



Governance and administration of occupational defined contribution trust-based schemes of occupational defined contribution trust-based schemes

ICAEW welcomes the opportunity to comment on the *Governance and administration of occupational defined contribution trust-based schemes of occupational defined contribution trust-based schemes* published by The Pensions Regulator on 24 November 2015, a copy of which is available from this [link](#).

This ICAEW response of 29 January 2016 reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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MAJOR POINTS

1. Overall, we think the Pensions Regulator (tPR) has done a good job in revising the Code and we support the removal of the quality features. However, given the inflexible nature of the consultation (requiring yes/no answers) our response seems overly negative because, for example, where we have concerns over one aspect of a section of the Code, the structure of the response document has required us to indicate that we are unhappy with the entire proposed section.
2. We also have a general concern regarding the balance between the overall high level principles (which should be included in the Code) and detailed guidance, including the many 'examples' currently given (which should be contained in the supporting guidance, for instance, in the Investment Governance section paragraph 103 suggests that, when considering the scheme's investment strategy, the trustees should consider '*the proximity to retirement or likelihood of selecting a particular retirement option*' – this should be dealt with in supporting guidance), to allow the Code to be more high level, principles-based and succinct, targeted and meaningful. In some areas we feel the revised Code fails to be sufficiently succinct/targeted to be of more use than the existing Code. Regarding the length of the Code, when all the supporting guidance is included we note it will probably result in as much, or even more, text than the current version.
3. As a general comment, we consider it would be helpful for tPR to address in the supporting guidance the very different types of organisation that are covered by the Code, for example the supporting guidance should clearly differentiate what tPR expects from MasterTrusts.
4. The signposting between the Code and the supporting guidance will need to be very clear.
5. We have some queries regarding the formalities that tPR expects around preparing the annual chair's statement. For example, in circumstances where the financial statements are delayed for reasons unconnected with the preparation of the chairman's statement (meaning they are not published within 7 months and there is a breach of the requirement to publish the chairman's statement), but it may be unclear whether the duty to prepare and sign the statement has been breached. tPR needs to clarify (in supporting guidance) practically what it expects to happen to show that the statement has been prepared and signed. Typically these statements are only dated on the same day as the accounts have been prepared, so what mechanism should be in place to ensure that the statement has been prepared other than ticking an annual return that says you have done so (eg in circumstances where the accounts are delayed)? Would tPR expect the Trustees to have a board minute confirming that the statement had been reviewed, approved and signed? (see paragraphs [60 to 62] below).

RESPONSES TO SPECIFIC QUESTIONS

Part 1: General questions for all respondents

Would the scope of schemes to which the new code applies be clearer if the code was retitled to, for example, 'Code of practice 13: Governance and administration of occupational trust-based pension schemes offering money purchase benefits'?

☐ Yes ☒ No

Please give your reasons

6. We consider that changing the name would not add anything, given the introduction to the Code clearly sets out the scope of the Code.

In your view, are there any areas where you believe the new code appears to set standards that are inappropriate?

☒ Yes ☐ No

Please give your reasons

7. The Code (at paragraph 112) expects trustees to communicate to members and employers in relation to the security and liquidity of assets. We acknowledge that members have a fundamental right to understand how their DC assets are protected, but it is a complex area, and we question the benefit of requiring this communication, which in some circumstances will be very difficult due to the complexity of the issues (eg where there is an underpin – see the *Bridge* case), and we fear such communication is likely to create confusion. We think there are better ways of improving transparency, and that tPR should establish an industrywide WP to work through the issues and establish the best way of improving transparency in this area.
8. We note that the regularity of this communication is also unclear, and would need to be dealt with in the underlying guidance. For instance, is such communication to be regular/periodic, for instance each time an assessment is carried out by the trustees, or when investments or IMs are changed? Or does this just need to be communicated once (for instance, included within a member's joining information)?
9. In the context of the security and liquidity of investments which are pooled investment vehicles, we draw to your attention that the pension SORP issued in November 2014 recommends that pension scheme financial statements disclose the type of pooled arrangement and the trustees' approach to managing and monitoring the associated direct credit risk (paragraph 3.16.7). Direct risk arises where the pooled investment vehicle is not exchange traded and hence there is an exposure to the pooled manager failing to discharge their obligations to the scheme.

Do you consider that any important areas have been missed in the new code?

☒ Yes ☐ No

Please give your reasons

10. Ear marked schemes are not mentioned, and we would welcome clarification of how the Code applies to them.

Please consider the following:

Do you have any comment on whether or not this language is sufficiently clear and unambiguous?

