

Comments on OECD Guidelines for Pension Fund Governance

Submitted by the Network for Sustainable Financial Markets

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Introduction

This paper is being submitted by participants in the Network for Sustainable Financial Markets (“NSFM”) in response to the OECD Working Party on Private Pensions’ public consultation on its draft Guidelines for Pension Fund Governance. The NSFM is an international, non-partisan network of finance sector professionals, academics and others who are dedicated to improving financial market integrity, efficiency and sustainability.¹

We believe that the OECD's efforts to develop pension fund governance guidelines are timely and will help pension fund fiduciaries, regulators and supervisory authorities. We particularly applaud the guidelines' emphasis on identification of separate operational and oversight responsibilities; establishment of governing body suitability standards; use of non-conflicted expert advice; adoption of risk-based performance and assessment standards; disclosure and monitoring of conflicts; improved reporting; and requirements for review by actuaries and external auditors.

However, we encourage the OECD to also examine the role that pension funds played in fostering a market environment that produced the current economic crisis. The guidelines should also address related governance issues, including those highlighted in our comments.

Good Governance Improves Performance

The OECD Working Paper by Fiona Stewart and Juan Yermo on “*Pension Fund Governance: Challenges and Potential Solutions*,” provides important background for the guidelines.² Stewart and Yermo cite several studies which show that ineffective pension fund governance is a global phenomenon. They also discuss research which has established that good pension fund governance lowers costs and improves investment performance, generating at least one to two percent of additional return per annum.

The paper cites Ambachtsheer and others for having identified key pension fund governance weaknesses. Those inadequacies include poor selection and training of governing board members, lack of mission clarity, ambiguous division of responsibilities between boards and pension fund management, and non-competitive pension fund staff pay levels (which undermine the ability to recruit quality personnel). In addition, Slager and Koedijk highlight the implications of Ambachtsheer’s research regarding the central role that clear investment beliefs, properly

¹ Additional information about the NSFM is available at www.sustainablefinancialmarkets.net. These comments were developed by the NSFM Working Group on the Fiduciary Duties of Long-Term Investors. Working Group Coordinators are Keith L. Johnson (United States); Frank Jan de Graaf (the Netherlands); and Ann T. Byrne (Australia). Individual NSFM participants who endorse these comments are listed as signatories. Their participation in NSFM and endorsement of the comments is done as individuals and not in any representative capacity for an organization or institution.

² Stewart, F. and J. Yermo (2008), “*Pension Fund Governance: Challenges and Potential Solutions*,” OECD Working Papers on Insurance and Private Pensions, No. 18, available at <http://econpapers.repec.org/paper/oecdaf/ab/18-en.htm>.

defined investment policies and focused investment strategies play in effective pension fund governance.³

A recent study by Watson Wyatt (*Defining Moments: The pensions and investment industry of the future*) also reports some disconcerting trends.⁴ Pension fund investment management costs increased from 83 basis points in 2002 to 119 basis points in 2007, without a corresponding increase in aggregate pension fund investment performance.

A Watson Wyatt/Financial Times survey on forces shaping the future of pension funds (reported in the *Defining Moments* study) found that investment industry professionals are worried about underperformance of defined contribution schemes, the influence of undue short-termism, growth of regulation and over-complexity in investment products. The study's conclusion was prescient, given the subsequent market meltdown.

“The industry’s ‘incentive structure’ is flawed – the rewards and sanctions facing industry participants are not appropriate and so participants are incentivised to act in ways that will ensure the system remains prone to periodic crises.”

In this context, we suggest guideline modifications and the addition of targeted outcomes aimed at updating pension fund governance to handle twenty-first century economic system realities. We would also like to see the OECD incorporate action points in the guidelines, as part of a ten-year program to measure adoption and effectiveness.

We recognize that circumstances vary from one country to another. Pension fund governance is not a “one size fits all” matter. Nevertheless, we believe that most of the issues which fiduciaries face are similar across markets and that OECD guidance is merited.

Market Influence of Pension Funds

Our primary point is that the guidelines should recognize the influence pension funds now have on our financial markets (whether from pension fund action or inaction). The economic, social and environmental influence of pension fund asset management practices in the aggregate has drastically changed since the 1970s. Pension fund management decisions now affect more than just the fund's beneficiaries. This relatively recent (last 25 years) change in the size and influence of institutional investors sets the stage for our comments.

We also think the guidelines should recognize and specifically address the role that pension funds, as major market participants, played in facilitating creation of the sub-prime crisis. Adoption of better pension fund practices might have mitigated the market forces that fostered growth of short-term, pro-cyclical investment strategies; encouraged inappropriate compensation structures; and disregarded unmeasured risk exposures. The ramifications for beneficiaries are astounding and should be acknowledged.

