

Chapter 10

Guidance on activities related to pension schemes

10.3 Pension Scheme Trustees

Q7. I am a trustee of an occupational pension scheme ("OPS") - will I need to be authorised if I also manage the investments held under my scheme?

Only if you are involved in the day-to-day management of the assets and your scheme is not a *small self-administered scheme*.

Occupational pension scheme trustees are subject to special treatment when they manage investments held under their scheme. This means that they may need to be *authorised* even though they are not carrying on their managing activities by way of business in the normal sense (they may be unpaid individuals for example).

That aside, and broadly speaking, you will not need to be *authorised* if:

- you delegate day-to-day decision-making about *securities* or *contractually based investments* to an *authorised, exempt* or *overseas person* (typically a fund manager); or
- the only day-to-day decisions you take relate to pooled investment products and are only taken after you have obtained and considered advice from a regulated person; or
- your scheme is fully insured and you do not take or need to delegate any day-to-day decisions; or
- your scheme is a small self-administered scheme.

Q8. What decisions can I make, as a trustee of an OPS (other than a small-self administered scheme), if I am not authorised?

You can make:

(1) strategic decisions, such as decisions:

- about the adoption or revision of a statement of investment principles as required by relevant pensions legislation; or
- about the formulation of a general asset allocation policy; or
- about prescribing the method and frequency for rebalancing asset classes, and the permitted ranges of divergence, following the setting of the general asset allocation policy; or
- about the proportion of the assets that should constitute investments of particular kinds; or
- affecting the balance between income and growth; or
- about the appointment of fund managers; or
- as to which pooled investment products to make available for members to choose from under a money purchase scheme;

(2) decisions that are needed to be taken in exceptional circumstances, such as:

- in a take-over situation; or
- where the person managing the scheme's assets has a conflict of interest; or

- where the decision is sensitive (such as one relating to investments in the same market sector as the employer or in the employer's own securities); or
- where the decision raises sensitive policy considerations (such as investments in certain territories or markets or in ethical or green areas); or
- where the trustees are required to make decisions:
 - about investments acquired purely as a result of a demutualisation by an insurer or building society in which the scheme holds investments or deposits; or
 - following a change in fund managers which results in the scheme holding investments which the new fund manager is unable or unwilling to take on;

(3) day-to-day decisions about investment in pooled investment products, namely:

- *collective investment schemes* such as unit trusts, contractual schemes, limited partnerships, hedge funds or open-ended investment companies;
- shares or debt securities issued by an investment company such as an investment trust or a venture capital trust;
- contracts of insurance such as annuities or unit-linked investment policies;

(This is subject to the decisions being made only after you have taken and considered advice from an *authorised, exempt or overseas person* or an *exempt professional firm* (that is, a firm of solicitors, accountants or actuaries who can carry on incidental *regulated activities* without *authorisation*).);

and

(4) decisions of any kind about investing in assets that are not *securities* or *contractually based investments* - such as real property, cash or precious metals.

Q9. As an unauthorised OPS trustee, what decisions am I unable to make?

You will be unable to make most day-to-day decisions. Generally speaking, these will be:

- decisions to *buy, sell* or hold particular *securities* or *contractually based investments* such as a fund manager would be expected to make in his everyday management of a client's portfolio (other than day-to-day decisions about investment in pooled investment vehicles taken after obtaining advice as per Q8(3)); or
- decisions made as a result of regular or frequent interventions outside scheduled review meetings in the decision-making of external fund managers; or
- recommendations made to fund managers, on a regular basis, with a force amounting to direction relating to individual *securities* or *contractually based investments*.

Q10. As an OPS trustee, will I be making day-to-day decisions by implementing strategic decisions on a regular basis?

No. For example, you will not be making day-to-day decisions merely because the application of the method for rebalancing asset classes and permitted ranges of divergence result in mechanical changes being made regularly to the asset allocation policy. This is because the decisions are made at the time the method and frequency are set and not when those decisions result in a change to the policy.

