

## PREMIER PENSIONS MANAGEMENT

### LEGISLATION UPDATE : 20/06

#### CONFLICTS OF INTEREST

##### Background

For many years in the UK, Senior Company Directors have also acted as trustees of the defined benefit company pension scheme. This has often been to provide invaluable financial acumen, but has also served to provide a link into the company for communication. Traditionally, conflicts of interest for trustees or advisers acting for both an employer and its pension scheme have rarely arisen since in an on-going scheme without any significant deficit and where the employer's business is expected to continue, what has been right for the pension scheme has also been right for the company.

##### Why are conflicts of interests now arising?

Today, many U.K. defined benefit pension schemes have a significant deficit relative to the size of the company and have been closed to new employees for several years or closed to future pension accrual altogether. The level of funding required to address a deficit is expected to rise further and the manoeuvrability of trustees is being restricted by the Scheme Specific Funding requirements. There is therefore likely to be more conflict between the trustees and the company in the future. This difference of views will also emerge when:

- (a) Changes in the shareholding or management result in a reduced commitment to the employer's business and an increased interest in extracting shareholder returns;
- (b) The employer group is proposing to enter into transactions for which it may seek clearance from The Pensions Regulator (TPR).

Recent U.K. legislation has, among other things, required a solvent employer to meet the buy-out debt in a pension scheme if it is wound-up and the stance of TPR has led to scheme deficits being redefined as debts. This has changed the traditional relationship between the employer and the trustees to one of a debtor-creditor. TPR has made it clear that it expects such conflicts of interest to have been resolved and legal advice obtained before it will grant clearance.

There are two main areas which should be considered for those trustees who are directors of the employer or a shareholder:

- (a) That a decision taken by the trustees, including a conflicted trustee, may later be challenged.
- (b) That trustees have an obligation to make available to their co-trustees anything within their knowledge that is relevant to issues being considered by them and to use that information in the best interests of the beneficiaries.

Where a Company has appointed one of its directors to be a trustee, it can be argued that it has to that extent, waived the fiduciary duty which the director owes it so as to give priority to the duty to the scheme. Given this, conflict management is at least as important for the company and its shareholders as for the trustees.

### **How can these conflicts of interest be avoided?**

There is a range of possible solutions to deal with these conflicts:

- (a) Resignation by any conflicted trustee;
- (b) The conflicted trustee abstains from discussions and voting on matters where a conflict exists. This however does not address the duty for the conflicted trustee to pass on to co-trustees relevant information;
- (c) Delegation of any decision to which the conflict is material to a committee of the trustees, excluding the conflicted trustee.
- (d) The company only appoints individuals which are not privy to sensitive company financial information;
- (e) Make a rule amendment to remove the requirement to pass on information. This is generally more appropriate before or on the first appointment of a trustee with potential conflicts. The decision to make the amendments needs to be taken by non-conflicted trustees who need to be satisfied that this is in the interests of the Scheme;

The safest solution will be to allow conflicted trustees who are indispensable to the company to resign from their role as trustee and for company appointed trustees to not be privy to sensitive company financial information. It will then be necessary for the trustees to invite a senior company representative to their meetings to provide them with any relevant financial company information.

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*This update includes general information and cannot be relied upon for individual schemes issues.  
You should contact your adviser or P Couchman at Premier Pensions Management Ltd, Capital  
Business Centre, Units 14 & 15, 22 Carlton Road, South Croydon, Surrey, CR2 0BS.  
DL: 020 8916 2129. Email: [paul.couchman@premierpensions.co.uk](mailto:paul.couchman@premierpensions.co.uk),  
if you require definitive advice*