustees to make other arrangements.

3.2 Definitions, Parties, Appointment, Commencement

Frequently used terms can be set out and defined at the beginning to avoid repetition throughout the agreement. Defining important terms reduces the risk of ambiguity of meaning depending on the context in which the term is used. Defined terms should be capitalised to show that the term has a specific meaning as set out in the definitions section.

The parties to an IMA are the trustees of the pension scheme (often referred to as the “client” or “investor”) and the manager. In some cases the employer under the scheme may also be a party to meet requirements relating to the recovery of VAT (see page 14).

It is usual to state expressly that the trustees appoint the manager to act as discretionary investment manager and the IMA needs to specify an effective date from which the manager takes on this role, which is typically defined as a fixed date or the date on which the manager is transferred responsibility for the assets (depending on transition arrangements).

3.3 Manager’s powers and duties

Subject to the Investment Guidelines, the manager is given full discretion to manage the portfolio and take all investment decisions without further reference to the trustees. There is usually a non-exhaustive list of the tasks the manager is expected to carry out, including buying, selling and otherwise dealing in investments, making deposits, negotiating and executing counterparty agreements, and instructing the custodian or administrator on behalf of the trustees.

The agreement should state that the manager is authorised and regulated by the FCA. The manager is obliged to classify its clients as either retail, professional or eligible counterparty. A pension fund trustee will invariably be classified as a professional client, not because the trustees are professional investors, but because they receive investment advice before making any investment.

The manager should be obliged (as a minimum standard) to act in good faith and with reasonable skill and care.

The manager must take reasonable steps to ensure that a decision to trade on behalf of a client is suitable for the client, based on the client's knowledge and experience, financial situation and investment objectives. In considering the trustees' investment objectives, the manager should comply with the Investment Guidelines.

All transactions must be effected in accordance with the rules and regulations of the relevant market or exchange. The IMA should require the manager to do so and should also record that the manager needs the trustees' express permission to:

- trade outside of a regulated market or multi-lateral trading facility; or
- not make public a "client limit order" (ie an order at a specified price limit or better) where the order is not immediately executed.

The IMA will usually allow the manager to aggregate transactions on behalf of the trustees with transactions for other clients. This is usually considered to make the execution process more efficient for the benefit of all clients. However, aggregation of any particular transaction can work to the advantage or disadvantage of individual clients. This advantage or disadvantage is usually considered to be outweighed by the efficiency and cost advantages of aggregation, but it is important that the IMA requires the manager to carry out the aggregation and subsequent allocation on a fair and reasonable basis.

A manager should be required under the IMA to take all reasonable steps to obtain, when executing orders, the best possible result for the trustees taking into account the execution factors (price, costs, speed, likelihood of execution and settlement, size, nature or any other relevant consideration). The relative importance of each factor may vary depending on the characteristics of the trustees, the nature of the order, the type of financial instrument being traded and the available execution venues. The manager must provide appropriate information to the trustees on its order execution policy and the trustees must give their express consent to the policy. **The IMA therefore will include a statement that the trustees have been provided with a copy of the execution policy and consent to it.**

3.4 Pension-specific requirements

The agreement should state that it constitutes notice of the manager's appointment as a fund manager for the purposes of s.47 of the Pensions Act 1995. The manager should be obliged to have regard to the requirements of the Pension Fund Disclosure Code in discharging its obligations under the agreement.

In order to comply with the Pensions Act 1995, the agreement should expressly state that it constitutes a delegation of the trustees' discretion to make investment decisions for the purposes of s.34 of that Act and must delegate all day to day decisions to the manager.

The manager is required to comply with s.36 of the Pensions Act 1995 and the Occupational Pension Schemes (Investment) Regulations 2005 in exercising its discretion. This includes the requirement for proper diversification of scheme assets and investing predominately on regulated markets. The IMA would usually include a requirement to comply with this legislation.

Section 36 also requires the manager to invest “with a view to giving effect” to the principles set out in the scheme’s statement of investment principles. Managers can be reluctant to agree to a provision in the IMA which requires them to comply with the statement of investment principles as the trustees control that document and can change it. The manager may therefore want the trustees to commit to providing it with a copy of the statement.

The agreement should state that the trustees hold the assets as trustee of an occupational pension scheme registered with HMRC, and the manager acknowledges that the trustees are not beneficially entitled to the assets under management other than in the capacity as a trustee. This helps protect individual trustees from personal liability under the IMA.

