Sackers

ESG and climate change for pension funds in 2023

Where are we now and where are we going?

Contents

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Environment

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Abbreviations

BEIS: Department for Business, Energy & Industrial Strategy

CFRF: Climate Financial Risk Forum

Climate Change Governance Regulations: The Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021

DB: Defined benefit

DC: Defined contribution

Disclosure Regulations: The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013

DWP: Department for Work and Pensions

ESG: Environmental, social and corporate governance

EU: European Union

FCA: Financial Conduct Authority

FRC: Financial Reporting Council

GHG: Greenhouse gas

GTAG: Green Taxonomy Advisory Group

HMT: HM Treasury

IA: Investment Association

IFoA: Institute and Faculty of Actuaries

IGC: Independent governance committee

IIGCC: Institutional Investors Group on Climate Change

Implementation Statement Guidance: Reporting on Stewardship and Other Topics through the Statement of Investment Principles and the Implementation Statement: Statutory and Non-Statutory Guidance

Investment Regulations: The Occupational Pension Schemes (Investment) Regulations 2005

ISSB: International Sustainability Standards Board

LDI: Liability-driven investment

MMMM: Make My Money Matter

NGO: Non-governmental organisation

NZICI: Net Zero Investment Consultants Initiative

Occupational Pension Schemes Regulations: The Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019

PAII: Paris Aligned Investment Initiative

PCRIG: Pensions Climate Risk Industry Group

PLSA: Pensions and Lifetime Savings Association

PRA: Prudential Regulation Authority

PRI: Principles for Responsible Investment

SDR: Sustainability Disclosure Requirements

SIP: Statement of investment principles

SRD II: Directive (EU) 2017/828 (which amended the previous EU Shareholder Rights Directive 2007/36/EC)

TCFD: Task Force on Climate-related Financial Disclosures

TNFD: Taskforce on Nature-related Financial Disclosures

TPR: The Pensions Regulator

TPSVI: Taskforce on Pension Scheme Voting Implementation

TPT: Transition Plan Taskforce

Introduction

Download our previous ESG guides from our website.

Since the launch of our first ESG guide in 2016, the industry and regulatory environment on ESG and climate change has moved on apace. The landscape that trustees must now navigate is significantly different and the latest requirements and legal thinking continue to develop.

In this, our latest guide, we take a look at how the legislation and associated guidance have developed and what else is coming down the track. We start on pages 4-5 with a reminder of the requirements for SIPs and implementation statements before recapping the climate governance and reporting requirements which were introduced in 2021 and have applied to schemes with assets over £1bn since October 2022. This year, the "second tranche" of TCFD reports will be published. With extended reporting obligations for climate-related metrics now in place we expect lots of schemes to be grappling with issues of data availability. To some extent, data coverage may improve as new FCA rules come in, imposing new ESG reporting obligations on investment managers. On pages 8-10, we look at what is to expect from the other strands of the Government's Green Finance Strategy.

Another area where we anticipate significant development is in relation to how trustees approach stewardship and engagement. Policymakers have been keen that asset owners should take greater ownership of how their voting rights are exercised on their behalf. New guidance on implementation statements is part of this but other initiatives, including pension trustees signing up to be Stewardship Code signatories, may become more prevalent.

In this guide, we provide an overview to help trustees see the wood from the trees and have included lots of links back to our previous publications where topics are covered in more detail. We have also referenced plenty of other resources for those looking to get deeper into particular issues, such as biodiversity and TNFD.

We hope you enjoy reading the guide and that it helps you take stock of where we are and where the industry is headed. ESG and climate change issues will continue to grow in importance at both a national and global level and there is no doubt that there are more requirements and obligations to come for trustees...

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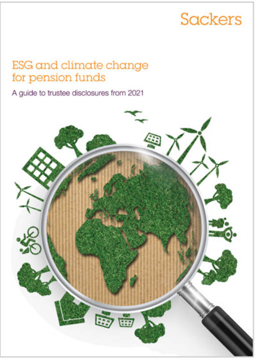
Pensions regulation and ESG: the story so far



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The Investment Regulations

The Investment Regulations introduced new practices in relation to preparing and updating the SIP. By October 2019, trustees were required to update or prepare their SIP to set out their policies in relation to "financially material considerations" (defined to include ESG considerations and climate change) over the appropriate time horizon of the investments and their engagement activities in respect of investments (stewardship). SIPs also had to be updated to set out the extent (if at all) to which "non-financial matters" (generally member views on ethical matters) were taken into account.

