

# alert

## CONFLICTS GUIDANCE - THE HIGH FIVE SURVIVES

### 1 INTRODUCTION

Following consultation<sup>1</sup>, the Pensions Regulator published its final conflicts of interest guidance for trustees on 1 October 2008. The final version bears a striking resemblance to the draft guidance, with the five high level principles for analysing conflicts all surviving the consultation process.

The guidance makes it clear that management of conflicts is crucial to good scheme governance. The guidance, with its emphasis on education and support, is therefore essential reading for all occupational pension scheme trustees.

### 2 KEY POINTS

- In future, trustees are being urged to consider conflicts in three important stages: identification; monitoring; and managing conflicts.
- There are five high level principles designed to help trustees formalise conflicts management policies (section 3).
- The tone of the guidance has softened in certain key respects (section 4).
- Given the complexities of the law on conflicts, the Regulator supports a scheme specific approach (section 5).
- Whilst the guidance is long and detailed, a helpful summary identifies the key principles and lists a number of questions trustees "should be asking themselves".

<sup>1</sup> See our Alert "Conflicts Guidance - A High Five from the Regulator" dated 29 February 2008

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### 3 THE HIGH FIVE

The guidance includes five high level principles to “assist trustees with the formalisation of the conflicts management procedures”. Although the principles are intended to be of general application, the Regulator recognises that there is no “one size fits all” approach, especially for smaller schemes which may need to take a proportionate approach to applying the principles.

The headline principles have not changed from the draft guidance. They are:

Principle 1 - Understanding the importance of conflicts of interest;

Principle 2 - Identifying conflicts of interest;

Principle 3 - Evaluation, management or avoidance of conflicts;

Principle 4 - Managing adviser conflicts;

Principle 5 - Conflicts of interest policy.<sup>2</sup>

According to the guidance, it is “good practice” for trustees to have a conflicts of interest policy. Originally Principle 2, it’s been moved to number 5 reflecting the fact that it should be the “last step of the cycle, once other principles have been addressed”.

### 4 CHANGE IN EMPHASIS?

#### *Directors/Senior Employees*

The Regulator’s response to consultation refers to concerns having been raised that the risks of appointing trustees who also hold senior positions within the employer were being overemphasised. As a result, the guidance has been updated (and softened) to acknowledge that such appointments “can bring additional benefits which may not be easily replaced.”

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<sup>2</sup> An example conflicts policy is appended to the guidance

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Although a welcome change in emphasis, it remains the case that such trustees are more likely to face “acute or pervasive” conflicts because of their role with the employer.

### *Independent Trustees*

The Regulator’s focus on the appointment of independent trustees in managing conflicts was criticised during the consultation process. Some changes have therefore been made to the final guidance - including an acknowledgment that some schemes may not have the resources available to appoint an independent trustee and that no single option is a “panacea for conflicts management”.

Nevertheless, a significant number of references to independent trustees remain, with the guidance specifically highlighting the suitability of their appointment as chair of trustees because they are “ideally positioned to supervise conflict management and avoidance procedures”.

## 5 A SCHEME SPECIFIC APPROACH

The lack of legal clarity on conflicts and the fact they are inherently “scheme specific and fact dependent” means the prominence placed on the importance of taking legal advice remains. In particular, trustees may need advice on confidential information. Although a common request during consultation, the Regulator stops short of giving a definitive view in the final guidance of how to deal with this thorny issue.

But trustees should also be aware that it is essential that the advice itself is free from conflict, with the Regulator tackling the need to manage adviser conflicts head on.<sup>3</sup>

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<sup>3</sup> See Principle 4 – Managing adviser conflicts