The IMA should require the manager not to take any action which could affect the scheme’s tax status.

3.5 Securities lending, borrowing/overdrafts

The manager may want to have the power to engage in stock-lending and use borrowing facilities as part of its management of the investments. However, the scheme’s trust deed and rules may prevent the manager engaging in stock-lending and possibly restrict borrowing activities. The position needs to be checked to ensure that the range of activities proposed in the agreement is appropriate.

If any restrictions on the manager are required to ensure compliance with the trust deed and rules, it would be usual to set them out in the Investment Guidelines rather than in the body of the agreement.

3.6 Delegation and appointment of agents

The manager will usually be allowed to delegate its duties to an Associate (essentially a group or connected company). The trustees’ consent is usually required before the manager can delegate to a non-Associate.

The IMA should require the manager to retain liability for the acts of any delegates, and use a reasonable standard of care in selecting, using and monitoring them. In addition, the trustees should not be expected to incur additional fees for the services of any delegates or agents of the manager, other than broker commissions.

The trustees’ consent should be required where the manager wishes to delegate the whole or substantially the whole of the exercise of the managers’ discretionary investment powers. Otherwise, the trustees may find that the person actually managing their investments is not the entity which they appointed.

The manager will usually need to use the services of third parties, such as brokers, and so this should be permitted under the IMA. The manager would not usually be liable for the actions of such a party unless it was an Associate of the manager, but the IMA should make the manager responsible for the selection, use and monitoring of that third party.

3.7 Custody

Whilst the manager decides what investment trades to make, it is the custodian who actually processes those trades. The manager will therefore want the trustees to confirm in the IMA that custody arrangements have been made and the custodian is obliged to comply with the manager’s instructions.

These days, the manager is not typically involved in the trustees' selection and appointment of a third party custodian. The manager will therefore want to make clear in the IMA that it has no responsibility for the acts or omissions of the custodian and no liability to pay its fees.

The manager should be obliged to co-operate fully with the custodian and to provide such information as the custodian requires to fulfil its duties, including settling transactions and reporting to the trustee.

3.8 Representations and warranties

The trustees are usually required to make a number of standard warranties and representations, including:

- that they have the power to enter into the agreement;
- that they have the power to deal with the scheme assets in the manner envisaged by the agreement; and
- that any information provided to the manager about the assets, the scheme and the trustees is correct.

The scope of the representations and warranties is important and the trustees should take legal advice and consult the investment consultant before accepting any representations or warranties.

One warranty which requires negotiation relates to whether the assets which the manager is managing are subject to any security or liens. It is understandable that the manager wants to know that it is free to trade the assets which it is managing. However, where those assets are transferring from another investment manager, the trustees may feel that they do not have the knowledge to give this warranty.

The manager generally has to make similar representations and warranties to those outlined above, and in addition it should confirm that it has the appropriate knowledge and experience for managing the assets, it is authorised and regulated by the FCA and has appropriate permissions to carry out the activities envisaged by the agreement.

3.9 Liability and indemnity

The manager

The manager should typically accept liability for losses suffered by the trustees as a result of the negligence, wilful default or fraud of the manager, its associates or delegates, or its or their employees. Often the liability will be extended to also cover the manager's breach of contract (ie for losses suffered by the trustees as a result of the manager's breach of the agreement in circumstances falling short of negligence, wilful default or fraud on the part of the manager).

The manager will invariably want to exclude liability for indirect or consequential losses, while the trustees will want the widest possible definition of loss. This usually comes down to a matter of negotiating power.

The manager may in certain circumstances try to impose a cap on its own liability, for example a limit of a multiple of the fees payable. Any limit may breach the provisions of s 33 of the Pensions Act 1995 (which prevents limiting liability for breach of any duty of care relating to investment functions).

The manager should be required to maintain professional indemnity insurance adequate for a manager of its size.

The trustees

The trustees will typically agree to indemnify the manager against all costs, losses, claims and expenses:

- arising out of any action properly taken by the manager in accordance with the agreement; or
- in consequence of any breach of the agreement by the trustees.

The trustees' liability should exclude any loss caused by the manager itself or its associates, delegates or employees.