11. We note that the Code is intended to set out the legal 'requirements' and tPR's 'expectations'. However, in some places the words "must" (eg see Code paragraph 49), "should" (eg see Code paragraph 20) and "need" (eg see Code paragraph 64) appear, and these should be removed and replaced with a clear indication of whether they are legal requirements or tPR expectations.

Are there any instances where you believe the language used is not appropriate? If so, which standards are you referring to and what is the issue?

12. We note paragraphs 118 and 158 of the Code include the term "contemporaneously", which we do not think is consistent with tPR's objectives of being clear and simple.

Part 2: Optional questions on specific areas

The trustee board

Does this text make clear the regulator's expectations in relation to the fit and proper requirement on trustees?

☐ Yes ☒ No

Please give your reasons

13. We consider it is inappropriate for tPR expectations around DC trustees to not be in line with those for DB trustees. In our view, there should be a level playing field across DB and DC schemes, with trustee boards being considered holistically rather than carving out DC boards in this Code, and we would recommend tPR considers other guidance on trustee board governance such as that issued by the Charity Commission. tPR should also link their requirements to the outcome of their 21st Century Trustee initiative to ensure there is consistency.
14. Looking at the proposed requirements in the Code, it is not clear that compliance with tPR's expectations set out paragraph 20 would render the trustee fit and proper in eyes of tPR. This needs to be clarified by including a more explicit statement regarding the link between tPRs expectations as set out in that paragraph and the legal requirement to be fit and proper.
15. We also have some more general concerns about this section on the trustee board. We acknowledge that tPR is trying to drive up standards of professionalism and competency among trustees, so that boards are not adviser-lead but can robustly challenge their advisers. However, this whole section is loosely constructed and very judgemental, with no objective benchmarks and no formal assessment by tPR. It is not clear to us how one would assess a candidate's ability to acquire knowledge as part of the recruitment process. We assume the supporting guidance will provide more information on what tPR expects in this area, eg the extent to which this would be a matter of self-certification, versus obtaining DBS (CRB) checks, employer references, character references etc. The Code states that tPR expects professional trustees to be 'financially sound', but this term is not defined. Also, in relation to MNTs etc, introducing these standards is likely to make it difficult to maintain current board composition, and more clarity is needed regarding how these expectations should be met when such trustees are selected via an election process.
16. We note paragraph 21 provides that trustees should be re-assessed 'regularly', and we consider this should be explained/amplified in the supporting guidance.
17. The Code is also silent with regard to incumbent trustees, at what stage should those already in office be assessed in line with tPR's expectations as set out in the Code?

[Chair of trustees]

Are these standards clearly defined?

☐ Yes ☒ No

Please give your reasons

18. Please see our comments at paragraphs [13 to 17] above, which also apply to appointing the chairman. There are also some additional issues regarding appointment of the chair; for instance, there could be complications arising if it is a corporate appointment and these need to be considered/addressed in the Code or supporting guidance. And who would be expected to carry out the assessment of the chairman (the trustee board of smaller schemes is very unlikely to want to do this, so there is an argument for this to be dependent on scheme size or

risk based, with tPR's expectations being proportionate to the size of scheme). We also note there is no mention of how often the chair is to be re-assessed. This is an area fraught with difficulty, so the supporting guidance will need to be good.

Do you believe the new code should reference any other key qualities of a chair?

☒ Yes ☐ No

If 'Yes', please explain what other qualities should be referenced, and why.

19. The chair of trustees should be well equipped to respond to changes, for example, in the demographic of scheme and therefore the Code should include a reference to the chair demonstrating a willingness to adapt to change. This is particularly important in the evolving pensions market as schemes will not benefit from having a Chairman set in their ways being a barrier for driving standards and outcomes forward.

Are these the right areas to be covered in guidance?

20. Subject to our general comments about moving some of the current detail into the supporting guidance, these areas seem sensible.

Are there any additional areas the regulator should consider covering?

21. See above.

Are there specific issues related to any of these areas that are particularly challenging?

22. See above.

Scheme management skills

Do the regulator's standards in this area articulate clearly what trustee boards need to do in order to demonstrate how their scheme has met the trustee knowledge and understanding requirements?

☐ Yes ☒ No

Please give your reasons

23. See our earlier/general comments; the Code contains too much detail which should be moved to the supporting guidance.

[Relationship with service providers and advisers]

Are these standards clearly defined?

