

**TRUSTEE KNOWLEDGE AND UNDERSTANDING
RESPONSE TO CONSULTATION**

The comments set out below form the formal response (“Response”) of Sacker & Partners LLP (“Sackers”) to the Review of the Trustee Knowledge and Understanding code of practice and scope guidance published by the Pensions Regulator (“TPR”) on 13 October 2008 (“the Consultation Document”).

Sackers is a firm of solicitors specialising in pensions law. The views expressed in this Response have been collated following discussions with a representative group of the firm’s solicitors. Sackers has extensive experience of promoting TKU to lay trustees and of conducting scheme specific trustee training on subjects listed in TPR’s scope guidance.

General comments

1. We fully support TPR’s initiatives to help trustees meet their duties under the Pensions Act 2004 by means of the code of practice (“the Code”) on trustee knowledge and understanding (TKU) and the scope guidance. We also agree that it is appropriate that the Code “should be refreshed to reflect changes in regulation, legislation, the market place and the focus of the regulator”.
2. In our experience, the Code, scope guidance and the Trustee toolkit are excellent tools for trustees. The toolkit, in particular, appears to be used by most trustees on our clients’ trustee boards. For our part, we encourage trustees to use the toolkit, and indeed for would-be trustees to do so to get a feel for the challenges of the role.
3. Given that the purpose of the consultation exercise is to refresh / update the Code and scope guidance, trustees will be reassured by the confirmation in the Consultation Document that this is “not an exercise in raising the bar for trustees”, and that there remains “no expectation that trustees should take on the mantle of an expert.” Trustees would no doubt take comfort from a reiteration of this message when the final revised Code is published.

4. The introduction of separate scope guidance for small, fully insured DC schemes is very helpful, as trustees of such schemes will face different (and fewer) issues than those of other occupational pension schemes. Appropriately tailored guidance will be easier for such trustees to use.
5. It would greatly assist trustees to have a comparison of the original and revised codes once the text has been finalised so that they can see at a glance which new areas they need to add to their existing TKU.

Application of TKU requirement to corporate trustees

6. We note that the present review has given TPR the opportunity to consider the DWP-led deregulatory review “which recommended the TKU requirements ought to apply not to individual trustees but to the whole board.” We also note that the Consultation Document explains that independent research on the Trustee toolkit found that trustees consider “that the TKU regime should apply to every trustee rather than to the board as a whole”. The proposed amendments to paragraph 18 of the draft Code appear to pick up on this point, stating that “Any individual who exercises a function in relation to the scheme as a director of the trustee company is required to have knowledge and understanding *of the same matters as if they were individual members of a trustee board...*” (our emphasis). Similarly, the addition of new paragraph 21, which clarifies that “the word ‘trustee’ is taken to include directors of a corporate trustee board”, appears to confirm this.
7. As TPR is aware, the relevant legislative provision is contained in section 248 of the Pensions Act 2004. This requires that “a company to which this section applies must, in relation to each relevant scheme, secure that each individual who exercises any function which the company has as trustee of the scheme is conversant with each of the documents mentioned in subsection (4) so far as it is relevant to the exercise of the function.” While we note the comments in the Consultation Document that neither the DWP nor the Regulator were minded to seek to amend the legislation governing TKU requirements, given the comments set out in paragraph 6 above on the results of the independent research, it is not clear from the proposed amendments to paragraph 18, whether this is an attempt to extend the TKU

requirements under the legislation for directors of a corporate trustee, or is intended simply to confirm that the requirements apply in relation to functions exercised only. This is an important point and we would welcome further clarification.

8. Our experience is that, in practice, while sub-committees of a trustee board may be tasked with a particular project (for example, investment or discretions sub-committees), the sub-committee tends to report back to the whole board with a recommendation which then needs to be voted on by the board. Because the whole board is taking decisions, the individuals which make up that board are effectively exercising all functions and are therefore subject to the whole range of TKU requirements in any event.

Extent of the draft Code

9. Under the heading “Applying the scope to individual circumstances”, paragraph 25 of the draft Code notes that “even the three versions of the scope guidance do not quite capture the exact body of knowledge which is appropriate for all trustees in all circumstances” and goes on to note that trustees need to “determine what is appropriate in their particular circumstances using the relevant framework”. This is a helpful clarification.
10. As a number of new items have been added to the draft scope guidance (for example, to cover buyout issues and winding-up), there is a risk that it could become over-prescriptive, to the extent that compliance with the elements listed becomes a “box ticking” exercise. As such, trustees may be more inclined to demonstrate quantity rather than quality of knowledge, with less emphasis placed on the need for “understanding”. For this reason, we consider that in addition to the section dealing with this in the draft Code, the scope guidance should also stress the fact that the items listed are illustrative only and that trustees must always consider the circumstances of their own scheme in determining what their specific TKU requirements are.