The manager is under a general legal obligation to mitigate any losses arising out of the trustees' breach of the agreement, but it is prudent to include an express and more widely drafted duty in the agreement. In addition, it is common to state that the manager should not admit liability to a third party in respect of any claim without the prior consent of the trustees.

From the trustees' perspective, the most important requirement is to obtain a limit on the trustees' liability. The trustees' total liability under the agreement should be expressly limited to either the value of the assets under management (where the trustees are investing a significant amount and have strong bargaining power), or failing this, to the value of the assets of the scheme. The agreement should make clear that each trustee is acting in his or her capacity as trustee and is not liable in his or her personal capacity.

3.10 Counterparty default

If a counterparty fails to deliver the necessary documents or to complete a transaction, the trustees will usually want the manager to be obliged to take all reasonable steps to rectify the failure or obtain compensation. This is typically at the trustees' expense.

The manager should be obliged to inform the trustees promptly of any such failure and the trustees will want access to information about the steps the manager is taking as a result.

3.11 Managing conflicts of interest

It is common for conflicts of interest to arise or potentially arise in relation to investment management. For example, a manager may have clients buying and selling the same stock, or invest in a pooled fund run by an associate.

The manager is required by FCA Rules to have a policy for identifying and managing conflicts of interests. A copy of this policy should be available to the trustees on request.

The IMA should include a requirement on the manager to inform the trustees when there is a conflict of interest affecting the trustees and it is usual for the manager to want to include in the IMA a list of situations which may give rise to a conflict. The trustees should consider this list carefully and decide if they are happy to accept those conflict situations.

The manager should ensure that any transactions carried out in a conflict situation are effected in the best interests of the trustees and do not result in a materially less favourable position for the trustees than if the conflict had not existed. This obligation should be expressly stated in the IMA.

3.12 Voting and corporate actions

The trustees need to decide what role they want the manager to play in relation to voting and corporate actions. Are they happy following the managers' normal voting policy, in which case the manager should be required to provide a copy of its policy? If not, do the trustees want to impose some or all of their own corporate governance policies on the manager or use a third party to deal with corporate governance. See the NAPF Corporate Governance Policy and Voting Guidelines.

Some managers are more flexible than others in this area, and their willingness to move away from their normal policy may depend on the bargaining strength of the relevant trustees.

Where the manager is to make decisions on voting rights, the trustees should discuss with the investment consultant the sort of reporting on voting that would be most useful. This could be a detailed report or a record of any variance from the manager's policy in any given quarter. The IMA should require the manager to provide these reports and to inform the trustees whenever there are substantive changes to the managers policy.

3.13 Business continuity

The manager should be required to develop, maintain, test and regularly update a business continuity and disaster recovery plan. Recovery timescales should also be specified within the plan.

The agreement should provide a mechanism for invoking the plan eg if a disaster or force majeure event arises.

3.14 Fees and expenses

There are different fee structures, which your investment adviser will have explained to you, such as performance based fees or basic fees. The terms of your fee structure will be set out in a Schedule to the IMA.

The fees payable are typically set out in detail in a Schedule. The agreement should also state the arrangements under which the manager can change the fees.

The trustees are usually liable for expenses on top of the fees, such as broker commissions, stamp duty and registration fees.

The trustees should discuss with the investment consultant whether the manager should be allowed to deduct fees directly from the assets under management or whether an invoice must be submitted. If the manager is free to deduct its fees directly from the assets it manages, that obviously makes it harder to dispute any fees once the manager has the money.

If there is a dispute over the fees payable, a common approach is to pay the undisputed amount and to place the disputed amount in escrow, ie in the hands of a third party, while the parties try to reach agreement.

The manager must comply with its obligations under the FCA Rules on disclosing any inducements. These rules broadly prohibit the receipt or payment of fees or non-monetary benefits other than from a client or in certain defined circumstances.

The fee arrangements under the IMA may have VAT implications for the scheme’s sponsoring employer. It may be more tax efficient for the employer if the fees are invoiced by the manager and paid by the employer. This may require the employer to become a party to the IMA and receive services under the IMA.

3.15 Reports and records

It is common for trustees to require the manager to provide an annual statement of compliance confirming that the manager has:

- acted in accordance with the Investment Guidelines and restrictions;
- the manager has the appropriate knowledge and experience for managing the portfolio (s.34(4) of the Pensions Act 1995); and
- the manager has acted in accordance with s.36 of the Pensions Act, and the manager is not aware of any circumstances which could prejudice the scheme’s tax status.

