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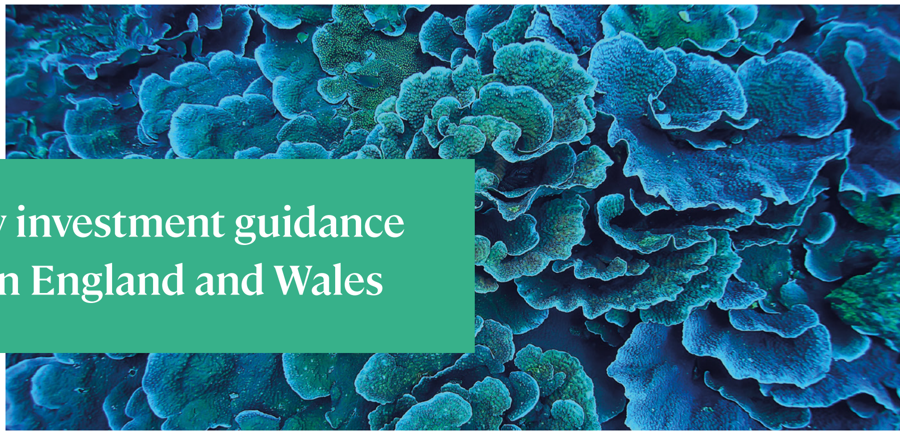

New charity investment guidance welcomed in England and Wales

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The long-awaited new trustee investment guidance, known as CC14, has now been published by the Charity Commission for England and Wales. This article provides an overview of its key elements. For those interested in the more detailed background to the new CC14, the Charity Commission has also published an accompanying Legal Underpinning document.

The new CC14 reflects the Butler-Sloss court case on climate-related screening of investments

In this case, the court approved the adoption of an investment policy by trustees of two charitable trusts which involved favouring investments aligned with the goals of the Paris Climate Agreement of 2016. The judge then went on to set out a summary of the law in England and Wales, which is the backdrop to the new CC14 guidance. To quote the opening section of the new guidance, "As trustees, your principal duty is to further your charity's purposes." The guidance goes on to illustrate five approaches which may be within the range of decisions that a reasonable trustee body could make about investments. The second to fifth of these include aiming for a financial return as well as:

- avoiding investments that directly conflict with a charity's purposes. Various examples are given eg. alcohol, tobacco or fossil fuels, depending on the nature of a charity's purposes.
- avoiding investments that could reduce support for a charity, where this might result in harm to a charity's reputation/fundraising efforts, particularly among its supporters or beneficiaries. The specific example is given of avoiding investment in fossil fuels, which a charity may do where trustees can show that this would be in the charity's best interests by avoiding damage to its reputation or fundraising. This is sometimes referred to as an "indirect" conflict with a charity's purposes.
- adopting negative or positive selection criteria which takes account of environmental, social and governance (ESG) factors;
- using shareholder votes to positively influence change.

The four approaches above are preceded by one which involves "aiming only for the best financial return you can achieve, within the level of risk that you have decided is acceptable for your charity." It would be wrong to assume that this first approach automatically means focussing on a financial return alone: it can be read as enabling the four approaches which follow it. That's because the guidance takes a holistic approach to examples of "risk", which is stated to include reputational risk, and the risk posed to the achievement of a charity's purposes from investments that conflict with them. Arguably then, the opening example could also incorporate any of the four which follow it.

Among the five examples, no single approach is favoured more than another: the balancing exercise is for trustees to weigh-up in each case, reflecting on what matters most in the context of a particular charity. It's also important to note that the list of five approaches is specifically said to be "non-exhaustive": other approaches may also be valid.

The word 'ethical' has disappeared from CC14

One of the biggest changes from the old CC14 is that you won't find the word 'ethical' in the new CC14. This welcome development reflects the renewed focus now placed on furthering a charity's purposes. As seen in the five approaches above, trustees can still apply screening to avoid certain investments if they have weighed-up matters relevant to a charity's circumstances, and decide to avoid investments that directly or indirectly conflict with a charity's purposes.

Other positive changes from the old CC14 include the revised section on reviewing and reporting on investments, which has been simplified. There is also an updated section on permanent endowment investing and total return, reflecting the latest total return regulations.

The attributes of good trustee decision-making have been placed front and centre

Above all, the emphasis in the new guidance is on the deliberations of trustees and the factors to consider (and disregard) when arriving at decisions. The seven bullet points listed under "Making decisions" are key here, placing investment decision-making within the broader context of how trustees should approach decisions more generally. This is helpful framing and represents a fundamental rethink from the problematic draft guidance which was open for consultation in 2021. In the opening sections of the final new guidance, the Charity Commission also reminds trustees that they must not allow personal motives, opinions or interests to affect the decisions made as trustees. It can often be the case that charity trustees find it hard to leave their personal views 'at the door', and this reminder is welcome.

There's positive news for UK cross-border charities

In 2018, the Scottish Charity Regulator (OSCR) published its investment guidance for trustees, which I was closely involved with. Many similarities now exist between the new CC14 and the guidance in Scotland, since the latter already took an enabling approach which placed investment decisions within the general context of charity trustee duties and good decision-making. The fact that CC14 is now framed along more similar lines to the OSCR guidance will be welcomed by trustees of UK cross-border charities. Notable points of difference will of course remain in areas where the law in England and Wales is quite different, for example on permanent endowments and the process for adopting a total return approach or making social investments.

Review your investment policy statement (IPS)

Trustees will want to review their IPS, to see if the rationale for their decisions has been recorded e.g. the reason(s) why certain investments are viewed as conflicting with a charity's purposes, or why ESG matters to a charity. This includes identifying reputational and other non-financial factors which have influenced investment decisions. As with a maths exam, showing your working in and of itself might count for more than the answer, since evidence of a good decision-making process is what will prove that trustees have acted appropriately, albeit there could be a range of reasonable outcomes.