SACKER & PARTNERS

CONFLICTS OF INTEREST

RESPONSE TO CONSULTATION

The comments set out below form Sacker & Partners LLP's formal response ("Response") to the consultation on "Conflicts of Interest" published on 22 February 2008. The consultation paper asks for views of interested stakeholders. Sackers is a firm of solicitors specialising in pensions law.

General Comments

1. In general, we support the policy of focusing on conflicts through the five high level principles. This is a practical approach to a difficult area.

2. Even though the guidance rightly addresses a number of difficult messages, the tone of the guidance is often unduly negative. This could add to the perception of over-regulation of occupational pension schemes. We consider the approach taken in the Goode Report still holds good. There, a positive outlook was attached to conflicts:

   > "It is therefore important that those who become trustees should be made aware of their duty to put the interests of the beneficiaries as a whole above those of any sectional interest or that of the employer. It is inevitable that there will be some conflict of loyalties. Trustees appointed by management frequently hold key positions within the company, whilst trustees appointed by members may feel obligations to those who appointed them. It is unrealistic to imagine that individual trustees will be able to leave behind entirely their other roles while acting as trustees. In the modern world, conflicts of interest cannot be avoided. They can, however, be managed. As long as trustees are aware of the potential for conflict and know what is required of them as trustees, they will be able to carry out their trustee duties to the best of their abilities" (paragraph 4.5.54)

3. The draft is very wordy. This is a general problem with codes / guidance and risks loss of attention by the general reader. However, we have confined our comments to more

general points on the draft as we suspect other organisations will send you detailed commentary.

4. To aid a more positive examination of the topic the difference between actual and potential conflicts could be highlighted and further explored. In addition, the section on managing conflicts could be expanded to emphasise that it can be possible to find solutions to conflicts, rather than just employing techniques which avoid conflicts altogether, such as the resignation of a potentially conflicted trustee.

5. It may be more helpful to trustees and companies for the focus to be on good (or best) practice rather than prescriptive rules relating to conflicts. For example, the maintenance of a register of interests is referred to as good practice in paragraph 59 but principle 2.1 says that trustees "should" agree to document a policy.

6. We assume from the way in which the guidance is set out that each section is intended to stand alone on that subject and support this aim.

7. The only suggestion we have to make about this "stand alone" approach is that the guidance can be repetitive. For instance, the guidance suggests in numerous places that trustees will be increasingly reliant on legal advice in relation to conflicts. It may be helpful to have a strong statement regarding the need for legal advice in the introduction to the guidance, rather than throughout each section.

8. Like many professionals in the pensions industry, we are concerned that increased prescription in this area can have a detrimental effect on schemes by starving the trustee board of access to skills and losing the benefit of management support for a proposed course of action by excluding senior company trustees from involvement. It is important that trustee boards continue to have the necessary skill sets required for running a pensions scheme, including managing conflicts.

9. The guidance suggests that employing an independent trustee can solve many of the issues associated with senior management sitting on the trustee board (without any loss of expertise). But this suggestion does not recognise that there may be many other

solutions for managing conflicts and, in addition, there are many schemes for which such an appointment may be inappropriate, such as some small schemes.

10. It would be helpful to remove legal language – for example, phrases such as “inter alia” and “per se” in paragraph 26 – which can be confusing.

11. The issue of confidential information could benefit from a more in depth analysis in the guidance. As it is undoubtedly the trickiest area in a difficult subject, it would help to have further expanded information on this topic. In particular, we note that confidential information may remain an issue even where there is an independent trustee sitting on the trustee board. Please also see our comments at paragraphs 14 and 19-23 below.

Principle 1 – Understanding the importance of Conflicts of Interest

12. In paragraph 26 of the draft guidance we note that the trustee duty is expressed as “to act in the best interests of the scheme beneficiaries”. This may be an over simplification of the legal requirement – it would in our view be better to say that the trustees have a duty to “safeguard the interests of the beneficiaries”. This would also be in keeping with previous guidance from the Regulator.