The manager is obliged to keep full and complete records relating to the services provided under the agreement. The manager should agree to allow the trustees and their auditor access to such records (and provide copies) upon reasonable request.

Where the manager is to make decisions on voting rights, the IMA should specify the frequency and format of reporting on voting. This could be a detailed report or a record of any variance from the manager’s policy in any given quarter. The IMA should require the manager to inform the trustees whenever there are substantive changes to the manager’s voting policy

3.16 Confidentiality and data protection

It is usual for the IMA to include a confidentiality clause to protect the information of both parties and place restrictions on public announcements. The clause should require the parties to keep the information secure and confidential, restrict its disclosure and prescribe to whom information may be disclosed. Use and retention of the disclosed information should be limited to set purposes.

The terms should include an obligation to make sure the disclosing party ensures that those it discloses the information to also keep it secure and confidential. Certain exclusions will usually be provided for (eg disclosure required by applicable law).

The agreement should oblige the manager to comply with all applicable data protection legislation in the UK and to ensure that the manager is (where required) properly registered to use or process any personal data in connection with its obligations under the agreement.

3.17 Instructions, information and notifications

The agreement should state which individuals can instruct the manager on behalf of the trustees and the manner in which such instructions can be communicated.

Trustees need to consider the risks associated with e-mail and oral instructions. For example, it is perhaps sensible to provide that any oral instructions should be acknowledged in writing by the manager. However, clarity is needed as to whether the instruction remains valid even if not acknowledged by the manager.

The manager should be obliged to follow instructions unless it would breach its legal or regulatory obligations by doing so. The manager should provide immediate notice of any refusal to follow instructions.

This section should be read in conjunction with the Schedules, which should set out the specimen signatures of the authorised signatories and the contact details of the parties respectively.

3.18 Complaints

The manager is required by FCA Rules to have a complaints handling policy in place and the agreement should set out this fact and confirm that a copy is available to the trustees on request.

The agreement should also set out who the trustees should contact at the manager if it wants to make a complaint.

3.19 Amendments

As a general rule, the agreement should make clear that any amendments only take effect where agreed in writing by both parties.

A more relaxed approach is usually taken to changes that are administrative in nature, such as updating contact details or making changes to the Investment Guidelines (for example, by changing a benchmark or adding a permitted market or asset class).

3.20 Termination

The termination rights of the manager and the trustees should not be symmetrical. **Typically the trustees will have an immediate right of termination so that they can move scheme funds quickly where they consider that to be necessary.**

However, the trustees need to make other arrangements in the event of a termination by the manager. **A minimum of three months' notice is usually required to be given by the manager to terminate the agreement.**

The agreement may also be terminated on the occurrence of certain events, such as the financial default of either party, a material breach of the agreement or the manager losing its FCA permissions to provide the services under the agreement.

On termination, the manager should be required to complete transactions already initiated and assist in the transfer to the new provider. The trustees will be expected to pay the manager's reasonable fees in effecting the termination and transfer (except where the agreement has terminated as a result of the manager's default or breach). The transfer of a number of portfolios or large portfolios may necessitate the appointment by the trustees of a specialist transition manager, usually a custodian bank hired to effect the transfer in the most efficient and cost-effective way possible.

3.21 Boilerplate clauses

The agreement should also contain standard provisions known as boilerplate clauses. The main boilerplate clauses are summarised below:

Entire Agreement – The agreement will usually contain an entire agreement clause to ensure that the agreement supersedes any prior arrangements between the parties relating to the subject matter of the agreement, whether written or oral, and that in entering into the agreement they are not relying on any representations not set out in the agreement. This means that any statements made by a manager during the selection and appointment process are not binding unless they are captured in the terms of the IMA.

Force Majeure – This clause allows a party to be excused from performing its obligations under the agreement for certain events outside its reasonable control, which typically include hurricanes, earthquakes and other natural disasters, terrorism, government acts, embargos, labour strikes and lock-outs.

Rights of assignment – It is not usual for a party to be able to assign its rights under the agreement without the consent of the other party and so there will usually be a non-assignability clause. However, it is conventional for the manager to be able to assign its rights to certain of its group companies. In addition, the agreement should automatically bind successor trustees to the trustees who entered into it.

