



ASSOCIATION OF PENSION LAWYERS

Eve Engledow  
FSMA secondary legislation consultation responses  
Financial Stability and Regulatory Policy Team  
Room 4/23  
HM Treasury  
1 Horse Guards Road  
London SW1A 2HQ

JB/JAB      Our Ref  
Your Ref

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twoyearreview@hm-treasury.x.gsi.gov.uk

Dear Ms Engledow

**FINANCIAL SERVICES AND MARKETS ACT two year review: Changes to secondary legislation**

I am writing on behalf of the Association of Pension Lawyers (the "APL") which is an association established and run by lawyers specialising in pensions in the UK who advise trustees, employers and product providers. The APL currently has a membership of more than 700.

My colleagues and I on the Investment Committee of the APL have been reviewing the Treasury proposals. Our response in this letter is limited to the questions raised for consultation in Chapters 7 and 8 of Volume 1: Proposals for change. (A colleague of mine on the Committee will be responding separately to the questions raised in Chapter 4.)

**Chapter 7: Investment by Occupational Pension Scheme Trustees**

**Q32: Do you agree that the expression "routine or day to day decisions" should be replaced with "day to day decisions" so as to increase the scope of decisions which unauthorised trustees are permitted to take?**

We agree.

We think that the Treasury could usefully go further. The words "are taken on his behalf" in Article 4(1)(b) of the Business Order suggest that all decisions are delegated and taken on behalf of pension scheme trustees. This is not the case. Where the Scheme investment is made through a pooled vehicle eg an insurance policy unit trust or OEIC, the decisions by the managers are not, technically speaking, made *on behalf of* the trustee. In the case of an insurance company, for example, the pooled assets are owned beneficially by the insurance company. There may, in consequence, be no day to day decisions relating to scheme assets.

Please reply to  
Jonathan Berman  
Sacker & Partners  
29 Ludgate Hill  
London  
EC4M 7NX

222719



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To address these concerns, Article 4(1)(b) could be amended as follows:

“(b) any day to day decisions in the carrying on of that activity (other than decisions falling within paragraph (6)), so far as relating to relevant assets, are taken by – “

**Q33: Do you agree that the scope of products in which unauthorised trustees are permitted to invest should include pooled investment vehicles and contracts of insurance?**

We agree.

**Article 4(6)(a) of the Business Order (as amended by Article 2(4) of the draft Statutory Instrument)**

The definition of pooled investment vehicles in Article 4(6)(a) of the Business Order (as proposed to be amended) may not, however, be wide enough to capture all forms of pooled vehicle in which pension scheme trustees may wish to invest. The wording which is most problematic is sub-paragraph (ii) which refers to “a body corporate”. Various *contractually* based vehicles such as fond commune de placement (FCPs) or Dublin-based common contractual funds may not be covered.

There may also be difficulty in the wording in sub-paragraph (ii) “the aim of spreading investment risk”. Spreading investment risk is not defined, and may rule out certain pooled hedge fund investment.

While not attempting to redraft the intended amendments to the Business Order, it may be easier to adopt more general wording after sub-paragraph (i) along the lines “any other scheme or arrangement for pooled investment”.

**Article 4(6)(d) of the Business Order (as amended by Article 2(8) of the draft Statutory Instrument)**

We would like to comment on some drafting difficulties in Article 2(8) of the draft Statutory Instrument which amends Article 4(6)(d) of the Business Order.

- (i) The first difficulty is that the cross-reference to sub-paragraph (a) (as amended) is not technically correct. It is the *underlying* assets of the vehicle to which the requirement for an authorised, exempt or overseas person may apply.
- (ii) A second difficulty is that some pooled investment vehicles may have as their investments assets which do not require to be managed by an authorised, exempt or overseas person, for example, real property.

It may be easier to cross-refer to the vehicles referred to in paragraph (a) whose assets comprise or include securities or contractually based investments. Alternatively, there could be an exclusion in relation to investments where fund managers may take decisions without contravening the prohibition imposed by section 19 of FSMA (prohibition on carrying on regulated activities unless authorised or exempt).



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**Q34: Do you agree that the condition under which unauthorised trustees can invest in certain products should be relaxed so that they only have to obtain and consider independent advice rather than act in accordance with it?**

We agree with the change to require the obtaining and consideration of advice rather than the current requirement of acting in accordance with advice.

We do not agree, however, with the new (and more stringent) requirement that the advice should be independent. Pension scheme trustees are already subject to the provisions of Sections 36(3) and (4) of the Pensions Act 1995. We would prefer the independence of the advice to be a regulatory issue for the provider rather than a legal requirement applicable to the customer. This approach would also be more consistent with the declared rationale of the two year review.

**Q35: Do you agree that the condition under which unauthorised trustees can invest in certain products should be relaxed so that advice can also be given by professional firms operating under Part XX of FSMA?**

We agree.

**Q36: Do you agree with the rationale for our proposals for deregulating trustees' investment activities?**

We support the approach although we would prefer the Treasury to go further in removing pension scheme trustees from FSMA regulation.

It may be that the Treasury, in consultation with the FSA, could see how the proposed changes work out in practice over the next two year period. This period will coincide with the implementation of the Pensions Bill with the higher requirements imposed on trustees.

It may be that Article 4 of the Business Order which applies a different business test for managing assets of a pension scheme could then be revoked placing pension scheme trustees on a similar FSMA footing to other trustees, recognising that they are adequately regulated through separate pensions legislation.

**Q37: Do you agree that the scope of exempt products should be limited to pooled investment vehicles or contracts of insurance and not include individual quoted securities or derivatives?**

Please see our response to question 36.

As stated, it may be that Article 4 of the Business Order could be revoked leaving trustees of an occupational pension scheme in the same position as other trustees, albeit subject to pensions legislation.

## **Chapter 8: Changes to the Regulated Activities Order**

**Q.38 What are your views on the three changes proposed to the Regulated Activities Order? We seek, in particular, views on the question of theatrical debentures.**



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We limit our response to comments on the drafting of Article 41A.

**Article 41 A of the Regulated Activities Order (as amended by Article 3 of the draft statutory instrument).**

There is a drafting difficulty in the definition of “relevant person” in so far as sub-custodians are not usually authorised persons. Although the sub-custodians are normally appointed by the main custodian, there may be cases where trustees directly appoint sub-custodians in other jurisdictions. It would be helpful if the provision could be amended to cover this situation.

Yours sincerely

**Jonathan Berman**  
**For APL Investment Committee**