Within a year, further changes to the Investment Regulations were made to implement aspects of the SRD II in the UK. These required trustees to make changes to their SIPs by 1 October 2020, setting out various details in relation to their arrangements with their asset managers (including alignment between trustee and manager policies). Trustees also have to publish their SIP on a publicly available website (from 1 October 2019 for DC and hybrid schemes and from 1 October 2020 for DB schemes).

New requirements for implementation statements

From 1 October 2020, trustees were also required to produce an implementation statement setting out how they acted on policies in the SIP. The timing and content requirements of the implementation statement, set out in the Disclosure Regulations, apply to schemes differently depending on their scheme year. Most trustees should now have got to grips with the publication timings for their implementation statement, but for more details see our timeline on pages 4-5 of our guide "ESG and climate change for pension funds: A guide to trustee disclosures from 2021".

In June 2022, new Implementation Statement Guidance from the DWP set out recommendations for the content of SIPs and implementation statements (see our Finance & investment briefing December 2022). The Implementation Statement Guidance contains both "statutory" guidance (generally on implementation statement content) and "non-statutory" guidance (generally in relation to SIP content), focusing particularly on stewardship, voting and engagement. A key theme in relation to implementation statement content is the link between a scheme's stewardship priorities and the voting behaviour of their appointed managers. Further guidance describes how trustees should report a scheme's "most significant votes".

Statutory guidance on implementation statement content: most significant votes

Which stewardship priority the vote was linked to	The company's name (unless there are particular sensitivities around disclosing this) and date of the vote(s)	Approximate size of the scheme's holding as at the date of the vote
Summary of the resolution	How the trustee / asset manager / service provider voted	If the vote was against management, was the intention communicated to the company ahead of the vote
Rationale for the voting decision	Outcome of the vote	Whether the trustee / asset manager / service provider intends to escalate stewardship efforts

15 June 2017
TCFD publishes recommendations

11 September 2018
DWP publish a response to the consultation on changes to the Investment Regulations together with a final version of the regulations

3 June 2019
Occupational Pension Schemes Amendment Regulations made, amending the Investment Regulations for SRD II

1 February 2021
Pension Schemes Act 2021 paves the way for regulations on climate risk, governance and reporting

1 October 2021
Climate change governance and reporting requirements apply to £5bn+ schemes

17 June 2022
Implementation Statement Guidance published

1 October 2022
Climate change governance and reporting requirements apply to £1bn+ schemes

Fiduciary duty

The compatibility of trustee fiduciary duties with the consideration of ESG issues has been discussed by commentators for many years. In our view, there is no doubt that trustees can take account of ESG issues as financial factors in their investment decision making and as part of their trust law and fiduciary duties. However, issues such as net zero, impact investment, systemic market risk and beneficiary quality of life all require trustees and lawyers to think more deeply about trustee duties (for further discussion on this see our previous guides). In broad terms, trustees' legal duties include:

- exercising their investment powers for their "proper purposes", namely the provision of members' pensions
- taking account of factors which are relevant to that purpose, which will usually mean those which are financially material
- acting in accordance with the "prudent person" test – broadly this is the principle that trustee investment powers must be exercised with the "care, skill and diligence" a prudent person would exercise, when dealing with investments for someone else for whom they feel "morally bound to provide".

Exercise investment powers for their proper purpose

Consider relevant factors

Act in accordance with the prudent person principle

TCFD reporting

The climate reporting obligations were introduced in 2021 under the Pension Schemes Act 2021. The Climate Change Governance Regulations focus on improving climate change risk, governance and reporting by pension trustees (see our Alert for details).

The requirements were phased in, with master trusts and larger schemes whose net assets are £5bn or more required to comply from 1 October 2021, and schemes with £1bn or more of assets in compliance from 1 October 2022. Trustees of schemes in scope are required to put in place appropriate governance arrangements to manage climate-related risks during the first scheme year in which the Climate Change Governance Regulations apply to them. They must then produce and publish an annual report on how they have done so within seven months of their scheme year end date (see our Hot topic "£1bn plus schemes – are you ready?" for further detail and example timings).

