Sackers

The General Code

Alert | 11 January 2024

Introduction

TPR published its long-awaited new general code of practice (the “Code”) and consultation response on 10 January 2024.

Previously known as the “single code” and first announced in 2019, a draft version of the Code was consulted on in early 2021, with an interim response from TPR following later that year. TPR received over 100 formal responses to the consultation and has reflected many of the suggestions and comments received in the final Code.

Key points

- The Code is expected to come into force on 27 March 2024. It brings together 10 of TPR’s 16 current codes of practice into new “modules” which are intended to be clearer and more accessible. For the most part, the standards it sets out are not new.
- Trustees are already required to establish and operate an effective system of governance (“ESOG”). Schemes with 100 or more members must carry out and document an “own risk assessment” (“ORA”) as part of the ESOG. For others, an ORA is an example of best practice. However, TPR “may consider failure to complete an ORA as an indicator of poor governance”.
- TPR has revised its original proposals for the timing of the ORA. Schemes are now expected to prepare and document their first one within 12 months of the end of their first scheme year that begins after the Code comes into force, at the earliest. It will not be necessary to assess everything that is covered by the ORA at the same time, but going forward, ORAs should be completed at least every three years.
- As a whole, the Code has been updated to reflect current legislation and practice, and to have a stronger focus on equality, diversity and inclusion.

Background

In producing the Code, TPR aims (among other matters) to provide all types of governing bodies with “consistent expectations, regardless of scheme type and so far as legislation permits”. This is hoped to lead to improved awareness of its expectations and from there to better governance.

Following consultation, TPR has made a number of changes. Most of these are designed to achieve greater clarity, but in some places its expectations have been revised. For example:

- TPR no longer expects a scheme's remuneration policy to be published. The Code also makes clear that the policy should only cover those costs that the governing body is directly responsible for; and that it does not have to set out the levels of remuneration paid
- recognising that its original expectation relating to unregulated investments "could negatively impact well governed schemes that hold such assets as part of well-managed investment strategies", TPR now just refers to a requirement to invest "mainly" in regulated markets.

In addition, some modules have been amended to reflect changes in the law up to October 2022.

Effective system of governance ("ESOG")

To recap, in 2019, regulations to implement parts of the second European Pensions Directive (better known as "IORP II") introduced the requirement for trustees to establish and operate an ESOG, which must be proportionate to the size, nature, scale and complexity of the scheme. The Code explains that an ESOG should include processes and procedures to ensure compliance with a list of specified modules which relate to:

- management of activities
- organisational structure
- investment matters
- communications and disclosure.

While there are some new expectations under the Code, such as the remuneration policy, TPR expects the ESOG to be "predominately a rebadging of things that the governing bodies of well-run schemes should be doing already".

The Code now makes clear that the ESOG can incorporate existing policies and procedures.

TPR hopes that trustees will "start a dialogue on whether and how they meet an expectation, and whether it is operating as intended, or could be improved".

Own risk assessment ("ORA")

Schemes with 100 or more members which are required to operate an ESOG should carry out and document an ORA. The ORA is an assessment of how well the ESOG is working and the way potential risks are managed. TPR envisages that "governing bodies of other schemes may carry out an ORA as an example of good practice" and has flagged that it "may consider failure to complete an ORA as an indicator of poor governance".

TPR initially proposed that schemes should complete an ORA every 12 months, with the first ORA required within 12 months of the Code coming into force. In response to feedback, TPR has reconsidered the timing requirements and concluded that schemes in scope should:

- prepare their first ORA within 12 months after the end of the first scheme year that begins after the Code comes into force at the earliest, or, if later:

  - within 15 months beginning with the date on which the trustees are next required to obtain an actuarial valuation, or

  - by the date on which the trustees are next required to prepare a chair's annual governance statement

- complete subsequent ORAs at least every three years. New assessments should also be carried out where elements of the ESOG, or risk management processes, are new or updated and whenever there is a material change in the ESOG or risks facing the scheme.

It is not necessary for all elements forming the ORA to be assessed at the same time, and schemes do not need to replicate work already carried out as part of existing risk assessment processes. Materials can be reused for the ORA where they were produced within the relevant timeframe.

TPR considers that the ORA should be a "straightforward project" for well-run schemes, and the focus of governance activities should be on maintaining the ESOG.

By its nature, the ORA will need to be "highly tailored to the circumstances of each scheme". For this reason, TPR does not intend to produce a standard template or guidance on its completion. However, it will "monitor the situation" and reconsider whether guidance is needed if it sees a "genuine demand".

Next steps

The Code is expected to come into force on 27 March 2024. The action to be taken will depend where your scheme is on its governance journey.

Some trustees will now be able to put the finishing touches to their governance strategies, documents and processes. Others should use the Code's publication as a trigger to get started on a governance review. Whichever camp you fall in, please speak to your usual Sackers contact about the best way to proceed.

Sacker & Partners LLP
20 Gresham Street
London EC2V 7JE
T +44 (0)20 7329 6699
E enquiries@sackers.com
www.sackers.com