Similarly, there may be occasions when you may determine that, in the absence of instructions from a member, his contributions will automatically be placed in a particular fund. Provided this follows a pre-determined

procedure that is rigidly applied and not subject to frequent alteration, it may be regarded as the routine application of a strategic decision and not as a day-to-day decision in its own right.

Q11. As an OPS trustee, I need, from time to time, to sell investments to raise cash to meet obligations to scheme members. Is this likely to mean that I am making day-to-day decisions?

No, unless you are making regular decisions as to which particular investments to dispose of to release the necessary cash. This would not include situations where, in realising assets, you are merely applying pre-agreed strategic policy decisions with no element of discretion. In that situation, the decision is made at the time that the policy is set and is strategic.

Q12. Does the fact that, as an OPS trustee, I only infrequently make decisions about investments mean that the decisions I do make will not be regarded as day-to-day decisions?

No. The mere fact that a decision may be taken only infrequently does not, of itself, prevent that decision being a day-to-day decision. It is the nature of the decision that is important, not its frequency. For example, if you were responsible for the investment of scheme assets in a portfolio of Government stocks and debt securities, the fact that you might only occasionally need to make decisions about buying new, or selling existing, investments would not prevent those decisions being day-to-day decisions. Similarly, the fact that you may be the trustee of a small scheme where decisions about the investment of scheme assets arise only infrequently does not, of itself, prevent those decisions being day-to-day decisions.

Q13. As an OPS trustee, will I be making day-to-day decisions if I decide on the purchase of annuities to be held under the scheme?

Not in most circumstances. Typically, you may choose to select what you consider to be the most suitable annuity provider on each occasion that a decision has to be made. If this is the case, provided that you are not purchasing annuities on a frequent basis, it is unlikely that the decisions you make would be day-to-day decisions (on the basis that you are making strategic decisions about which provider to use rather than decisions about investment of the scheme assets). Less typically, your choice of annuity provider might be determined at the outset so that, each time an annuity has to be purchased, that chosen provider is used. If this occurs, you may be regarded as having made a strategic decision with regard to the most appropriate provider and then as carrying out that strategic decision on each occasion that an annuity is purchased.

But, even if your decision to purchase an annuity is a day-to-day decision, you can still make it. This is provided you meet the conditions for making decisions that involve taking and considering advice about investment in pooled investment vehicles (see Q8(3)).

Q14. As an OPS trustee, if I make decisions about the purchase of annuities on the winding-up of the scheme, am I making day-to-day decisions?

No. Decisions taken about annuities in such exceptional circumstances would not be regarded as day-to-day decisions. This also applies to decisions about annuities taken in the context of ensuring provision of benefits for a member's ex-spouse.

Q15. As an OPS trustee, I make investments on the instructions of members of the scheme. Does this mean that I have to be authorised as I have effectively delegated day-to-day decision-making to persons who are not authorised, exempt or overseas persons? What about the member - is he then managing the assets of an OPS so as to need authorisation?

No, on both points. You will not be regarded as *managing investments* (so that issues about delegation of day-to-day decision-making do not arise) provided the investment is to be purchased solely for the benefit of the member and you, in practice, invariably seek to match the scheme's obligations to the member by purchasing those investments. This includes where the member instructs you to purchase a particular annuity. But the position may be different should you choose not to match the obligations that the scheme incurs through the members' instructions by purchasing the relevant investments. If you then make decisions about what alternative investments to make, you are likely to be *managing investments* and the decisions you make may be day-to-day decisions.

The member would be regarded as managing assets that belong beneficially to him rather than assets that belong to another. So, he would not be regarded as *managing investments* either.

Q16. Am I going to be managing investments by exercising voting rights conferred by investments that I hold as trustee under my OPS? If so, will this be viewed as my taking a day-to-day decision?