Achieving and maintaining standards

11. At paragraphs 58 and 59, the draft Code refers to the qualification offered by the PMI which trustees can take and thereby demonstrate their level of TKU. Qualifications can be a useful tool, providing the right motivation for some trustees to excel. However, having demonstrated that they met the requisite standard of TKU at a particular point in time, it does not necessarily follow that they will be able to demonstrate continued TKU going forward, particularly in terms of updating their skills in line with changes in legislation.
12. While the draft Code includes references to TPR's strong recommendation (at paragraph 47) "that trustees should review their own knowledge and understanding at least annually", it may be helpful to place a greater emphasis on re-evaluation of TKU standards and the need for trustees to maintain and update their skill set. We agree that a yearly review is appropriate.
13. In addition, while TKU is the responsibility of individuals who take on the role of trustee, one way of achieving a focus for raising and maintaining standards would be for the Code to recommend that on each board, there is a person who has overall responsibility - not just for monitoring compliance with TKU requirements, but for enforcing it. This might be, for example, the chairman of trustees (where applicable). Giving such authority would mean that there is someone close to each trustee board with the power to ensure that regular training and updating of knowledge is undertaken by all trustees. This could be particularly useful where, for example, one or more individuals on a trustee board are for some reason unable to acquire the necessary level of TKU to enable them to act as trustees (or to refresh their knowledge). It would also, in turn, give trustee boards an additional measure against which to judge a person's aptitude for the role, for example, for the purpose of selecting and removing member-nominated trustees and directors. In the same vein, that person would have a greater awareness of the competencies of the trustee board generally, and be better placed to ensure that appropriate training is provided. In practice, the scheme secretary tends to keep the training log for trustees, but what is needed is the authority to say "you must undertake this training or face removal".

Specific issues

14. Conflicts of interest are covered at 1j of the scope guidance (DB versions and at 1i and 1f of the versions for DC schemes and small schemes respectively). This list, which gives examples as to when conflicts might arise, is not exhaustive (for example, potential for conflict can also arise where trustees are also union representatives). In the current economic climate (requiring cost-savings, redundancies etc.) it may be that the interests of different classes of members (such as active members or pensioners) are more likely to diverge, and so bring trustees' conflicts to the fore. It would therefore be useful to emphasise the non-exhaustive nature of the conflicts list included in the scope guidance, and for trustees to be reminded that their primary responsibility lies in protecting (all) members' accrued benefits.
15. Unit 2 (the law relating to pensions) in each version of the scope guidance refers to a requirement for trustees to have TKU of "proposals for future major legislative change". Given the already numerous legislative provisions with which trustees are required to be familiar, trustee boards (in particular, those of smaller schemes and which have limited resources) can, justifiably, be reluctant to follow the ins and outs of a lengthy legislative consultation process. Although the proposed new requirement is limited to "*major* legislative change", it may be more appropriate to limit this to changes on the horizon which have been agreed by the Government. Trustees should also be able to rely on guidance from their external advisers regarding to the extent to which they need to become familiar with forthcoming legislation.
16. 7d of the DB scope guidance deals with the implications of the transfer of risk to members of DC occupational arrangements. (There are similar provisions at 3d of the DC guidance and 3e of the guidance for small schemes.) The guidance lists the "lack of member understanding of pension funding in general" as one such implication. Being presented in this way may suggest to trustees that they only need to be aware of these implications. In reality, however, trustees need to be pro-active, for example, in terms of ensuring that the communication programmes they devise

are comprehensive and appropriately targeted. An emphasis on dealing with these implications would therefore be of assistance to trustees.

17. Units 8 (DB) and 5 (DC/small schemes) deal with investment choice for members of DC arrangements. An additional point which may assist here would be for trustees to recommend that members seek independent financial advice.
18. In box 1 of the draft Code, under “E. Annuities”, it would be appropriate to make reference to the Open Market Option. This would be consistent with TPR’s guidance on member retirement options. Similar references could also be made in the scope guidance (for example, at 10e of the DB guidance (Decumulation of pension funds (DC))).

Delivery of learning

19. A strong emphasis is placed in the draft Code on use of TPR’s Trustee toolkit. While this is proving to be a very useful resource, the emphasis on a requirement for computer literacy in order to undertake training (and consequently take on the role of trustee), may inhibit some otherwise able candidates for the role of trustee from coming forward.
20. Although some employers make a computer available to trustees for accessing documents and websites etc. relevant to their role as trustee, it may be difficult for individuals in some sectors to gain sufficient access to such facilities to be able to achieve the maximum benefit from the toolkit and other on-line programmes. This is a point which is picked up in the independent research into the toolkit¹ and could therefore be taken into consideration in the Code, as well as thought being given as to whether there is sufficient appetite for providing the toolkit by alternative means for those who may encounter practical difficulties in accessing the toolkit.

¹ On page 11 of the research carried out by IQ Research Ltd: “Trustee Toolkit research: A report of the findings”, it states that “three of those who were aware of the toolkit had been put off because of the online delivery of the training, as they would either prefer a hard copy rather than an on line resource, or did not have access to a PC at the right time.”

21. In our experience, similar issues are encountered by trustees who are employees, in terms of getting sufficient time off work in order to attend trustee meetings and trustee training. In addition, much of the necessary reading is often done in trustees' spare time. It may therefore be helpful to make reference in the Code to the right which trustees have, under section 58 of the Employment Rights Act 1996, to time off for the purposes of performing their duties as trustee and for relevant training. This could help clarify the right for both trustees and employers. Similarly, it would help both trustees and employers if there were an explicit requirement for it to be made clear to all trustees and their line managers how much time is expected to be taken up each year, in terms of trustee meetings/reading papers/training etc. This would enable trustees to clear absence in advance with their line managers.

22. The "At a glance" section provides helpful confirmation that training can be done face to face or at a distance. This is particularly useful where trustees that make up a board are spread across different sites in the UK or where some are based overseas. However, the same concerns about access to adequate infrastructure (as noted in paragraphs 19-21 above) will also be relevant.

Sacker & Partners LLP

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