



Financial Sector
Conduct Authority



Fit and Proper Requirements for Board Members

FIT AND PROPER REQUIREMENTS FOR BOARD MEMBERS

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Fit and Proper Requirements for Board Members

- Insofar as there may be merit in the criticism about the gaps in our legislation and the alleged failure of the FSCA to enforce compliance of funds with the Fit and Proper Requirements of board members, the following interventions are currently underway:
 - The Financial Sector Harmonisation Project (“FSHP”) is reconciling the different financial sector laws under various themes (including fit and proper requirements).





Fit and Proper Requirements for Board Members

- The COFI Bill makes provision for the Fitness and Propriety of board members, among others. It provides a comprehensive definition with various elements with which board members will be expected to comply.
- The Draft Conduct Standard on Fund Governance, lends the force of law to the fit and proper principles, which are currently outlined in PF Circular 130.



Fit and Proper Requirements for Board Members

Honesty and Integrity

- Regulation 30(2)(v) to the PFA, prescribes that the rules of a fund must make provision for, *inter alia*, the appointment and dismissal of board members.
- It is submitted that, among others, fit and proper requirements find expression in fund rules on the strength of the above regulation.
- Principle 4 of PF Circular 130 enjoins funds to adopt a Code of Conduct aimed at preserving the integrity of the board and its governance role.
- Where a board member is violation of the Code Conduct, said member may be ordered to vacate office in terms of the fund rules and pursuant to Regulation 30(2)(v) above.



Fit and Proper Requirements for Board Members

Competence

- Section 7A of the PFA makes provision for the acquisition of skills and training within 6 months of a trustee's appointment to the board.
- Pursuant to the above provision, the FSCA issued Conduct Standard 4, 2020 on Minimum Skills for Training Requirements for Board Members of Retirement Funds.
- The Conduct Standard makes provision for the mandatory completion of the Trustee Toolkit by trustees.
- Principle 3 of PF Circular 130 provides for the rigorous training of trustees post-election and appointment to ensure that they acquire and maintain the requisite knowledge.



Fit and Proper Requirements for Board Members

Independent Board Members

- Guidance Notice 4 of 2018 provides that independent board members:
 - must continuously demonstrate the ability to exercise an independent discretion and have the relevant experience or expertise;
 - should be free from relationships that could affect their ability to perform their functions;
 - should not in the previous ten years have been expelled from any professional body;
 - should not have been employed by or derived any income from the sponsor in the last 5 years; and
 - should not have been convicted of an offence involving dishonesty, theft, fraud, forgery, uttering a forged document, misrepresentation, or breach of fiduciary duty.
 - the fund and/or the sponsor must ascertain that an independent board member has not in the previous ten years been expelled from any professional body which was entitled to exercise disciplinary powers over him or her.



International Standard Setting Bodies

OECD Guidelines of Pension Fund Governance

- **Guideline Number 4** deals with the suitability of trustees and provides as follows:
 - Members of the governing body should be subject to minimum suitability standards, such as “fit and proper” criteria.
 - Causes of automatic disqualification could include conviction for fraud, theft or other criminal offences, and gross mismanagement of a pension.
 - Each member of the governing body should also contribute to a balanced set of skills that enables the board, acting as a collective body, to execute its obligations successfully.
 - The qualifications and experience required of the members of the governing body will depend on their responsibilities.
 - In general, training is recommended both initially on appointment and on an on-going basis (at least every two years).



International Standard Setting Bodies

- **Guideline Number 4** concludes as follows:

“In general, it is desirable that all members of the governing body have sufficient knowledge and experience to be able to understand the decisions of the professionals that operate the fund. Where the governing structure includes a general assembly of the plan members and beneficiaries (as is sometimes the case in pension funds set up in the corporate form), these would evidently not be subject to fit and proper criteria.”

- **Guideline Number 5** deals with Delegation and Expert Advice and provides as follows:

- The governing body may rely on the support of sub-committees and may delegate functions to internal staff of the pension entity or external service providers. Where it lacks sufficient expertise to make fully informed decisions and fulfil its responsibilities the governing body could be required by the regulator to seek expert advice or appoint professionals to carry out certain functions.
- The governing body should assess the advice received, including its quality and independence, and should verify that all its professional staff and external service providers have adequate qualifications and experience.