No, you will not be *managing investments* unless the exercise of the rights would result in your *buying, selling, subscribing for or underwriting securities or contractually based investments*. This will not usually be the case. For example, voting to support a take-over offer to be made by a company in which the scheme holds shares would not involve *managing investments* as it would not result in your acquiring or disposing of investments. Neither would voting on the re-appointment of company directors or auditors or on whether a company in whom the scheme holds shares should make a rights issue (although deciding to subscribe to the rights issue when it is made would amount to managing investments).

Deciding to accept an offer to buy company shares held by you under the scheme, in the context of a proposed take-over of that company, would involve *managing investments*. But the decision you make would be viewed as strategic and not a day-to-day decision.

Q17. When may a decision I make as an OPS trustee that results in my investing in a pooled investment vehicle other than an annuity be regarded as a strategic decision?

This will arise where the decision:

- represents the initial decision to invest the scheme wholly or to a substantial amount, and on an ongoing basis, in a particular vehicle such as a life policy, unit trust scheme or contractual scheme (on the basis that an initial decision of this kind is of such importance to the scheme that it may be regarded as strategic); or
- may be seen to be a decision to appoint a discretionary fund manager.

Q18. When will a decision that I make as an OPS trustee be regarded as one to appoint a discretionary fund manager?

This will be the case when the decision:

- seeks to implement a strategic decision to invest part of the scheme assets in a particular area or asset class (such as venture capital or emerging markets);
- is based principally on the suitability of appointing the fund manager to manage that part of the scheme assets; and
- to use a pooled investment vehicle rather than a segregated portfolio is secondary to the decision to appoint the fund manager.

Where the circumstances surrounding the appointment of a fund manager suggest that the decision is day-to-day, you may still be able to make that decision. This is provided you meet the conditions for making decisions that involve taking and considering advice about investment in pooled investment vehicles (see Q8(3)).

Q19. As an unauthorised OPS trustee, I have made a decision to invest in an investment vehicle which allows me to switch between various sub-funds. Can I make decisions about switching between those sub-funds?

Yes. However, taking decisions of this kind other than to implement strategic decisions on asset allocation is likely to involve taking day-to-day decisions. So, you would need to meet the conditions for making decisions that involve taking and considering advice about investment in pooled investment vehicles (see Q8(3)).

Q20. I understand that, as an unauthorised trustee of a small self-administered scheme (a "SSAS") I can make day-to-day investment decisions. What types of scheme qualify as a SSAS?

There are two kinds of scheme that qualify as a SSAS. These are:

- (1) an "insured SSAS" - that is an OPS:
 - that has no more than 50 members; and
 - where:
 - the contributions made by or for each member are used in the acquisition of a contract of insurance or an annuity on the life of that member;
 - the only decision to be made is the selection of the relevant contract; and
 - each member has been given the opportunity to make that choice himself, whether or not he chooses to do so; and
- (2) a "12 relevant member SSAS" - that is an OPS:
 - with no more than 12 relevant members (broadly speaking, 'relevant members' are existing or former employees for whom contributions are being or have been made and for whom benefits under the scheme are or may become payable);
 - that is established under an irrevocable trust;
 - where all the relevant members are trustees of the scheme (except those who are unfit to act or incapable of acting as trustee); and
 - where all day-to-day decisions relating to the management of the assets of the scheme which are *securities* or *contractually based investments* (other than decisions that satisfy the conditions involving taking and considering advice about investment in pooled investment vehicles - see Q8(3)) are required to be taken by:
 - all or a majority of the relevant members who are trustees; or
 - an *authorised person* or *exempt person*, in each case acting either alone or jointly with all or a majority of the relevant members.

Q21. My 12 relevant member SSAS requires that all day-to-day decisions are taken by the trustee beneficiaries. The SSAS has an independent trustee who is not a beneficiary or an authorised or exempt person. If the

independent trustee takes a day-to-day decision in breach of the scheme's requirement, what effect does that have on him and on the relevant members?

The independent trustee's actions will not cause the trustee beneficiaries any regulatory difficulties, even though he has acted in breach of the requirements of the SSAS. This is because it is the existence of the requirement about day-to-day decision-making that is important and not whether it may be breached. The independent trustee may, as a result of having taken the decision, be regarded as managing the SSAS's investments. But whether or not this would be the case will depend on the particular circumstances in which the decision came to be made.