Recent amendments to the Climate Change Governance Regulations also require trustees, from 1 October 2022, to calculate a new "portfolio alignment" metric setting out the extent to which the scheme's investments are aligned with the Paris Agreement goal of limiting global warming to well below 2˚C, and pursuing efforts to limit it to 1.5˚C above pre-industrial levels. This must be calculated and reported on in addition to the three original metrics. The amended Climate Change Governance Regulations will provide trustees with flexibility to select the type of portfolio alignment metric which best reflects their circumstances. For further detail and discussion on TCFD reporting please see our guide "ESG and climate change for pension funds: A guide to trustee disclosures from 2021".

Governance

Strategy

Risk management

Metrics and targets

Spotlight on stewardship

The PRI defines stewardship as “the use of influence by institutional investors to maximise overall long-term value including the value of common economic, social and environmental assets, on which returns and clients’ and beneficiaries’ interests depend”.

As noted on pages 4-5, trustees have clearly defined obligations to articulate their policies on stewardship. In addition, all schemes are being increasingly encouraged, and required, to improve their stewardship activities as part of a global response to climate change and other sustainability issues.

TPR considers that “it is up to the trustees to exercise stewardship and ensure, as far as they are able, that this is done through the whole length of the investment chain” and that this “is particularly relevant for the management of macro-economic, systemic risks such as climate change, which cannot be sufficiently hedged through portfolio construction and asset allocation alone”.[1]

Stewardship activities include:

- monitoring assets and service providers
- engaging issuers and holding them to account on material issues
- publicly reporting on the outcomes of those activities.

Enhancing the trustee role

TPSVI	On 20 September 2021, the TPSVI published a report setting out its recommendations for giving pension savers a voice in how their savings are invested and to strengthen the role of those who manage those savings. The Taskforce was launched in December 2020 to address problems in the voting of equity shares by pension schemes. The report included a recommendation that all asset managers should offer asset owners the opportunity to set an “expression of wish” as to how votes are exercised on their behalf, regardless of how they invest. This is now supported by provisions in the Implementation Statement Guidance (see page 4).
IA report	In June 2022, a steering group of investment managers, pension funds, investment consultants and lawyers, established jointly by the IA and PLSA, published a report “Investment relationships for sustainable value creation: alignment between asset owners and investment managers”. The report aims to embed stewardship into the relationship between investment managers and pension funds and sets out several recommendations for each stage of the relationship between investment managers and asset owners from the appointment process to the ongoing monitoring of established relationships.
DWP paper on social factors and new task force	In July 2022, the Government published a long-awaited call for evidence (launched in March 2021) on the consideration of social factors by pension schemes. The call for evidence seeks to encourage a more proactive approach to embedding social factors within pension schemes’ investment decisions, separating out the “S” in trustee ESG and stewardship policies, and suggests themes that trustees might look at (for example, specific policies on human rights within the context of business practices, including modern slavery as well as a more focused approach to workforce conditions, supply chains, community engagement and consumer protection). The Government also announced a new minister-led taskforce to support pension scheme trustees and the wider pensions industry with some of the challenges around managing social factors, such as the identification of reliable data and metrics. A Taskforce on Social Factors was subsequently launched on 28 February 2023 with the support of the DWP. Under current plans, the taskforce will operate for one year and deliver guidance and recommendations to the pensions and investment industry.

1 DB investment guidance; DC investment governance guidance

The FRC's Stewardship Code

Download the guide

The FRC published its original stewardship code in July 2010. First revised in 2012, a significantly amended version was issued in October 2019 and took effect from January 2020 (the Stewardship Code).

Signatories to the Stewardship Code are required to make public disclosures about their stewardship activities and to assess how effectively they have achieved their objectives. They are also:

- expected to take ESG factors, including climate change, into account and, in the case of investment managers, to ensure investment decisions are aligned with the needs of their clients
- expected to explain how they have exercised stewardship across asset classes beyond listed equity, and in investments outside the UK
- required to explain their organisation's purpose, investment beliefs, strategy and culture and how these enable them to practice stewardship.