Foreign Jurisdictions

UNITED KINGDOM

- The Pensions Regulator (“TPR”) is the regulatory body of occupational pension schemes in the United Kingdom.
- The Trustee Knowledge and Understanding (“TKU”) framework in relation to trustees is regulated in terms of the Pensions Act, 2004 (“PA”).
- Section 247 of the PA makes provision for the knowledge and understanding of trustees and requires them to be conversant with the following:
 - the trust deed and rules of the scheme,
 - the statement of investment principles
 - the statement of funding principles
 - any other document recording policy which is adopted by the trustees relating to the administration of the scheme generally.



Foreign Jurisdictions

- Further to the above, trustees must have knowledge and understanding of—
 - the law relating to pensions and trusts,
 - the principles relating to—
 - ❖ the funding of occupational pension schemes, and
 - ❖ investment of the assets of such schemes, and
 - ❖ such other matters as may be prescribed.
 - The degree of knowledge and understanding required by the PA is that which is appropriate for the purposes of enabling the individual properly to exercise his/her functions as trustee of any relevant scheme.
- The Occupational Pension Schemes (Trustees Knowledge and Understanding) Regulations 2006, circumscribes the above provision as follows:

Foreign Jurisdictions

➤ Individual trustees: period of grace

3. Section 247(3) and (4) of the 2004 Act shall not apply to any individual who is a trustee of a relevant scheme for a period of six months beginning with the date of his appointment as such a trustee, unless—

- a) he is an independent trustee who meets the requirements of section 23(1) of the 1995 Act; or
- b) he was appointed as a consequence of holding himself out as having expertise in any of the matters listed in section 247(4) of the 2004 Act or in any regulations made under paragraph (c) of that section.”

AUSTRALIA

- The Australian Prudential Regulation Authority (“APRA”) is the regulator of superannuation funds in Australia. The Superannuation Industry (Supervision) Act, 1993 (“SIS Act”) is the primary legislation which governs the appointment of trustees to the board.
- Prudential Standard SPS 520 issued in terms of section 34C of the SIS Act makes provision for the Fit and Proper Requirements of board members.



Foreign Jurisdictions

- As part of the risk management framework of the fund, SPS 520 prescribes the adoption and implementation of a Fit and Proper Policy by RSE licensees.
- The fitness and propriety of responsible persons (board members) must be assessed upon appointment to the board and continue to be re-assessed on an annual basis.
- Criteria for determining whether a responsible person is fit and proper:
 - For purposes of determining whether a person is fit and proper to hold a responsible person position, the criteria are whether:
 - ❖ it would be prudent for an RSE licensee to conclude that the person possesses the competence, character, diligence, experience, honesty, integrity and judgment to perform properly the duties of the responsible person position
 - ❖ it would be prudent for an RSE licensee to conclude that the person possesses the education or technical qualifications, knowledge and skills relevant to the duties and responsibilities of an RSE licensee;
 - ❖ if the person has a conflict, it would be prudent for an RSE licensee to conclude that the conflict will not create a material risk that the person will fail to perform properly the duties of the position.



Foreign Jurisdictions

- The Fit and Proper Policy must include the process to be undertaken in assessing whether a person is fit and proper for a responsible person position (fit and proper assessment). The process must include details of:
 - a statement of who will conduct fit and proper assessments on behalf of the RSE licensee;
 - what information will be obtained and how it will be obtained.
 - the matters that will be considered before determining if a person is fit and proper for a responsible person position; and
 - the decision-making processes that will be followed.
 - The Fit and Proper Policy must specify the actions to be taken where a person is assessed as being not fit and proper.
 - When a fit and proper assessment is conducted, an RSE licensee must make all reasonable enquiries to obtain information, including collecting sensitive information as defined in the Privacy Act 1988, that it believes may be relevant to an assessment of whether the person is fit and proper to hold a responsible person position.



Foreign Jurisdictions

- In July 2008, APRA issued Prudential Practice Guide 520 (“APG 520”): Fit and Proper, the purpose of which was to assist regulated entities in complying with their obligations under SPS 520.
- Practice 56 of APG 520 provides as follows:
 - *“It is not necessary for a person to be a past, current or immediately prospective responsible person for APRA to consider that person’s fitness and propriety. In some circumstances, APRA will need to identify persons who are not fit and proper in order to ensure they are not able to hold responsible person positions in the future.”*



Conclusion

- Although the PFA does not set out in express terms the requirement for honesty and integrity of board members, it cannot be seriously argued that our legislation does not adequately make provision therefor.
- As has been observed from the UK example, where appropriate, the entire legislative scheme must be read holistically to form a complete picture of any legislative requirement.
- Although a case can reasonably be made for improvement of the Fit and Proper framework (which is currently underway), it is fair to say that we are in lockstep with the rest of the world.



THANK YOU

FOREIGN JURISDICTIONS