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21st Century Trusteeship
Investments and the Legal Framework

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The Pensions Regulator's 21st Century Trusteeship campaign

- Aim to "***stimulate a dialogue about how government, regulatory bodies and the pensions industry can raise standards of trustee competence and improve the governance and administration of pension schemes***".
- Areas of focus and guidance: ▪ Good governance ▪ Clear roles and responsibilities ▪ Clear purpose and strategy ▪ Skills and experience ▪ Advisers and service providers ▪ Managing risk ▪ Managing conflicts of interest

Trustees' investment duties– the old and new..

Trustees' investment duties:

- Pension trustees must take such care as an ordinary prudent person would take if he invested "*for the benefit of other people for whom he felt morally bound to provide":* **Re Whitely (1886)**
- Legal duties from Scheme Rules; Pensions Act 1995; Occupational Pension Schemes (Investment) Regulations 2005; FMSA 2000; Regulator guidance
- Duty to invest in a member's best financial interests – **Cowan v Scargill (1984)** - Trustees may not therefore put their own (or members') ethical or social concerns above their duty to obtain the best financial return for the members, *or can they…?*

Other recent developments:

CMA review (July 2018): report on investment consultancy / fiduciary management services: Concerns in the fiduciary management sector- recommendations: mandatory tendering for first supply of fiduciary management services; development of cross-selling warnings and greater FCA / TPR oversight

Consultation on clarifying and strengthening trustees' investment duties (June 2018): Government consulting on changes to regulations governing investment and disclosure of information by trustees to reflect environmental, social and governance (ESG) and stewardship concerns.

Key investment actions for a 21st Century Trustee

Investment governance:

Trustees to:

- establish investment sub-committees (both DB and DC) with clear and up to date terms of reference;
- monitor investment activity regularly and keep trustee training up to date;
- work collaboratively with investment advisers and scrutinise advice;
- establish and maintain systems to identify investment risks (including ESG risks); and
- monitor investment advisers and managers and consider conflicts of interest (e.g. fiduciary management).

Investment decisions and records:

- respond promptly to investment advice;
- prepare a clear record of investment decision-making; and
- update SIP regularly – NB: From 2019: Likely that SIPs will have to state policy on "*financially material considerations*" (including climate change) and state extent to which trustees have taken members' views about financial and non-financial matters into account.