



**ShareSoc**

UK Individual Shareholders Society

PO Box 62, Chislehurst, BR7 5YB

Phone: 020-8467-2686

Email: [info@sharesoc.org](mailto:info@sharesoc.org)

Web: [www.sharesoc.org](http://www.sharesoc.org)

Folarin Akinbami  
Law Commission  
52 Queen Anne's Gate  
London  
SW1H 9AG

Via Email: [fiduciary.duties@lawcommission.gsi.gov.uk](mailto:fiduciary.duties@lawcommission.gsi.gov.uk)

22 January 2014

## **Response to Consultation on Fiduciary Duties of Intermediaries**

Dear Sirs,

I refer to the above mentioned consultation. Here are our answers to the questions posed, submitted on behalf of our members (we have focussed our responses on the need to protect retail investors):

**Q1: Do consultees agree that this is a correct statement of the current law?**

**Answer:** To the best of our knowledge, it is a correct statement.

**Q2: Do consultees agree that the law reflects an appropriate understanding of beneficiaries' best interests?**

**Answer:** In general we agree. It is important that the financial objectives of a trust take priority over other influences or factors.

**Q3: Do consultees think that the law is sufficiently certain?**

**Answer:** In general it is but more clarity by regulation would certainly be helpful.

**Q4: Should the Occupational Pension Scheme (Investment) Regulations 2005 be extended to all trust-based pension schemes?**

**Answer:** We would be in favour of such an extension.

**Q5: Are there any specific areas which would benefit from statutory clarification?**

**Answer:** We believe that the duties of investment managers generally should be more regulated so that they act in the interests of the beneficiaries of funds rather than their own interests. At present most such managers only have a contractual relationship with their clients rather than a trustee relationship. This can lead to aberrant behaviour that is not in their clients interests - for example stock lending, or over expansion of the size of a fund which can both be in the interests of the fund manager but not of the client.

**Q6: Do consultees agree that the law permits a sufficient diversity of strategies?**

**Answer:** We agree.

**Q7: Do consultees agree that the main pressures towards short-termism are not caused by the duty to invest in beneficiaries' best interests?**

**Answer:** We agree.

**Q8: Do consultees agree that the law is right to allow trustees to consider ethical issues only in limited circumstances?**

**Answer:** We agree.

**Q9: Does the law encourage excessive diversification?**

**Answer:** We do not believe so. It is not the law or regulation that has led to excessive diversification but the risk averse attitudes of fund managers and trustees who do not wish to be seen as falling behind performance-wise even temporarily, i.e. they prefer to perform with the market than risk under-performance.

**Q10: Does the law encourage trustees to achieve the right balance of risk and return?**

**Answer:** It has no influence on this area in our view.

**Q11: Are there any systemic areas of trustees' investment strategies which pose undue risks?**

**Answer:** If anything the risk is that they tend to follow the latest fashions and move into "hot" investment areas by following the crowd. This often results in long term under-performance.

**Q12: Overall, do consultees think that the legal obligations on trustees are conducive to investment strategies in the best interests of the ultimate beneficiaries?**

**Answer:** In general we have no concerns that the legal obligations on trustees unnecessarily inhibit investment strategies.

**Q13: If not, what specifically needs to be changed?**

**Answer:** No comment - we see no need for change here.

**Q14: Do consultees agree that the duties on contract-based pension providers to act in the interests of scheme members should be clarified and strengthened?**

**Answer:** As we said above, we believe that the duties of investment managers generally should be more regulated so that they act in the interests of the beneficiaries of funds rather than their own interests. At present most such managers only have a contractual relationship with their clients rather than a trustee relationship. This can lead to aberrant behaviour that is not in their clients interests - for example stock lending, or over expansion of the size of a fund which can both be in the interests of the fund manager but not of the client.

**Q15: Should specific duties be placed on pension providers to review the suitability of investment strategies over time? If so, how often should these reviews take place?**

**Answer:** We have no opinion on this issue as we do not perceive it as a problem.

**Q16: Should members of Independent Governance Committees be subject to explicit legal duties to act in the interests of scheme members?**

**Answer:** Yes.

**Q17: Should pension providers be obliged to indemnify members of Independent Governance Committees for liabilities incurred in the course of their duties?**

**Answer:** No - personal liability is a strong incentive to pay attention to their responsibilities and is unlikely to be an issue other than in extremis.

**Q18: Do consultees agree that the general law of fiduciary duties should not be reformed by statute?**

**Answer:** In general we agree as we don't believe extending statute law would assist.

**Q19: Should rights to sue for breach of statutory duty under section 138D of the Financial Markets and Services Act 2000 be extended?**

**Answer:** In general we would support such a change. Although the right to pursue a claim for such a breach might be difficult because of the general cost of litigation, it might be helpful in some cases. We do not accept that there would be any negative results of adding such a provision. It might actually improve the behaviour of market participants. We note the comment about extending obligations beyond strict contractual or trust based relationships but often in the modern world it is unclear where or if a contractual or trust relationship exists.

**Q20: Is there a need to review the regulation of investment consultants?**

**Answer:** It would be helpful to have a review of this area.

**Q21: Is there a need to review the law of intermediated shareholdings?**

**Answer:** Yes it is very important to review this area of law. The growth of nominee accounts in the UK has over the years created a situation where rights are lost and ownership becomes unclear where securities are held in an intermediated relationship. We have published many articles in the past on this area (for example see: [http://www.sharesoc.org/nominee\\_accounts.html](http://www.sharesoc.org/nominee_accounts.html)) and are currently working on a more extensive critique. It is very disappointing that the Unidroit convention on intermediated securities has not been taken up in the UK or by other states - it at least would provide a clearer entitlement to rights by the beneficiaries.

Unfortunately UK law (specifically the Companies Acts and associated Regulations have not kept pace with the growth of intermediated electronic trading. Substantial reforms need to be made to ensure that investors are not prejudiced as against the interests of financial intermediaries and financial market operators.

I submit the above responses to you on behalf of our board and our members.

Yours sincerely

Roger Lawson  
Chairman

**About the UK Individual Shareholders Society (ShareSoc)**

ShareSoc represents and supports individual investors who invest in the UK stock markets. We are a mutual association controlled by the members with "not-for-profit" articles and incorporated as a company limited by guarantee. The organisation is financed by member subscriptions, donations from supporters and by its commercial activities. More information on ShareSoc can be obtained from our web site at [www.sharesoc.org](http://www.sharesoc.org) (our objects are fully defined on this page: [www.sharesoc.org/objects.html](http://www.sharesoc.org/objects.html) ).