Technical Briefing

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actuaries and consultants

Conflicts of Interests – The Regulator's Guidance

With the increased responsibilities for trustees particularly in respect of scheme specific funding, any potential conflict of interest of trustees (or their advisers) is more likely to be perceived as becoming material. As such the Pensions Regulator has issued some Guidance to assist trustees which can be found on the Regulator's website at www.thepensionsregulator.gov.uk.

Examples of Conflicts

The Guidance is given in respect of different types of conflicts including:

- *Continuing traditional conflicts of interests* – e.g. if there is a proposal to buyout pensioners or award pension increases to a particular category of member, when members of the trustee board making this decision could be members of the category concerned.

- *Increased conflicts of duty* – e.g. when negotiating a recovery plan with the sponsoring company when a trustee is also a sponsoring employer director or a sponsoring employer director receiving confidential information which could affect a decision made by the trustee board (which in itself may also been further regulated by the new Companies Act 2008 requirements).

- *Increased advisers' conflicts* – historically (mainly to save costs and because a number of trustees were already familiar with and used to working with company advisers), many trustee boards have shared advisers with their sponsoring employer. With increased trustee role advisers may find it necessary to revert to their primary client (usually the trustees) to ensure they can provide independent advice which can be relied upon, particularly when negotiations (such as funding matters) is required.

Regulatory Guidance

The Guidance is split into five key principles:

- *understand the importance of conflicts of interest (and duty)* – trustees need to be aware that no personal interest (or duty) can have an impact on their decisions made or actions taken as trustee due to the legal duty a trustee has to act in the best interests of all the scheme's beneficiaries as well act impartially, within legislative/scheme restrictions. Some trustees may have additional duties such as the chair of the trustee board.

- *identify conflicts* – trustees need to recognise situations when a conflict of interest/duty has arisen, albeit it that it would be preferable for a potential situation to be recognised in advance of occurring to avoid a trustee (or adviser) being put in a compromising position. Any potential trustee/adviser would also need to evaluate their position before being appointed whilst any appointed trustee/adviser would need to keep their position under review.

- *evaluate, manage or avoid of conflicts* – not every conflict situation may be considered as 'material' but trustees may wish to take advice when evaluating the risk and even so, there are methods of managing such risk which may not always require resignation (non-appointment) or an application to court, such as withdrawal from decision making or delegation. These methods can be temporary or permanent depending on the nature of the conflict.

- *manage conflicts with advisers* – most advisers will themselves have an obligation to disclose and evaluate any potential conflict of interest but trustees should ensure that these are managed and are aware of any processes in place to ensure independent reliable advice (particularly from employer advice). This is also applicable to in-house advisers/assistants such as pensions managers and other employer personnel.

- *retain a conflicts of interest policy (and if necessary, register)* – not only should trustees request confirmation from their advisers regarding potential conflicts of interest, they should also consider as part of their scheme governance requirements establishing a conflict of interest policy (and procedure) which sets out how any potential or actual conflict of interest will be identified, monitored and managed. Making such a policy available to members may also offer additional comfort to the members that the trustees take their role seriously whilst ensuring openness and honesty.

cprm commentary

The Regulator's Guidance provides practical advice and assistance to trustee boards (as well as employers and advisers) in dealing with an issue which has seen a steep rise in interest and difficulty given the changing world of pensions legislation and ever-increasing trustee responsibility. A number of trustee boards/employers have added this issue to that of trustee knowledge and understanding, confidentiality issues and trustee liability whilst considering the overall trustee board structure.

Many potential conflicts of interests can be managed (as agreed by the Regulator in the Guidance) depending on whether it is considered 'trivial' or 'material' but a key point is for any trustee (or potential trustee) and adviser to be aware of the importance of conflicts and try wherever possible to avoid any conflict before it arises.

For SMEs who are more likely to:

- appoint company directors as trustees for very valid and honest reasons such as availability of time, knowledge and expertise (which has continued to ensure compliance with various TKU requirements) but may now find it harder to continue to "swap caps" whilst undertaking the separate roles; and

- share advisers with the trustee boards to save on costs so funds were better used to support the scheme.

There is a need for increased awareness of the potential for conflicts.

If you would like any further information, advice or assistance in respect of conflicts of interests including establishing a conflict of interest policy, creating an internal register or managing potential conflicts, please contact your usual **cprm** contact.