In addition, national pension funds serve as an example and precedent for sovereign wealth funds. Many market regulators and policymakers have expressed concern about transparency and governance standards of sovereign wealth funds. It will be difficult for markets to seek application of governance standards to sovereign wealth funds if similar standards are not also applied to national pension funds. This is worthy of mention in the OECD report.

Comments

We believe the OECD guidelines could be improved through inclusion of several additional factors, incorporation of action plan recommendations and recognition of targeted outcomes. The

³ Slager, A. and K. Koedijk, "Investment Beliefs – Every Asset Manager Should Have Them," The Journal of Portfolio Management, Spring 2007.

⁴ Available at http://ehr.com/asia-pacific/news/pressreleases/news/Defining_Moments_final_AP.pdf.

undersigned NSFM participants submit the following suggestions with the hope that they will help to support this OECD initiative and strengthen the guidelines.

1. Market Influence and Outdated Fiduciary Interpretations:

Institutional investors have grown over the last several decades from insignificant players into market-controlling aggregations of capital. The Conference Board reports that institutional investor ownership of companies in the Fortune 1000 has increased to 76% of outstanding equity.⁵ This has become a global phenomenon. While the growth of institutional investor influence has major implications for the economy as a whole, it also presents largely-unrecognized ramifications for the interpretation of fiduciary duties.

In most jurisdictions, pension fund fiduciary duties are tied to practices used by similar institutional investors. This creates a circular feedback loop that encourages herding behavior, impedes adoption of improved practices and magnifies market volatility. The end result is exaggerated reaction to market cycles, destruction of economic value and increased investment risk.

Interpretations of fiduciary duty must recognize that herding behavior of a growing capital pool presents an additional risk for all pension fund investors. Prudent investment decisions should not require copycat strategies. Reference to practices used by other institutional investors should not be used as an excuse to engage in imprudent practices that do not serve the best long-term interests of fund participants. Without changes in how regulators and practitioners interpret the duty of care, current market realities turn the traditional understanding of fiduciary duty into a de facto "lemming standard."

In addition, there is a growing body of research in behavioral economics that is relevant to investment management practices. The impact of declining trust between market participants in the sub-prime crisis illustrates importance of non-financial considerations. We think it is time to clarify that the fiduciary duty to manage assets in the "best interests" of fund beneficiaries requires the evaluation of relevant intangible factors. Prudent pension fund risk management practices should reflect the current state of knowledge. We can no longer afford to ignore extra-financial concerns (e.g., regulatory changes, political trends, climate change, reputation risk, manager perception biases) that can affect investment returns, harm beneficiaries and present real risk exposures, merely because they have traditionally not been ascribed monetary or investment value.

Targeted Outcome: Modernized interpretation of fiduciary duty by regulators and legal advisors to reflect market realities, new risks and current research.

2. Rediscovery of the Fiduciary Duty of Impartiality

Research conducted by Graham, Harvey and Rajgopal (*Value Destruction and Financial Reporting Decisions*) found that pressure to deliver short-term investment results has become so strong that nearly 80% of corporate managers would sacrifice future economic value to manage short term earnings so as to meet investor expectations.⁶ Srinivasan, Mergenthaler and Rajgopal (*CEO and CFO Career Consequences to Missing Quarterly Earnings Benchmarks*) report that CEOs who fail to meet two quarterly analyst consensus forecasts in a year suffer a 24% lower equity and 14% lower bonus than CEOs who meet analysts' short-term expectations.⁷

The CFA Centre for Financial Market Integrity and Business Roundtable Institute for Corporate Ethics (*Breaking the Short-Term Cycle, July 2006*) conclude that "the obsession with short-term results by investors, asset management firms, and corporate managers

⁵ Brancato, C. and S. Rabimov, "The 2008 Institutional Investment Report: Trends in Institutional Investor Assets and Equity Ownership of U.S. Corporations," The Conference Board (September 2008).

⁶ The paper is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=871215.