Q22. I am a trustee of a 12 relevant member SSAS but not a relevant member. My role requires me to monitor investments made by the scheme - won't I be drawn into making day-to-day decisions?

No. You should be able to perform your role in monitoring and, where necessary, objecting to particular transactions without needing authorisation. Merely operating a blocking vote where a certain proposed investment would, for whatever reason, be prohibited, would not be regarded as taking part in the decision to make, or to refrain from making, that investment. If you merely express a view as to whether or not a certain proposed investment would be permitted you would not, thereby, be making a decision to buy the investment. However, to reduce the risk of being drawn into making day-to-day decisions, you may wish to make a point of not participating in a vote except where the investment could not, in your view, be made without breaching the relevant requirements.

Q23. My company acts as the corporate trustee for a self-invested personal pension scheme ("SIPP"). Will it need to be authorised?

No, provided it is not establishing, operating or winding up the scheme and is able to satisfy various exclusions that apply to other regulated activities. Guidance on the regulated activities of establishing, operating and winding up a personal pension scheme is in Q24 to Q28 and in ■ PERG 12 (Q3 to Q5).

So, your company's position will depend on a combination of the activities that it carries on and the availability of certain exclusions. These exclusions may also apply to trustees of pension schemes other than SIPPs, including trustees of stakeholder pension schemes, with the exception of that for *managing investments* (which will not apply to a trustee of an OPS).

- (1) Your company is likely to be *dealing in investments as principal* in entering into investment transactions on behalf of the trust. However, in general terms, it would avoid this if either:
- it is a bare trustee acting on the instructions of the member or his agent and it does not hold itself out as someone who provides a dealing service (see article 66(1) of the *Regulated Activities Order*); or
 - it does not hold itself out to the public as someone who carries on business as a market maker or dealer in *securities* and, if it buys or sells *contractually based investments*, it only does so with or through a regulated person (see articles 15 and 16 of the *Regulated Activities Order*).

But you will not be *dealing in investments as agent* merely because you commit co-trustees to a transaction by entering into it on behalf of the scheme.

- (2) Your company should not be *arranging* because this activity does not apply where a person arranges transactions to which he is to be a party (see articles 25 and 26 of the Regulated Activities Order).
- (3) Your company is likely to be *managing investments* if it has discretionary control over the assets held under the trust. But it will not be managing investments if:
 - it is acting solely on instructions from the members or from a fund manager or other agent appointed to instruct it on their behalf; or
 - it is not holding itself out as an investment manager and is not remunerated for managing investments in addition to what it is paid for acting as trustee (see article 66(3) of the Regulated Activities Order).
- (4) As trustee, your company is likely to be responsible for *safeguarding and administering investments* held as scheme assets. If it makes use of a specialist custodian it will be *arranging safeguarding and administration of assets*. These are potentially regulated activities. But they will not be if:
 - your company is not holding itself out as a custodian and is not remunerated for providing custody services in addition to what it is paid for acting as trustee (see article 66(4) of the Regulated Activities Order); or
 - (as respects arranging for another person to provide custody services) it delegates custody to a suitably *authorised or exempt person* (see article 66(4A) of the Regulated Activities Order).
- (5) Your company will not be *advising on investments* unless it advises a prospective member on the merits of his *buying or selling* interests in *securities or relevant investments* to be held under the trust. If it gives advice to its co-trustees about trust investments or to existing members about their interests under the trust, its advice will be excluded provided it is not remunerated for giving the advice in addition to what it is paid for acting as trustee (see article 66(6) of the Regulated Activities Order).
- (6) There are no exclusions from the regulated activities of *establishing, operating or winding up a stakeholder pension scheme* or *establishing, operating or winding up a personal pension scheme*. Guidance to help you determine whether or not your company will be carrying on any of these activities is in Q24 to Q28 and in ■ PERG 12 (Q3 to Q5).