☐ Yes ☒ No

Please give your reasons

24. We think the Code (and supporting guidance) should deal with the situation where service provider appointments are put out to tender (the Code is currently silent on this).

Do they address the key risks in relation to a trustee board's delegation of certain tasks to service providers, including the risk that the services are not providing value for members?

☐ Yes ☒ No

Please give your reasons

25. The Code attempts to set out some guiding principles on value for members, competitive pricing etc, but it is very long and we consider it should be more principles-based (with much of the detail moved to supporting guidance).

Do the standards make clear the regulator's expectations in respect of the relationship between trustees and employers?

☐ Yes ☒ No

Please give your reasons

26. We consider that paragraph 63 should require trustees to monitor the receipt and accuracy of contributions (in addition to their timeliness), with a cross reference to the requirements of *Code of practice 5: Reporting late payment of contributions to occupational pension schemes* (rather than imposing any additional requirements), and that payroll in general should be highlighted in this employer section of the Code (to be amplified in supporting guidance) as it is such an important aspect to get right as the implications for payroll inaccuracies in DC arrangements is so significant.
27. tPR should also add reference to the legal position *vis-a vis* information sharing duties/rights between trustees and employers, ie the employer is legally obliged to share information with the trustees (under Regulation 6(1) of the Occupational Pension Schemes (Scheme Administration) Regulations 1996, which imposes a duty on the employer and its auditor or actuary to provide trustees, on request, such information as the trustees or their professional advisers reasonably require for the performance of their duties. This legislation also requires the employer to make the trustees aware, within one month of its occurrence, of any *event* that could be reasonably considered to be of material significance to the trustees or their professional advisers in the exercise of their functions), and this should be mentioned in the Code as it helps set out the balance of power.

Are these the right areas to be covered in guidance?

28. Subject to our general comments about moving some of the current detail into the supporting guidance, these areas seem sensible.

Are there any additional areas the regulator should consider covering?

29. See above.

Are there specific issues related to any of these areas that are particularly challenging?

30. See above.

Administration

Do the standards address the key risks around scheme administration?

☐ Yes ☒ No

Please give your reasons

31. We note that tPR expects in all cases that “*contributions to the scheme, including sums transferred into the scheme, are invested within a maximum of three working days following receipt of the contributions and completion of a reconciliation exercise*” (paragraph 80), but there is no time limit expressed for when reconciliation should take place (para 87 simply says this should be done ‘promptly’). We consider it would be better to include an ‘end-to-end’ time limit from a member perspective, giving an overall time limit for all the processes that need to take place from deduction of contributions to them being allocated to a members account.

Otherwise, in circumstances where there is a legitimate reason why contributions are not investible, we fear the proposed wording could lead to unintended consequences eg deferral of reconciliation, or of payments over from payroll (which can retain contributions for up to 19 days). An example of uninvestible contributions would be that some providers refuse to hold unallocated money so, in the case of new joiner contributions where the joiner information has yet to be processed, the trustees may be unable to invest those contributions within the proposed 3 working day period.

32. There is also no reference to switching in the administration section. We consider that the Code should contain some high level expectations regarding switching, with the detail in the supporting guidance.
33. As a general comment on this section (in particular, the paragraphs describing what prompt means), there is too much detail on some aspects, much of which could sit within the supporting guidance. This should allow a more even distribution of the detail, as the Code currently is uneven/selective in providing more detail on what tPR expects in relation to promptness.

In meeting the standards, will trustee boards improve the quality of the administration service used by their scheme and increase the likelihood that it will deliver value for members, whether that service is in-house or outsourced?

☐ Yes ☒ No

Please give your reasons

34. See our comments at paragraphs [31 to 33] above.

[Core financial transactions - promptness, paras 75 to 81]
Are these standards clearly defined?

☐ Yes ☒ No

Please give your reasons

35. Please see our comments at paragraph [31] above regarding the 3 working day timescale specified in paragraph 80.
36. We also note that the consultation states that tPR “*have deliberately not provided prescribed timeframes for what is considered ‘prompt’ in the new code*”, which is misleading as paragraph 80 sets out the 3 working day timescale.

Are you aware of any barriers that exist in relation to meeting the standards?

37. Given the technology and automation that is now available, these standards should be achievable. However, barriers do exist eg relating to costs and capabilities, albeit these are probably not insurmountable. For instance, the willingness of service providers to update their systems will have cost implications for schemes. In this respect, proportionality is also likely to be a compounding factor for smaller schemes because, if service providers pass the costs down to members, then this could conflict with delivering value for members.