⁷ The paper is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152421.

collectively leads to the unintended consequences of destroying long-term value, decreasing market efficiency, reducing investment returns, and impeding efforts to strengthen corporate governance.⁸ This comes as no surprise, given McKinsey estimates that up to 80% of a company's market value can be attributed to future cash flows, rather than current results.⁹

Our concern is that decisions to forego future wealth creation in order to generate current value intensify market cyclicality, increase investment risk and result in an asset transfer from younger (future interest holders) to older pension fund participants (current income recipients).¹⁰ It is a fundamental fiduciary duty that trust assets must be managed so as to not unreasonably favor one group of beneficiaries over another. (See Restatement of Trusts, Third, section 79.)¹¹

Current pension fund and investment industry practices that emphasize short-term investment strategies and fail to recognize associated long-term risks raise a red flag about compliance with the fiduciary duty of impartiality. This is a legal risk that has not been identified for most fiduciaries and should be highlighted by the OECD for regulators and pension fund legal advisors.

Risk exposures associated with exclusive use of a short-term investment horizon and short-term benchmarks, while managing liabilities that extend out over generations, should also be addressed. Climate risk,¹² under-funding risk, exposure to corporate governance risks at portfolio companies and future political or regulatory risk are examples of long-term threats to the best interests of younger fund participants that are regularly ignored by many fiduciaries. Extra-financial and other long-term risks should be highlighted in the guidelines as requiring measurement and management. The sub-prime crisis aptly illustrates the consequences of obsessing over short-term matters while not recognizing long-term risks.

This recommendation would bring the guidelines into alignment with other strands of OECD activity – notably, the OECD Principles of Corporate Governance¹³ and OECD Guidelines for Multinational Enterprises.¹⁴ We believe the key is to require that fiduciaries, as asset owners, exercise informed care when selecting, instructing, structuring compensation for, monitoring and overseeing their supply chain service providers, advisors and investment managers.

Targeted Outcome: Renewed attention to application of the fiduciary duty of impartiality by regulators, legal advisors and fiduciaries, resulting in widespread adoption of investment and risk management practices that proactively identify and explicitly balance short- and long-term considerations.

⁸ The report is available at <http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2006.n1.4194>.

⁹ Davis, Ian, "How to Escape the Short-Term Trap," The McKinsey Quarterly (April 2005).

¹⁰ In some situations, even current retirees who live long enough could bear the consequences of unbalanced short-term investing.

¹¹ The duty of impartiality is summarized in official comments to §79(1) of the Restatement of Trusts, Third, as follows: "In what might be called the 'substantive' aspects of impartiality . . . Subsection (1) directs trustees . . . to make diligent and good-faith efforts to identify, respect, and balance the various beneficial interests when carrying out the trustees' fiduciary responsibilities in managing, protecting, and distributing the trust estate, and in other administrative functions."

¹² Exposure to health risks and changes in the economy and in portfolio company business fundamentals due to future climate changes, increased levels of carbon dioxide in the atmosphere and related environmental, regulatory and social factors.

¹³ The Principles state "As companies play a pivotal role in our economies and we rely increasingly on private section institutions to manage personal savings and secure retirement incomes, good corporate governance is important to broad and growing segments of the population."

¹⁴ The Guidelines are designed "to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise."

3. Reporting on Pension Fund Board Suitability

The OECD proposed guidelines note that financial markets have become increasingly complex, and the process for selection and training of “fit for purpose” pension plan trustees has not kept pace. Indeed, it is hard to imagine how pension fund fiduciaries could be successful in today's markets without the right set of skills.

We encourage the OECD to underscore this problem by recommending adoption of trustee certification, education and ongoing training programs. “Fit for purpose” standards have been used in some markets, including Australia and the Netherlands, as a means to improve board capabilities.

Best Practice Principles developed by the Stanford Institutional Investors Forum Committee on Fund Governance,¹⁵ encourage fiduciary boards to conduct and publish an annual inventory of trustee skills and capabilities. The practice is not intended to result in concentration of investment professionals on boards. Rather, it recognizes that boards need trustees with a balanced set of skills, including representation of fund stakeholders.

We encourage the OECD to call for publication of an annual skills inventory and training plan to help pension funds adopt a “fit for purpose” approach to selection and education of trustees. The implications of failure to develop an appropriate mix of qualified trustees who receive ongoing training should raise red flags regarding compliance with fiduciary duty. Where fiduciaries are subject to overlying legal constraints on development of a “fit for purpose” board (e.g., due to creation of an inferior mix by law or by an appointing authority's actions), the guidelines should encourage the trustees to pursue modification of the constraints.¹⁶

Targeted Outcome: Widespread adoption of trustee training and certification programs, publication of “fit for purpose” reports and development of organizations to support professional development of fiduciaries; resulting in improvements in trustee skills, as well as in design, governance and risk-adjusted performance of pension funds.