To be a signatory to the Stewardship Code, organisations must submit a stewardship report to the FRC which demonstrates how they have applied the Stewardship Code's Principles in the previous 12 months. The report may cover any 12-month period beginning after 1 January 2020. Once listed, organisations must annually report to remain signatories. For more information please see our guide "ESG and climate change for pension funds: A guide to trustee disclosures from 2021". Current Stewardship Code signatories can be found here.

The PLSA's stewardship toolkit

Download the guide

The PLSA has collated best practice, templates and toolkits offering members guidance on how best to engage with investee companies, including what information to request about the workforce and corporate culture, and how to hold companies accountable to shareholders. This guidance, along with other resources, including the latest Stewardship and Voting Guidelines 2023, can be found in the PLSA's stewardship hub.

On 1 July 2020, the PLSA and Investor Forum also published a guide which aims to provide "a practical and accessible toolkit to help pension schemes assess the effectiveness of their asset managers' delivery of stewardship".

The guidance includes the PLSA's and Investor Forum's views on:

- definitions of stewardship and engagement, and their application across different asset classes
- an outline of how to frame an overall pension scheme stewardship strategy
- a framework for understanding and distinguishing between different forms of engagement
- an overview of what effective engagement looks like and the key factors for successful delivery
- the key questions schemes need to ask of their asset managers.

In addition, in July 2021, the Occupational Pensions Stewardship Council was launched as a dedicated council of UK pensions schemes. The council aims to promote and facilitate high standards of stewardship of pension assets and support schemes to learn about, act collaboratively and improve reporting of stewardship activities.

The bigger picture

ESG and related regulation and disclosure continues to have an impact across the economy. We take a brief look at the wider initiatives. It is anticipated that 2023 will see movement in relation to the Government's Greening Finance Roadmap, particularly in respect of the new sustainable disclosure requirements for asset managers, which, over the longer term, are expected to filter down to pension schemes.

Download the guide

Greener finance initiative

In June 2019, the Government said it was the first major economy in the world to pass laws to bring all GHG emissions to net zero by 2050. There have been several moves to achieve this goal, setting the backdrop for regulations specific to occupational pension schemes.

In October 2021, HMT published a policy paper Greening Finance: A Roadmap to Sustainable Investing. The paper set out the Government's ambition "to green the financial system and align it with the UK's world-leading net zero commitment". This builds upon the Government's first Green Finance Strategy published in 2019. Developments in this area are likely to have an indirect impact on schemes via the companies and investment products in which a scheme invests. In time, the scope of these further direct reporting obligations may be expanded to include pension scheme trustees. For further detail, please see our Finance & investment briefing December 2022 and our previous guides.

SDR and the UK Green Taxonomy

The FCA has consulted on new SDR disclosures for asset managers, as well as a new sustainability and classification system for funds and portfolio arrangements in line with the new UK Green Taxonomy. The proposals "aim to build transparency and trust" and to ensure that "sustainability-related terms in the naming and marketing of products are proportionate to the sustainability profile of the product". This includes requiring that certain ESG criteria are met before funds can use certain labels. The consultation closed on 25 January 2023. Final rules and guidance are expected in the first half of 2023, and the FCA will look to "expand and evolve" the requirements over time. See our Finance & investment briefing December 2022 for further information.

In addition, the Government is implementing the UK Green Taxonomy that sets out the criteria which specific economic activities must meet to be considered environmentally sustainable or taxonomy aligned. The details of the taxonomy are set out in the roadmap policy paper and draw on the EU's approach pursuant to Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088, which the UK helped design as a former member state. The Greening Finance Roadmap indicates that the UK Green Taxonomy will adopt the same six environmental objectives as the EU taxonomy. Some divergence is expected, to ensure that it is "suitable for the UK market and consistent with UK government policy", but there is also a recognition that international alignment is desirable. Reporting against the UK Green Taxonomy will also form part of the SDR disclosures. For further detail please see our Finance & investment briefing December 2022.

A Green Taxonomy Advisory Group (GTAG) has been established by the Government to advise on the UK Green Taxonomy. A consultation was initially planned for Q1 2022 ahead of legislation coming into force by the end of 2022. However, it has been delayed by controversy over the inclusion of gas, and also by leadership changes within the Government.