Contracts (Rights of Third Parties) Act 1999 – It is commonplace to see a clause that specifies that non-parties to the agreement do not benefit from and cannot enforce the agreement. This is necessary because in the absence of such a clause, the Contracts (Rights of Third Parties) Act 1999 could have the effect of granting certain people/ groups of people rights under the agreement.

Service of notices – The agreement should be clear on how any written notices under the agreement should be served, eg in writing, by post, by email, by hand delivery etc.

Waiver – It is usual for the agreement to contain a clause making it clear that any delay by the parties in exercising, or failure to exercise, any right or remedy in connection with the agreement does not operate as a waiver of that right or remedy and that no waiver in connection with the agreement shall be effective unless it is in writing.

Severability – This clause is usually included to ensure that if a provision of the agreement is held to be illegal, invalid or unenforceable, in whole or in part, the remainder of the agreement shall not be affected.

Signing in counterparts – For ease, it is commonplace for there to be a clause allowing the parties to sign different copies of the same version of the agreement, which together are treated as one agreement. Any signing restrictions of the parties should be checked before inserting such a clause.

3.22 Governing Law

The agreement should make it clear which is the relevant law that governs the agreement. For IMAs in the UK, for the most part, this will be the law of England and Wales.

4. SCHEDULES

4.1 Schedule 1 – Investment Guidelines

The trustees' investment consultant will negotiate the specific provisions in the Investment Guidelines. These guidelines should make clear the investment objectives and strategy, asset allocation, any restrictions on asset classes or markets or exposure limits, and reference to a benchmark if appropriate. The agreed approach on use of derivatives, liquidity and currency management will also be reflected here.

Any restrictions in the scheme rules, particularly in relation to underwriting, stock-lending and employer related investments, must be reflected in the Investment Guidelines.

The manager will not usually be in breach of the Investment Guidelines if a change in asset allocation is merely due to market movements. **The trustees should consider how they want the manager to react to such a breach of the Investment Guidelines.** Do they want the manager to be obliged to bring the portfolio back within the investment guidelines as soon as possible, or do they want the manager (or the trustees) to have some discretion as to how to react to the breach?

The agreement should set out a procedure for amending the Investment Guidelines by written notice from the trustees.

4.2 Schedule 2 – Authorised Signatories

This schedule will include scanned copies of the signatures of individual trustees or trustee directors or other members of staff authorised to give instructions to the manager.

This schedule should be read in conjunction with the section in the main body of the agreement on authority to give instructions and needs to be kept up to date by amending it when appropriate in the way prescribed in the main body of the agreement.

4.3 Schedule 3 – Fees

The investment consultant will be closely involved in negotiating this schedule.

Commercial arrangements vary widely but typically could include a percentage fee based on assets under management, potentially with a performance fee element for outperforming an agreed benchmark.

If the manager is allowed to invest in funds (collective investment schemes) the trustees will wish to ensure that fees payable to the managers of those funds are deducted from the fees payable to the manager appointed by the trustees – otherwise the trustees end up paying twice for management of those assets.

This schedule should be read alongside the section in the main body of the agreement on fees and expenses.

4.4 Other schedules

An IMA may contain other schedules, in addition to the three standard schedules listed above. In particular it is common to have a schedule setting out both parties' contact details, usually including email and fax for day to day communications and a formal postal address for service of legal proceedings.

A party's contact details can usually be updated by simple notification to the other party, rather than having to be agreed between the parties as with most other amendments.



C/M/S/

Law . Tax

CMS is an international law firm with a market leading pensions practice advising trustees, employers and pension providers. Our trustee clients range from schemes with assets of a few million pounds to multi-billion pound arrangements.

Our pensions services include a team of over 50 specialist investment lawyers who advise our trustee clients on documentation and related issues covering the full range of pension scheme investments, including derivatives, infrastructure investments, longevity contracts and insurance company buy-ins.

We use our vast experience and depth of resource to provide our clients with concise, commercial solutions.

For further information, contact us at pensions@cms-cmck.com or visit www.cms-cmck.com/pensions



Securing the future of pensions

**The National Association of
Pension Funds Limited**

Cheapside House
138 Cheapside
London EC2V 6AE

Tel: 020 7601 1700
Fax: 020 7601 1799
Email: napf@napf.co.uk
www.napf.co.uk

