

The power to give guarantees as Social Investment

A statutory power for charities to make social investments was introduced by the Charities (Protection and Social Investment) Act 2016 (the “Act”), which came into force on 31 July 2016. The Act defines a social investment as an act carried out with a view to both:

- 1) Directly furthering a charity’s purposes, and
- 2) Achieving a financial return for the charity.

The motivation behind the proposed act must meet both limbs in order to qualify as a social investment, and therefore fall within the new statutory power.

Social investments vs mixed motive investments

It may appear that a social investment is no different to a “mixed motive investment” – an investment which contains elements of both financial investment and programme related investment, and which, as a general rule, was already lawful. There are many acts of investment which charities would have been able to carry out anyway before the statutory “social investment” power was introduced.

However the legislation states that the making of a social investment by a charity or its trustees means either:

- Using the charity’s funds or other property, or
- Taking on a “*commitment in relation to a liability of another person (such as a guarantee) that puts the charity’s funds or other property at risk of being applied or used*”.

Therefore social investment powers are broader than those offered by the existing power to make “mixed motive investments”.

Financial return

A financial return is regarded as being achieved for these purposes where the charity’s funds or property are invested and the outcome is better for the charity in financial terms than expending the whole of those funds or other property in question.

Guarantees

In order for a guarantee to qualify as a social investment, there is no requirement for an expectation that money will come back to the charity, acting as guarantor. Instead, if the expectation is that the guarantee will not be called upon or, if it is called upon, that the whole of the guarantor’s funds or other property which were put at risk, will not be called upon, then under the Act the guarantee is regarded as having achieved a financial return.

Therefore the definition of financial return differs in the case of a guarantee. In the case of guaranteeing a social investment, our opinion is that the bar is set quite low, and should be readily achievable, provided that the charity giving the guarantee carries out the level of due diligence and puts in place the measures for monitoring, control and security that most charities would regard as essential pre-requisites to giving any guarantee.

Therefore, subject to a charity’s governing document, the new social investment power may

present a useful tool for charities in giving them greater freedom to commit to guarantees.

Boards/Trustees

When boards or trustees exercise any power to make social investments, they must comply with their general duties including making decisions in the best interests of the charity and not putting their charity's assets at undue risk, as well as their own constitutional powers and constraints. The giving of a guarantee must be intended of itself to further the purposes of the charity. Therefore boards and trustees should not authorise a social investment without having assured themselves that the level of financial return and the benefit to the furthering of the charity's purposes will, on balance, be in the charity's interests. The new power to make social investments does not over-ride these general principles.

Because motivation is an essential component of the statutory power, we recommend that the decision-making process is carefully recorded. In addition, trustees must consider whether they ought to obtain any advice on the social investment and obtain such advice if they conclude that it is necessary.

It should be noted that the Charity Commission has to date only published interim guidance on social investments. A review shall be conducted into trustee investment guidance in 2017.

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