13. Paragraph 30 refers to the chair of trustees and suggests that they can play a “pivotal role” in relation to conflicts. A chair may be ideally placed to fulfil this role, perhaps by being the first port of call for any trustee who is under an actual or potential conflict. However, this could place additional duties on the chair of trustees. In a similar way the Myners report imposed a higher duty of care on the chair in relation to investment. If this is the intention this should be explicit in the guidance. In addition, there may be circumstances where this arrangement is not appropriate, for instance, a number of boards do not have a formal chair of trustees.

14. Whilst a provision in the trust deed and rules of a scheme which “authorises” a conflict does not obviate the need for proper conflict management (as you refer to in paragraph 36) it can be useful as part of a package of conflict management arrangements. It may be helpful to expand this section so that it properly explains the legal background which gives rise to the need for such a rule. Please also see our comments in relation to

confidential information – paragraphs 19-23 below. As an aside, it may also be more appropriate to locate these comments in the section on managing conflicts (Principle 4).

Principle 2 – Conflicts of Interest Policy

15. Whilst having a written conflicts policy will be appropriate for many schemes, there will always be some schemes (or perhaps those with a sole independent trustee) for which it is not practicable. It would be helpful if this was made clear in the guidance.

16. However, we note that a written policy may help trustees to ensure that they meet the requirements under the internal controls legislation.

Principle 3 – Identifying Conflicts of Interest

17. We agree that a register of interests so that actual or potential conflicts can be identified quickly is "good practice" (paragraph 59).

18. However, it should be made clear in the guidance that the register of interests is not a public document. Indeed, the full content of the register may only be known to the trustees themselves.

Principle 4 – Evaluation, management or avoidance of conflicts

19. We see confidential information as the major issue in relation to managing conflicts. Sackers have been advised by Leading Counsel that a trustee generally has a duty to disclose to his co-trustees or use for the pension scheme beneficiaries' advantage relevant information acquired by him, whether in his capacity as trustee or otherwise and whether or not that information is confidential to others.

20. All the conflict management techniques mentioned in the guidance are subject to the issue of confidential information – including the appointment of an independent trustee. Given this, it would be helpful to expand this section significantly.

21. The problem of confidential information can be handled by the employer not telling a trustee in his day job anything he does not want to be disclosed to the trustees. Another practical approach may be for the trustees to permit a trustee to continue to act without disclosing confidential information he holds to his co-trustees, provided he withdraws from any discussion or decision in which that confidential information may be relevant.

22. Authorisation does not absolve the trustee under a conflict from managing that conflict, but it can help trustees to continue to sit on the trustee board where this is regarded as valuable by their co-trustees and would not otherwise be possible because of their dual role in senior management of the company (i.e. where they have access to confidential information).

23. Guidance from the Regulator together with examples relating to when authorisation may be appropriate would be helpful (which would be subject, of course, to scheme specific legal advice).

Principle 5 – Managing Adviser Conflicts

24. We support the broad thrust of the section regarding adviser conflicts and feel that the comments in this section highlight legitimate concerns in this area. We note that many advisers already operate under strict controls from their governing bodies on conflicts.

25. Our experience as pensions specialists is that while using joint advisers can be a pragmatic and cost effective way of managing the needs of both the employer and the trustees, employers and trustees often have different needs (including member perception) which are more likely to need input from separate advisers. This does not, however, mean that schemes require two sets of advisers working in parallel, duplicating work and costs. Rather there can, for example, be one primary adviser (usually the trustees' adviser, since the trustees have the major legal, compliance and administrative duties in relation to the scheme) with a secondary "sounding board" adviser for the employer. Experience shows that this model works well in today's funding and corporate environment where contingency planning is needed, but costs have to be controlled.

26. A key benefit of this “dual appointment” approach is that when a real conflict does arise requiring separate advice, the trustees do not find themselves having to identify and instruct a firm unfamiliar with their scheme at what could be a critical point in the scheme’s lifecycle. Furthermore, if the trustees have their own advisers, members are more likely to be reassured that their interests are being upheld – this is less easily done in difficult times if the trustees use the same advisers as the sponsor. Member perception and comfort as to the administration of their scheme is important.

Sacker & Partners LLP

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