4. Alignment of Interests and Investment Beliefs with Participant Interests

Lack of needed expertise at the fiduciary and pension fund staff levels has increasingly placed fund management at the mercy of agents and advisors to whom power has been delegated. Unfortunately, compensation of those agents is rarely aligned with the best interests of fund participants. As noted in the Watson Wyatt study mentioned above, costs associated with current practices have ballooned with no corresponding industry improvements in risk-adjusted results. A report issued last month in the United States by the National Institute on Retirement Security (*A Better Bang for the Buck: The Economic Efficiencies of DB Plans*)¹⁷ concluded that defined contribution plans in the United States cost almost twice as much as defined benefit plans to produce the same retirement benefit.

The draft guidelines note the importance of the alignment of compensation incentives with performance objectives as part of risk-based internal controls. However, we would like to see the OECD emphasize this by establishing a separate guideline that explicitly encourages development of compensation plans for agents to be aligned with investment beliefs and investment strategy.

Lack of alignment could result in investment decisions being made to serve the economic interests of portfolio managers or advisors rather than to serve the best interests of plan

¹⁵ Available at: http://www.law.stanford.edu/program/executive/programs/Clapman_Report-070316v6-Color.pdf.

¹⁶ The Stanford Best Practice Principles (cited above) recommend, “If a state constitution, statute or local ordinance prescribes trustee membership selection in a manner that could be inconsistent with the appropriate exercise of fiduciary responsibility on behalf of fund beneficiaries, then the trustees should seek legislative amendments as necessary to provide an appropriate governance and fiduciary structure.”

¹⁷ The report is available on the National Institute on Retirement Security website at <http://www.nirsonline.org/storage/nirs/documents/Bang%20for%20the%20Buck%20Report.pdf>.

participants. This could be highlighted in the guidelines as a fiduciary responsibility issue. For example, if a pension fund expresses investment beliefs that favor a long-term investment horizon but selects, evaluates and compensates its advisors and portfolio managers on short-term criteria, it should be required (at a minimum) to explain why. While there might be situations where it is appropriate, a “comply or explain” approach could help expose failures to manage assets in the best interests of beneficiaries.

Correspondingly, the importance of mission clarity and effective communication with fund participants about how investment strategies are designed to meet liability payment goals could also be emphasized in the guidelines. The Stanford Institutional Investors Forum Committee on Fund Governance Best Practice Principles, recommends publication of an annual report on how investment practices are designed to meet liability obligations, fit with investment beliefs and serve the best interests of beneficiaries. We would like to see this approach incorporated in the OECD guidelines.

The guidelines should also specifically address management of proxy voting and other shareholder rights.¹⁸ We believe that investors' failure to effectively engage with policymakers and companies on matters relating to the exercise of shareholder rights, exposure to corporate governance risks and creation of sustainable wealth helped enable the sub-prime crisis. Widespread free-riding and passive reliance on the actions of other investors will inevitably lead to recurring "tragedy of the commons" events like the current crisis. To counteract that, the guidelines should encourage collaboration on responsible investment issues.

Targeted Outcome: Better analysis of, reporting on, and alignment of investment beliefs, strategies, liability obligations, proxy votes and compensation incentives; development of more institutional investor collaboration.

5. Cost Efficiency, Fiduciary Duty and Access to Expertise

Small funds often lack the scale to function on a cost-effective basis in today's complex global markets. This is exacerbated by the tendency to delegate responsibilities to agents and the resulting capture of pension fund fiduciaries by those external experts. As a result, fiduciaries are seldom advised to consider options for plan design modification, collaboration or merger with similar funds to capture the benefits of increased cost-efficiency.

Development of in-house expertise or collaboration by a group of small pension funds to jointly acquire needed expertise would capture the benefits of greater scale that have been identified as associated with improved investment returns. Specification of fiduciary duties relating to collaboration and attention to cost efficiency should be included in the guidelines.

In addition, measurement of costs and expenses should include those that are hidden or bundled with other items. Service providers often attempt to obscure the amount of expenses incorporated in their offerings. The guidelines should require that costs be evaluated and reported on a total transparency basis, to encourage more accurate evaluation of cost efficiency. In a market environment where lower returns are anticipated, it is even more important to focus attention on management of costs.

Targeted Outcome: Improved cost reporting and in-house development of, or collaboration to acquire access to, advisory services and investment managers at lower cost; better identification, measurement and management of total cost structures on a net result basis.