Are these the right areas to be covered in guidance?

38. Subject to our general comments about moving some of the current detail into the supporting guidance, these areas seem sensible.

Are there any additional areas the regulator should consider covering?

39. See above.

Are there specific issues related to any of these areas that are particularly challenging?

40. See above.

Investment governance

Is this standard clearly defined?

☐ Yes ☒ No

Please give your reasons

41. In our experience, most schemes now invest in pooled vehicles and we therefore think the requirement for investments to be predominantly in listed securities (as mentioned at paragraph 111) needs to be elaborated in the supporting guidance, especially given there is as yet no caselaw on this point.
42. Please also see our general comments above regarding the balance between overall principles (which should be included in the Code) and detailed guidance (which should be contained in the supporting guidance).

Are you aware of any barriers that exist in relation to meeting this standard?

43. Yes, the cost of communicating to members and employers in relation to the security and liquidity of assets, the benefit of which we question - see our comments on paragraph 112 at paragraph [7] *et seq* above.
44. Also, the opacity of investment arrangements, for instance it will not always be clear whether they are covered by FSCS and what protections are in place.

Does this standard convey clearly the regulator's intention that trustees should focus on ensuring they have an understanding of the overall security of scheme assets and on communicating that broad view to members?

☐ Yes ☒ No

Please give your reasons

45. Please see our comments at para [7] *et seq* above regarding the expectation that trustees will communicate to members and employers in relation to the security and liquidity of assets.

Do you agree with the regulator's approach to this issue?

☐ Yes ☒ No

Please give your reasons

46. The circumstances covered in paragraph 115 of the Code give rise to legal issues (and will, for example depend on the contents of the trust deed and rules) and in our view the Code and supporting guidance need to provide clearer guidance in relation to whether trustees MUST monitor the allocation of membership investment allocations after 6 April 2015 when they don't meet the 80% pre 6 April 2015. For example if member switches occur after the 6 April 2015 that subsequently result in the 80% test being met. The Code and supporting guidance also need to be consistent with the DWP guidance in particular see page 13:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420215/charge-cap-guidance-apr-2015.pdf

Taking this section in the new code as a whole, do you believe the regulator has articulated clearly the additional legal requirements that relate to default arrangements?

☐ Yes ☒ No

Please give your reasons

47. We question tPR's interpretation of the law in paragraph 115, because it is not clearly articulated (see our comments at paragraph [46] above) and we believe this is something tPR needs to discuss with the legal profession, eg the APL.

Are these the right areas to be covered in guidance?

48. Subject to our general comments about moving some of the current detail into the supporting guidance, these areas seem sensible.

Are there any additional areas the regulator should consider covering?

49. See above.

Are there specific issues related to any of these areas that are particularly challenging?

50. See above.

Value for members

Do you agree with this view?

☐ Yes ☒ No

Please give your reasons

51. This is a difficult area and tPR's expectations need to be proportionate and in line with FCA guidance for IGCs. The whole concept of 'benchmarking' in this area is misleading and misguided. Different benefit structures cannot be compared in the market. Care needs to be taken to avoid unintended consequences, for instance some (smaller) schemes may use TPA templates but a boiler plate approach is not appropriate as there is a need to take account of the demographic of the particular scheme, or of the relevant sector (eg ethical investments may be more significant in the charities sector, rather than a focus on costs).

Is our approach articulated clearly?

☐ Yes ☒ No

Please give your reasons

52. Paragraphs 119 and 120 of the Code appear to be contradictory and thus sending out a mixed message. Paragraph 119 suggests trustees consider charges and transaction costs 'when compared to options available in the market' (ie a more objective test), whereas paragraph 120 implies that it is not possible to carry out any meaningful benchmarking/market comparisons between schemes due to differences in demographics etc, and that trustees should consider value by reference to how their own scheme members would consider represented value (ie a more subjective test). The Code and Guidance should set out tPR's expectations as to whether trustees should take an objective or subjective approach to assessing value for members and if it is to be a mix then explain the rationale and make it clear which approach relates to the areas covered by the assessment.

Do you agree with the regulator's approach to how employer cost absorption should be viewed in the context of the legal requirements relating to VFM?

☐ Yes ☒ No

Please give your reasons

53. At paragraph 125 of the Code, we do not agree that the trustees should consider only the value of services for which members bear the cost (ie trustees should also consider the value of services funded by the employer).

Are these the right areas to be covered in guidance?