Q24. My company acts as corporate trustee for both trust-based stakeholder and personal pension schemes. Does it need to be authorised?

This depends on the responsibilities that your company assumes as trustee. *Establishing, operating or winding up a stakeholder pension scheme* or a *personal pension scheme* are regulated activities in their own right. These are functions that may often be carried out by the trustees of a trust-based scheme other than where the trustees are mere bare trustees. This is apart from establishing a scheme which is a function that may often be carried out by a third party such as a product provider. See Q25 to Q28 and ■ PERG 12 (Q3 to Q5) for further guidance on these activities.

Q25. What does establishing a stakeholder or personal pension scheme involve?

The establisher of a stakeholder or personal pension scheme is the *person* responsible for putting in place the arrangements founding the scheme. With a trust-based scheme, this will usually be the person who executes the trust as provider. In a scheme established by deed poll, it will usually be the person who enters into the deed poll. There will usually only be one person who establishes the scheme. Any professional firms that he may employ to act as his agent (such as solicitors) would not be establishing the scheme. The

establisher may also be the operator but need not be. An employer will not be establishing a stakeholder pension scheme purely as a result of his having designated such a scheme to meet the statutory requirement to do so.

Q26. What does operating a stakeholder or personal pension scheme involve?

The 'operator' is the *person* responsible to the members for managing and administering the assets and income of, and the benefits payable under, the scheme in accordance with relevant pensions and tax legislation, the scheme's constitution and the *regulatory system*. In this respect, the responsibilities that are placed under Part 4 of the Finance Act 2004 on a pension scheme administrator (as defined in section 270(1) of that Act) will mean that he is likely to be the operator of the scheme. In trust-based schemes, the trustees may act as scheme administrator or there may be a separate person who acts in that capacity. Where there are separate trustees, it may be the case that they are operating the scheme jointly with the scheme administrator by virtue of the responsibilities they assume under the trust deed for the management and administration of the scheme assets. However, in situations where the trustees' role is merely to act as a bare trustee holding the scheme assets, it is the scheme administrator who is likely to be the sole operator of the scheme. The scheme may be established by an *authorised person* who acts as a provider of investment products or services to the scheme. This does not make that person the operator of the scheme if, as a matter of fact, he has appointed another person to be responsible to the members for carrying out all of the operator's functions as scheme administrator or as trustee, or both as the case may be.

Q27. What is my position as the operator of a stakeholder or personal pension scheme if I delegate day-to-day functions such as administration of the scheme or management of the scheme assets to another person?

A *person* who accepts responsibility, and remains responsible, for carrying on a *regulated activity* is carrying on that activity even though he may delegate or outsource the day-to-day carrying out of the functions to another person. So, if the operator of a scheme delegates some or all of his functions to another person, he will still be the regulated operator of the scheme. At the same time, none of the people to whom he delegates his activities will become an operator of the scheme. However, they may be carrying on other regulated activities in performing their delegated or outsourced tasks (such as *arranging or managing investments*), in which case they will be subject to regulation for those activities.

Q28. What does winding-up a stakeholder or personal pension scheme involve?

The *person* who winds-up such a pension scheme will be the person who is responsible for putting in place the arrangements for bringing the scheme to an end in a way that complies with the relevant provisions of the instrument that established the scheme and any relevant rules under pensions or tax legislation. This will, more often than not, be the operator of the scheme.

Q29. I am one of several trustees of a pension scheme. Sometimes I arrange an investment transaction on behalf of all the trustees but another trustee actually signs the purchase agreement and becomes the registered owner of the trust asset - does this mean that I could be regarded as arranging deals in investments on behalf of my fellow trustee?

No. You will not be *arranging* in these circumstances. This is because the interest that you acquire as trustee in the investment means that you will be regarded as being a party to the transaction. Arrangements made by a person in relation to transactions of which he is to be a party as principal or agent are excluded from *arranging*.

Q30. [Deleted]