6. Development of Alternative Plan Structures

Plan design issues have often been portrayed in extremes, with defined benefit and defined contribution plans seen as mutually exclusive alternatives, while other plan designs are rarely

¹⁸ The OECD Principles of Corporate Governance recognize the importance of proxy voting and shareholder participation in key corporate governance decisions such as nomination of director candidates and approval of equity executive compensation plans. See <http://www.oecd.org/dataoecd/32/18/31557724.pdf>.

considered. However, both options have advantages and disadvantages. For example, the Watson Wyatt/Financial Times survey cited above emphasizes the potential for risk of insufficient funding associated with some plan designs that provide portability. This could be one of the biggest problems faced by pension systems and deserves more attention in the guidelines.

The OECD could facilitate improved plan design by highlighting the need to clearly define allocation of risk between pension fund stakeholders, encourage consideration of hybrid structures and remove regulatory or legal obstacles to their use. For example, plans that combine portability with low-cost shared management and longevity risk sharing might provide advantages. Extension of fiduciary duty to explicitly include plan design and related risk management issues would also encourage pension funds to directly address these issues before it is too late.

Targeted Outcome: Greater use of hybrid plans that are specifically tailored to meet the future needs of beneficiaries.

7. Allocation of Greater Resources to Effective Governance

Improved pension fund governance, as outlined in the proposed guidelines and these comments, requires the allocation of greater resources (including trustee time) to implementation of best practices. The OECD guidelines should include a provision that requires fiduciaries to establish a written plan for governance improvements and to report annually on progress toward achieving best practices. Without attention brought to implementation, the OECD's recommendations will merely be put on the shelf.

Targeted Outcome: Publication of plans and annual reports showing movement toward best pension plan governance practices.

Recommended Action Plan

To encourage movement toward more efficient allocation of the capital held in retirement savings vehicles, we believe the OECD should identify specific actions that could be taken by regulators, fiduciaries and their advisors. For example:

- i. Regulators could be encouraged to clarify interpretations of fiduciary duty in regard to balancing short-term and long-term investment goals in the best interests of young and retired beneficiaries; confirm that herding behavior is not required in order to comply with fiduciary duties; and establish "comply or explain" standards designed to encourage better long-term risk management, reporting and alignment of interests. Regulators could also be encouraged to confirm that consideration of non-traditional risks (e.g., climate change) which have the real potential to cause discontinuous pricing shifts (i.e., endogenous risk) *requires* particular attention.
- ii. Pension funds could be required to make a clear statement about their investment beliefs, explain how they view their role in the financial markets and periodically report on how investment practices will meet liabilities. Investment beliefs have implications for governance of the organization, design of investment policies and how pension funds interact with other stakeholders in the financial markets. This should all be in line with the stated mission of the fund and the best interests of the beneficiaries.
- iii. Pension fund audits could include regular verification of controls relating to risk management and conflicts of interest, both regarding financial interests of named fiduciaries, alignment of agent compensation structures with beneficiary interests, and comprehensive risk evaluation and management practices.

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- iv. Regulators could establish certification standards and/or auditors could review compliance with industry “fit for purpose” criteria for pension fund boards and trustees.
 - v. Actuaries could be required to separately evaluate and report on intergenerational plan funding status from the standpoint of fund participants with 25, 15 and five years of service. This would encourage greater attention to the fiduciary duty of impartiality.
 - vi. Actuarial analyses of defined contribution plans could be required, to identify how well the plan is serving the interests of participants. Such reports would help discourage practices that result in under-funding relative to retirement needs.
 - vii. Additional interdisciplinary research could be funded to develop a better understanding of long-term risks associated with the investment of pension fund capital, identify criteria for determining risk-adjusted long-term health of pension plans, and ascertain the impact that pension fund investment practices have on both the economy and the future well-being of pension plan members.
 - viii. Tax policies applied to pension funds (and perhaps to their advisors) could be examined to identify tax law changes that would encourage better plan structures and investment practices. For example, fiduciaries could be encouraged to better align the interests of agents with the best interests of plan participants through differential tax rates on long-term incentive compensation. Tax structures could favor pension plan designs that address both portability and longevity risk goals.
 - ix. Regulators and pension fund organizations should be encouraged to sponsor fiduciary training programs that highlight the concepts contained in the OECD guidelines. Both could consider use of programs that expand the number of fiduciaries that are fit for purpose. Creation of professional support and training organizations for trustees in all markets should be an OECD goal.

Whether or not the OECD sees these particular examples as appropriate or achievable action points, we strongly recommend development and implementation of a long-term plan to encourage adoption of improved pension plan governance. Continued “business as usual,” with ever larger pools of pension fund capital being managed under misaligned and ineffective governance schemes, has major ramifications for future health of the global economy, environment and society. We believe that a comprehensive and proactive approach is required.

We would be glad to assist the OECD in further deliberations on pension fund governance matters.

Respectfully submitted,

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