FCA proposed funds

"Sustainable focus" funds – investing in assets that are environmentally and/or socially sustainable

"Sustainable improver" funds – aims to improve the environmental and/or social sustainability of assets over time, including in response to the stewardship influence of the firm

"Sustainable impact" funds – investing in solutions to environmental or social problems, to achieve positive, real-world impact

What does the future hold?

13 January 2023: independent review of the Government's net zero strategy published

25 January 2023: FCA's consultation on SDR and investment labels for certain FCA-regulated firms closed

22 February 2023: TPR launched new campaign increasing its focus on climate and ESG non-compliance

28 February 2023:

- TPT's consultation on the TPT Disclosure Framework and Implementation Guidance closed
- Taskforce on Social Factors launched with DWP support

28 March 2023: TNFD publish version 0.4 of its draft beta framework recommendations for market consultation

30 March 2023:

- Government published an updated Green Finance Strategy
- Government opened a consultation on a future regulatory regime for ESG ratings providers
- Government published a revised net zero strategy Powering Up Britain: Net Zero Growth Plan following R (Friends of the Earth and others) v Secretary of State for BEIS

30 June 2023: Government's consultation on the regulatory regime for ESG ratings providers closes

Summer 2023: Government to publish updated investment guidance aimed at charity trustees following the Butler-Sloss case

Q3 2023: FCA expected to publish final rules on SDR and investment labels for certain FCA-regulated firms

September 2023: TNFD expected to publish its final recommendations

2023?

- Government may review whether to expand the categories of UK companies required to make TCFD disclosures
- TPT Disclosure Framework and Implementation Guidance expected to be finalised
- Expected mandatory disclosure requirements in annual reports incorporating UK Green Taxonomy and ISSB-issued standards for most economically significant companies; voluntary disclosures for other companies
- Potential FCA consultations on requirements on how sustainability matters are taken into account in investment advice by financial advisers, and applying a sustainable investment label to pension products regulated by the FCA
- DWP is expected to review the Climate Change Governance Regulations to assess whether the regulations and statutory guidance need to be updated (this is anticipated to include consideration of whether nitrogen trifluoride should be incorporated within reported emissions as a GHG)

30 June 2024: FCA's SDR and investment label rules expected to come into force

2024: Government expected to consult on expanding the DWP's climate change governance and reporting requirements to occupational pension schemes with assets below £1bn

2025: Government intends to mandate climate disclosures by large companies and financial institutions across the UK economy

2050
UK's net zero carbon target under the Climate Change Act 2008

Cases

We are starting to see an increasing number of cases on ESG issues for asset owners relating to both disclosures to members and climate related investment decisions for investors.

Disclosure to members

See ESG and climate change for pension funds: A guide to trustee disclosures from 2021 pages 18-19

Shell International Limited: in August 2019, the Pensions Ombudsman held that there was no breach of trustee disclosure duties in declining a member's request for information relating to climate change. It should be noted, however, that this pre-dated most of the current ESG-related disclosure regulations.

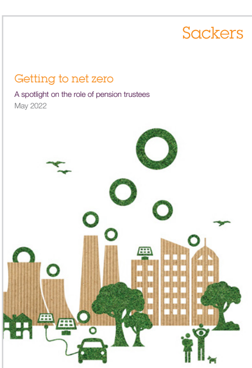
McVeigh v REST: an Australian disclosure case regarding a member claim on climate change policy that reached a confidential settlement and resulted in a public commitment from the trustee to implement a long-term objective to achieve a net zero carbon footprint for the fund by 2050, and to implement changes to its climate change policy and internal risk framework.

ESG – a financial factor?

See Finance & investment briefing September 2022

Butler-Sloss v The Charity Commission for England and Wales: the High Court considered whether potential investments which conflicted with two charitable trusts' charitable purposes could be excluded, even if financial returns would suffer as a result. The judgment clarified that the objects of a charity can be taken into account by trustees when exercising investment powers.

McGaughey v Universities Superannuation Scheme Ltd: members of the pension scheme challenged the investment decision of the directors of Universities Superannuation Scheme Ltd for their failure to implement a plan to divest from fossil fuels. The claim was dismissed as there was no evidence that loss would have been suffered as a result of the changed strategy, nor had there been any deliberate or dishonest breach of duty by the directors in adopting the strategy.



