

The pursuit of excellence

✓ Baker McKenzie considers how well TPR's 21st Century Trusteeship guidance works in practice



When The Pensions Regulator launched its 21st Century Trusteeship and Governance Programme in 2016, it committed to raising the standards of trusteeship across the industry. Now, following the publication of a series of guidance papers, we have been provided with some insight on what the regulator considers this higher standard to be. We hope that trustee boards will reflect on it but wonder if the guidance approach is sufficient to enable the objective to be achieved.

The guidance comprises (so far) 10 papers, each containing the regulator's thoughts on a particular aspect of the trustee role, which can be grouped under the following overarching topics: governance, roles and strategy; training, skills and advisers; risk and conflicts of interest; meetings; and value for members.

By breaking down these topics, the regulator has provided key principles and pointers for trustees to consider in relation to each aspect of trustee governance, often accompanied by some (generally unsurprising) examples of

what would constitute good behaviour and bad behaviour. These all seem simple on paper, with the regulator providing something of a black and white view. It remains to be seen how useful trustees find the guidance in practice when faced with their particular, potentially more grey,

factual matrix.

One of the key themes of the guidance is efficient and effective process. The regulator recognises that not all decision making can wait for a trustee meeting and considers how trustees can efficiently tackle the vast array of decisions that need to be made. The answer, it concludes, is delegation. Delegation, not just to advisers, but also to trustee sub-committees. Effective delegation should allow trustees to reduce the time spent on day-to-day questions, giving them more time to focus their attention on investment performance and strategy, which are items the regulator puts high on the agenda for trustee meetings.

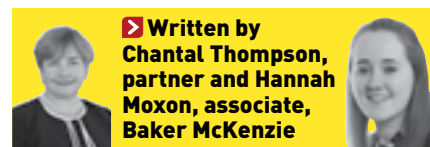
However, delegation raises a number of legal issues, some of which are alluded to in the regulator's guidance. First, a sub-committee needs to have appropriate authority to deal with matters within its remit, with a clear limit on what that remit is. This is a delicate balance to maintain and relies on clearly drafted and detailed terms of reference outlining the powers and responsibilities delegated to the sub-committee, including when and how any matters should be escalated,

and regular reviews by the full trustee board on the effectiveness of the sub-committee.

The trustees' delegation powers under the scheme rules should also be checked and, if necessary, amended, to ensure that any delegation is valid. Secondly, the trustees retain responsibility for all decision making. This means that careful consideration should be given to the make up of the sub-committee to ensure its personnel have the required expertise to manage its responsibilities, but even then, the trustee needs to maintain oversight of the decisions the sub-committee has made, which can be a difficult balance to strike.

The regulator's guidance is a positive step towards the government's aim of improving standards of trustee competence and scheme governance and administration. However, it is open to question whether it will be sufficient to drive up standards or whether a more prescriptive approach will be required in the long run. There are also areas that the guidance does not address that trustees are increasingly having to consider, such as the recent emphasis on investing responsibly and the exercise of trustee discretions. In the latter area, trustees are coming under increasing scrutiny following the *BA* case and the recent Pensions Ombudsman determination relating to *Dr G*.

Baker McKenzie is hosting a panel discuss on 21st Century Trusteeship with key industry panellists on 26 March 2019. If you would be interested in attending please contact Kate Bullard (kate.bullard@bakermckenzie.com) for further information.



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