

# The New Regime for Conflicts of Interest - Considerations for Pension Trustee Companies

## June 2009

**Conflicts of interest have been high on the Pensions Regulator's radar recently, which culminated in a finalised guidance note in October 2008. This coincided with the new provisions relating to directors' conflicts of interest that came into force on 1 October 2008, which apply to trustee companies as they do to other companies. Broadly, trustee directors must avoid situational conflicts, disclose interests in proposed and actual transactions, and not accept benefits from third parties.**

Conflicts of interest are an issue for trustee companies because senior staff of the employer to which the pension trust relates are often appointed to its board in recognition of the knowledge, expertise and experience that they can bring to it. However, conflicts are likely to arise before, and after, appointing such individuals as trustees. It is therefore vital that those conflicts are identified, monitored and managed.

### **The new regime**

The Companies Act 2006 (the "**Act**") sets out for the first time a statutory statement of the general duties owed to a company by its directors, most of which came into force on 1 October 2007, save in respect of the following provisions that have since come into force on 1 October 2008:-

- the duty to avoid situations giving rise to a conflict of interest
- the duty not to accept benefits from third parties
- the duty to declare interests in proposed transactions and arrangements
- the duty to declare interests in existing transactions or arrangements

Private companies incorporated on or after 1 October 2008 are able to authorise any matter giving rise to a conflict, unless there is a provision in the company's articles stating otherwise, and subject always to the board acting in a manner most likely to promote the success of the company. For private companies incorporated prior to 1 October 2008, the option exists either to pass an ordinary resolution to authorise a specific conflict, or for the company to pass a special resolution to amend its articles to expressly permit the board to authorise conflicts of interest in accordance with the Act.

At a board meeting to approve a director's potential conflict of interest, that director should not count towards the quorum or vote on the authorising resolution.

If a trustee company is amending its articles to expressly permit its board to authorise conflicts, it should also consider the duration of such authorisations. It is at the board's discretion whether it authorises each disclosed conflict indefinitely (subject to a right of the board to vary or revoke it) or for a defined time period, for example, 12 months. This would allow the board to annually review the authorisation.

### **The new guidance from the Pensions Regulator**

The aim of the recently published guidance is to assist trustees of pension schemes to identify conflicts of interest, monitor and manage them. The Pensions Regulator wishes trustee companies to embrace a culture of openness in their approach to managing conflicts of interest.

It notes that the management of conflicts is crucial to good scheme governance, but at the same time that it is a complex area of law and trustees should be prepared to seek legal advice as necessary.

When a trustee is obliged to act in the best interests of his beneficiary and, at the same time, has:-

- a separate personal interest; or
- another fiduciary duty owed to a different beneficiary (i.e. as a senior manager of a company of which he is a pension trustee) in relation to that decision, giving rise to a possible conflict with his first fiduciary duty

it is simply not enough to disclose the conflict and for the board then to authorise it. Trustee companies should consider how to monitor and manage these conflicts.

### Practical guidance

Examples of situations in which a trustee director may find himself in a position that could constitute a conflict of interest include:-

- accepting a trustee directorship where that person is a significant shareholder in the sponsoring employer and as a result of the trustee directorship would be able to exercise a degree of influence over decision-making
- accepting a trustee directorship if that person is also currently a director or senior employee of the sponsoring employer
- being party to investment decisions where a director trustee has shares or other financial interests in companies into which the trust is considering investing
- a director trustee who also has a role with the sponsoring employer and becomes privy to sensitive information that could impact on the scheme, for example, details of a potential takeover offer

Though many schemes may already have processes in place, they should continue to monitor the adequacy of their existing arrangements in light of the codified directors' duties introduced by the Act and the latest sector guidance.

The board cannot retrospectively approve conflicts and therefore authorisation should be sought prior to any director accepting any role that may place him in a situation giving rise to a conflict of interest.

Difficult situations may arise for a director, for example, when he is a director of the trustee company of a pension scheme considering making a demand for a contribution from an employer company in financial difficulties of which he is also a director/employee. While the trustee company may have the authority to approve the conflict, it may nonetheless refuse to do so because it would not be in the best interests of its shareholders. In extreme situations, the conflicted director may have to consider stepping down from his role on the trustee board.

The Pensions Act 2004 generally requires one third of the trustee board to be nominated and selected by, or on behalf of, the members. Member representatives are, by definition, members of the pension scheme and so are in a difficult position when decisions affect them personally. Such member representatives should bear in mind that they are required to act on behalf of all classes of member in their role as a trustee director, not just the section from which they are drawn.

The trustee directors, as a board, may wish to consider establishing a sub-committee to avoid conflicts arising and so that certain decisions may be delegated to an independent group whose views are not likely to be compromised. The company should consider seeking legal advice to ensure that delegation is permissible and that its acts will be binding.

A director of a trustee company may hold confidential information in his capacity as a director/employee of the employer company - the question is whether that director may withhold such confidential information from the trustee company. Such a matter must be authorised by the trustee company. The trustee company has the option to incorporate wording into its articles allowing, in a case where the conflict has been authorised, for any information held by an individual in another capacity in connection with that conflict to remain confidential and not to be disclosed. Alternatively, a specific shareholder resolution could be passed to allow the board of the trustee company to authorise the treatment of relevant confidential information.

## Key points to remember

Trustee companies must authorise situational conflicts by either resolution of the board (provided it is permissible in its articles) or by shareholder resolution, as appropriate to the circumstances. Directors must, on a constant and independent basis, consider their codified duties when participating in any board decision.

Trustee directors should remember to disclose transactional conflicts on an ongoing basis as and when they arise. It is advisable for routine and ongoing interests to be set out in a register of interests.

The trustee board should also review and monitor conflict authorisations regularly and implement a policy to manage its compliance. This policy should itself be reviewed regularly to ensure that the trustee board is acting in a manner consistent with current good practice.

This briefing note sets out a summary of the law at the time of writing and is for information purposes only. It should not be regarded as legal advice but if you would like more information please contact:



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