



ICAEW REPRESENTATION 63/15

Renumbered ICAEW Representation 162/15

Changes to the Law on Investments in Occupational Pension Schemes

ICAEW welcomes the opportunity to comment on the *Changes to the Law on Investments in Occupational Pension Schemes* published by Department for Work and Pensions on 27 February 2015, a copy of which is available from this [link](#).

This ICAEW response of April 2015 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. The ICAEW notes with respect that the Law Commission July 2014 Report¹ recommended the Government review whether trustees should be required to state their policy (if any) on stewardship. In our view, the Department is best placed to consider, as part of that review, the desirability or otherwise of imposing greater regulation on pension scheme trustees compared to the possible alternatives, including guidance from the Pensions Regulator, which we note was also recommended by the Law Commission. In our view, a persuasive case for imposing a new legislative duty on trustees of all schemes has not been made out and the desirable outcomes which the Law Commission has identified could instead be achieved by regulatory guidance.
2. In particular, we note that larger schemes have a strong track record of high standards of governance which include following regulatory guidance and in some cases implementing even higher standards than recommended by the Regulator. The Department will have better statistics than we have on how many schemes would fall into the "larger" category but, in the context of stewardship, the relevant metric is the value of assets under management in such schemes and we would expect a definition of "larger schemes" to mean this would exceed 90% of the assets in all UK pension schemes.
3. It is also our view anecdotally that for the smaller schemes (ie those not in that 90% by value of assets) many would aim to comply with any legal duty to state their policy on stewardship by producing a form of words drafted by advisers explaining why they did not have a policy on stewardship because, for instance, they were considered to be such an unimportant investor for the purposes of the investee company that they were unable to influence stewardship. In other words the new duty would produce "boiler plate" disclosures at additional external professional cost but no meaningful change in behaviour. In that context we consider it will be more appropriate for the stewardship obligation to be met by a statement of policy produced by the investment managers for such schemes rather than the trustees.
4. The Law Commission's proposed duty is phrased as compulsory: "require trustees to state their policy", and the DWP's proposal would be to amend the Investment Regulations to "require trustees to comply with the ... Stewardship Code or explain why they have not done so". Considering that the Stewardship Code is implemented on a comply or explain basis, it is not at all clear what the implication would be of failure to discharge this obligation, which was a fundamental principle advocated by the Goode Report. It may be that the Regulation intends to "expect/encourage trustees to apply ... the Stewardship Code..." Without this point being clarified, we are unable to comment further on this. In principle, we would not support imposing a penalty on trustees and consider that a regulation which did so would be an unnecessary burden on trustees.
5. Taking our above points in the round, we would recommend that:
 - 5.1. regulatory guidance is issued by the Regulator to encourage schemes above a certain size to have such a policy and remind them that if they do have such a policy there is a requirement to include it in their statement of investment principles, and
 - 5.2. at most the investment regulations are amended to provide that *if* trustees of larger schemes have a policy by reference to the Stewardship Code then it should be included in their statement of investment principles, but this should be optional for smaller schemes, rather than having a mandatory amendment to the statement of investment principles for all schemes requiring them either to comply with the Stewardship Code or explain why they have not done so.

This would mean that the largest and best run schemes with the most assets under management will pay attention to this duty, will consider their stewardship obligations and will

¹ http://lawcommission.justice.gov.uk/publications/fiduciary_duties.htm

engage with their investment managers regarding them taking appropriate advice. The smaller schemes for whom, this is unlikely to have any effect on behaviour in terms of the impact it would have on investee companies would be able to continue as at present without an unnecessary burden of regulation being imposed upon them while they should be aware of their fiduciary duty.