54. The two most important areas that influence value for members (from a DC member's perspective) are the amount of contributions being paid in and how good is the investment return (when compared with the market), so these aspects should be included in the supporting guidance.

55. We also query how the proposed list of supporting guidance links back to the four key areas that tPR expects boards to consider when assessing VFM identified in paragraph 120 of the Code, and this should be clarified. For instance, on 'VFM in decumulation', it is unclear whether this is intended to cover what the scheme offers (ie the products available to members) or how decumulation is administered.

56. The supporting guidance on value for members will need to be meaningful and set out very clearly what tPR expects.

Are there any additional areas the regulator should consider covering?

57. See above.

Are there specific issues related to any of these areas that are particularly challenging?

58. See above.

Communicating and reporting

Does this text make clear the regulator's expectations regarding trustee boards' responsibilities in this area (subject to the government's consultation on retirement risk warnings as referenced on pages 14-15)?

☐ Yes ☐ No

Please give your reasons

59. No comments.

[Chairman's statement]

Are these standards clearly defined?

☐ Yes ☒ No

Please give your reasons

60. If there is to be consistency and comparability with these chairman statements, TPR needs to be clear about the scope and depth of detail they are expecting from these statements, either

in the Code or in the supporting guidance, to avoid them either being too high level or too overwhelming in detail.

61. We also have some queries regarding the formalities that tPR expects around preparing the annual chair's statement. We note that Regulation 23 of the Scheme Administration Regulations 1996 contains the requirement for a chairman's statement on governance to be **prepared** within seven months of the end of each scheme year (and the penalty in relation to the preparation of this statement is set out in Regulation 28 of the Charges and Governance Regulations; failure to comply means that tPR *must* issue a penalty notice to the trustees or managers, ie this is a strict liability offence, and the penalty is issued regardless of the intentions of the trustees or mitigating factors as to why the statement was not prepared). This is distinct from the obligation to **publish** the chairman's statement in the annual report, as required by paragraph 34 (Part 5) of Schedule 3 of the Disclosure of Information Regulations 2013 (and where trustees have failed to comply with this requirement, this would be governed by the civil penalties set out in Regulation 5 of the Disclosure Regulations, where tPR has a discretion to require a person to pay a penalty).
62. Our concern here is that there can be circumstances where the financial statements are delayed for reasons unconnected with the preparation of the chairman's statement, meaning they are not published within 7 months. In these circumstances, there is likely to be a breach of the requirement to publish the chairman's statement, but it may be unclear whether the duty to prepare and sign the statement has been breached. tPR needs to clarify (in the supporting guidance) practically what needs to happen to show that the statement has been prepared and signed. Typically these statements are only dated on the same day as the accounts have been prepared, so what mechanism should be in place to ensure that the statement has been prepared other than ticking an annual return that says you have done so (eg in circumstances where the accounts are delayed)? Would tPR expect the Trustees to have a board minute confirming that the statement had been reviewed, approved and signed? And is there a reliance on auditors to whistleblow if the statement does not appear to have been prepared and signed within the seven month deadline? We would welcome clarification of tPR's expectations for whistleblowing by auditors in respect of any aspect of the timeliness, completeness, accuracy or quality of the Governance statement, especially given we understand tPR will not be reviewing these statements and therefore the auditor will in many cases be the only independent entity that is required to read these statements – we are happy to meet with tPR to discuss this.

Are these the right areas to be covered in guidance?

63. See our comments above and below.

Are there any additional areas the regulator should consider covering?

64. Yes. In addition to our request above for guidance on the formalities that tPR expects around preparing the annual chair's statement (ie in addition to the proposed guidance on principles for completing the statement), we think guidance is needed in relation to:
- 64.1. how trustees should communicate charges and transaction costs, because (if the charge is simply stated as a %) many members would not understand what this means, so should illustrations be provided by the trustees to explain to members what the charges actually mean in practice;
 - 64.2. how trustees should communicate to members regarding the security of member funds, once an industrywide WP has established the best way of improving transparency in this area (see paragraphs [7 *et seq*] above);
 - 64.3. how trustees should communicate to members in circumstances where they identify that an investment arrangement satisfies the default arrangement descriptions set out in the

legislation and thus have triggered a requirement to communicate to members (see also paragraph [46] above); and

64.4. how trustees should communicate to members regarding 'how to spot a scam' (see paragraph 154 of the draft Code).

Are there specific issues related to any of these areas that are particularly challenging?

65. See our comments above.

Further comments

66. See our general comments at paragraphs [1 to 5] above.