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Net zero

Put simply, "net zero" means achieving a balance between the amount of GHG emissions produced and the amount of GHG removed from the atmosphere.

In 2022, we published our guide "Getting to net zero: A spotlight on the role of pension trustees". As net zero becomes increasingly standard for trustees looking to solidify their ESG efforts, we examined what is meant by making a net zero commitment and the factors trustees should be considering ahead of making such a commitment. As well as covering some of the legal aspects to think about, we also provided a practical slant on the issues with contributions from a number of industry experts.

Who's who in ESG

A4S Accounting For Sustainability An organisation established by HM King Charles III in 2004 with the aim "to transform finance to make sustainable business, business as usual".

CFRF Established in March 2019, this industry forum is jointly convened by the PRA and FCA to build capacity and share best practice across industry and financial regulators to advance the sector's responses to the financial risks from climate change. The forum has set up four technical working groups on disclosure, scenario analysis, risk management and innovation.

Client Earth An environmental law NGO, with a mission to "use law as a tool to mend the relationship between human societies and the Earth". Client Earth is notable in pensions for their instruction of Keith Bryant KC and James Rickards to consider the legal duties of pension fund trustees in relation to climate change. Their abridged joint opinion was published online in April 2017.

Climate Action 100+ An investor-led initiative, launched in 2017, to ensure the world's corporate GHG emitters take necessary action on climate change.

GTAG Launched in June 2021, this expert group was established to advise on standards for green investment and to oversee the Government's delivery of a "Green Taxonomy".

IIGCC The European membership body for investor collaboration on climate change. The IIGCC has published numerous reports and guides including "Net zero investment framework 1.5˚C Implementation Guide" in March 2021.

IFoA sustainability research Research undertaken by working parties and shared with IFoA members on areas including biodiversity, net zero and the implications for investment portfolios.

Impact Investing Institute Launched in 2019, this group aims for capital markets to be "fairer and work better for people and the planet, in order to deliver sustainable and inclusive economic growth."

MMMM "A people-powered campaign fighting for a world where the public have the knowledge and power to align their pensions, savings and investments with their values". In November 2022, MMMM published its Climate Action Report highlighting the gaps that pension schemes must address to achieve a "real world" climate impact.

NZICI Launched in September 2021, the initiative was set up by 12 investment consulting firms, responsible for advising institutional asset owners on assets of approximately USD 10 trillion. Through nine specific action points, the initiative is committed to supporting the goal of global net zero GHG emissions by 2050 or sooner.

PAII Established in 2019 by the IIGCC. As of March 2021, the initiative has grown into a global collaboration, developing the Net Zero Investment Framework through the PAII (for more information on PAII and net zero see our guide "Getting to net zero: A spotlight on the role of pension trustees").

PCRIG Formed in 2019 to provide cross-industry guidance to help pension trustees meet their legal responsibilities. Its guide "Aligning your pension scheme with the TCFD recommendations" was published in January 2021.

PRI Leading proponent of responsible investment. Key work includes understanding the investment complications of ESG factors and supporting its international network of investor signatories in incorporating these factors into their investment and ownership decisions. For more information, see our guide "ESG and climate change for pension funds: A guide to trustee disclosures from 2021".

ShareAction A charity initially set up as FairPensions. Its work includes providing resources for investors "to benchmark investors and define the highest standards for responsible investment". It proposed the Responsible Investment Bill including mandatory net zero for DC default funds marketed as sustainable, as well as imposing new duties on TPR and the FCA consistent with net zero.

How we can help

Sackers is the UK's leading commercial law firm for pension scheme trustees, employers and providers. Over sixty lawyers focus on pensions and its related areas, including Sackers finance and investment group, a team of lawyers who provide cutting-edge advice on all aspects of pension scheme finance and investment.

We advise on the development and implementation of ESG strategies consistent with trustee fiduciary duties and the development of trustee ESG and engagement policies, including how to document trustee responsible investment policies and related disclosures. We also provide ESG training for trustees and pension scheme providers.

For further information and advice on ESG and climate change considerations for UK pension schemes, contact any of the contributors to this guide using the details below, or your usual Sackers contact.

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