

UPDATING THE MYNERS PRINCIPLES
RESPONSE TO CONSULTATION

The comments set out below form Sacker & Partners LLP's formal response ("Response") to the consultation on "Updating the Myners Principles" published in March 2008.

The consultation paper asks for contributions from the pensions industry, including pensions professionals. Sackers is a firm of solicitors specialising in pensions law.

General Comments

1. We have seen governance issues becoming increasingly important for trustees in the last few years – and it is currently a top priority for trustees. Given this and the changes to the legislative background (with the introduction of the Pensions Act 2004), we believe it is right to re-examine Myners with a view to the evolution of the principles.
2. A move to a smaller number of higher level principles would be a pragmatic approach to the application of the principles for small, medium and large schemes.
3. A key factor in the effectiveness of the implementation and the monitoring of the principles will be the "governance budget" (i.e. access to appropriate resources both in the allocation of trustee time and internal investment support). We comment further on resources in paragraphs 5 to 8 below.
4. We continue to support the aim that the Myners Principles are a "comply or explain" code of best practice for trustees.

Principle 1 – Effective decision-making

5. A major barrier to effective decision-making by the trustees is the provision of an insufficient governance budget – in obtaining sufficient and appropriate trustee and internal investment resource.

6. We see the continuing availability of trustees with investment expertise as an important issue. Many schemes do not have access to experts or have lost skilled trustees through associated governance issues, such as conflicts.
7. Where trustees with relevant expertise continue to sit on trustee boards they can often have too little time to devote to trustee business because of the pressures of the “day job”. Remuneration of trustees may not necessarily help to alleviate this problem and can bring with it its own difficulties.
8. Where there is limited internal resource, hiring additional assistance may be appropriate. For example, hiring an independent trustee may, in certain circumstances, assist in providing a solution whilst an in-house investment adviser can often be seen as essential for larger schemes.
9. Nevertheless, the wording on remuneration of trustees in the draft principles issued for consultation is an improvement as it gives additional flexibility to tailor the solution to the scheme.

Principle 2 – Clear objectives

10. In the best practice guidelines, it seems incorrect to refer to “member expectations” in the context of fund manager guidelines. This wording seems to import defined contribution (DC) concepts into a one size fits all approach. We had understood that the proposed Investment Governance Group (IGG) would be considering the principles for DC schemes in due course.

Principle 3 – Risks and liabilities

11. There is duplication in the second bullet point of the principle – as the risk of sponsor default is a key element of the sponsor covenant, we would suggest that the reference to default is deleted.
12. In the bullets on best practice guidelines, it is unclear what bullet points 2 and 3 mean. It may help to reformulate these.

13. Finally, bullet point 4 of the best practice guidance refers to internal controls. As this is a legal requirement rather than guidance on best practice we would suggest relocating the comment to the preamble to the principles.

Principle 4 – Performance Assessment

14. Although we have no comments on the principle, we are concerned that the best practice guidance refers to the assessment of the individual performance of trustees.

15. The wording suggests that an appraisal system should be put in place which may be very difficult to implement. Who is to assess the trustees and on what criteria? Trustees will also be understandably concerned as to whom the results should be made available. Following the principle in the case *In Re Londonderry's Settlement*, it may be open for a member to argue that such a document is a trust document and should therefore be available to members.

16. Further given the requirements for trustee knowledge and understanding (TKU) individual assessment of trustees may be unnecessary and misleading.

17. The TKU requirement for individual trustees in section 247 of the Pensions Act 2004 is that each trustee must have knowledge and understanding of the principles relating to the investment of the assets, but the degree of knowledge and understanding is that “appropriate for the purposes of enabling the individual properly to exercise his functions as trustee”. This may mean that if, for example, investment matters are delegated to a sub-committee (using the power in section 34 of the Pensions Act 1995) only those trustees who sit on the sub-committee are required to have in-depth knowledge of investment matters. Therefore, if trustee assessment is deemed appropriate it should be limited only to those trustees responsible for investment matters.

18. This position is even clearer in the case of a corporate trustee as a trustee director must only have knowledge and understanding of those functions he exercises on behalf of the company (see section 248 of the 2004 Act). In our experience, most larger schemes now have corporate trustees.

19. We would suggest removing the example given on participation being an effective measure of trustee effectiveness for two reasons. First, the use of examples goes against the aim of having higher level principles and secondly, in our view this measurement is inadequate as a single well-judged comment can have the same effectiveness as several comments.

20. Finally, we agree with the reduced profile of the chair of trustees in the draft principles (compared to the role set out in the revised Myners principles).

Principle 5 – Responsible Ownership

21. It would be helpful if this principle recognised that it is not always practical for a scheme to have a strong engagement policy. An example is a scheme with substantial holdings in passively managed funds. It seems to us therefore that whilst engagement is important, this principle elevates it to too high a degree which may be impracticable for some schemes to implement.

Principle 6 – Transparency and Reporting

22. We welcome the flexible approach adopted here to reporting, allowing trustees to create a bespoke document suitable for their membership.

23. In particular, taking reporting outside the Statement of Investment Principles (SIP), a legal document, is helpful. This means that the reporting approach may be changed without consultation with the employer (which is required when amendments are made to the SIP).

24. With the comments in paragraphs 22 and 23 in mind, we do not consider it necessary for the IGG to publish guidance on the reporting requirements.

Investment Governance Group

25. Since application of the Myners principles and consequential improvement to trustee governance will have implications beyond occupational pension schemes, it may be appropriate for a new entity such as the IGG, representing a wider constituency, to take ownership of the principles.

DC Schemes

26. Given the increasing importance of DC schemes, we consider it would be helpful for these to be reconsidered following the completion of the consultation on these principles. Again, we would expect the IGG to consult on the principles for DC.

Small Schemes

27. As the aim of the consultation is to produce fewer higher-level principles, we would prefer not to see a further set of principles directly aimed at smaller schemes. However, guidance on their application to smaller schemes (considering the appropriateness of each principle) may be helpful.

Sacker & Partners LLP
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