



An tÚdarás Pinsean
The Pensions Authority

FAQs on investment and borrowing rules and derogations for one-member arrangements (OMAs)

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Introduction

These FAQs are intended to provide assistance to trustees of one-member arrangements (OMAs) (as defined below) in understanding their obligations under the Pensions Act, 1990, as amended (the Act), in relation to investment and borrowing rules and the derogations available to them in respect of those obligations.

The Act (as amended in particular by the European Union (Occupational Pension Schemes) Regulations, 2021 (S.I. No. 128 of 2021)) provides for various transitional measures including for existing OMAs so that some provisions will apply from the end of the five-year derogation period i.e., from 22 April 2026.

For OMAs established before 22 April 2021:

- A derogation from the new requirements under Part VIB (new governance obligations on schemes that include written policies, key functions, outsourcing and investment management) of the Act applies until 21 April 2026.
- An open-ended derogation from the investment rules under section 59AB of the Act and the borrowing restrictions under section 61B of the Act applies in respect of investments made or borrowing arrangements entered into before 22 April 2021.

OMAs established on or after 22 April 2021 will not be entitled to benefit from any of the above derogations.

An OMA is established on the date the documentation setting up the arrangement is validly executed by all of the parties, or any later establishment or commencement date provided for in that documentation. An OMA cannot be established retrospectively to a date prior to the date the documentation setting up the arrangement has been validly executed by all of the parties.

These FAQs should be read with any other guidance or FAQs which is published by the Authority in relation to investment rules and/or restrictions on borrowing for schemes that are subject to the Act.

A. Investment rules

1. To what arrangements does the investment rules derogation apply?

The derogation applies OMA's which made investments before 22 April 2021.

An OMA is:

- a scheme which is established solely for one person and for that person permanently to be the sole member and that member has discretion in respect of the manner in which the resources of that scheme are invested,
- a trust retirement annuity contract (RAC) which is established solely for one person and for that person permanently to be the sole member and that member has discretion in respect of the manner in which the resources of that trust RAC are invested, or
- a scheme or trust RAC, referred to above, which is the subject of a pension adjustment order and which, pursuant to that order, includes, in addition to the member, a person or persons referred to in that order.

2. What does 'discretion in respect of the manner in which the resources of that scheme or trust RAC are invested' mean?

This means that the rules of the scheme or trust RAC:

- require the consent of the member in respect of the trustees' investment of the resources of the scheme or trust RAC, or
- provide that the trustees invest the resources of the scheme or trust RAC in accordance with directions given by the member and the trustees have determined the different types of investment of those resources that could be made at the direction of the member.

Investment in pooled funds will not disqualify a scheme or trust RAC from being an OMA as long as the choice of funds and/or fund manager requires the member's consent.

3. To what investments does the investment derogation apply?

The derogation in section 59AB applies to any investments made by the trustees prior to 22 April 2021. Investments made on or after 22 April 2021 will be subject to the full requirements of section 59AB.

In determining if the derogation applies to an investment, investments made before 22 April 2021 will be regarded as being ring-fenced from investments made on or after 22 April 2021.

Where the assets held in respect of investments made prior to 22 April 2021 are, after that date, sold and proceeds reinvested the derogation no longer applies to these assets. However, the trustees of an OMA established before 22 April 2021 are not required to sell or dispose of the assets held in respect of an investment made by the trustees before that date in order to comply with section 59AB.

The Pensions Authority (the Authority) regards an investment as being made from the point that the parties are legally committed to complete the investment. This may be a date which is earlier than the date the investment transaction has been completed.

Trustees will need to keep adequate records and details in relation to investments they have made before 22 April 2021 so that those investments can be readily identified as having been made before that date and therefore fall within the scope of the derogation. These records must be made available to the Authority if required.

4. What investment rules apply to investments made by OMAs on or after 22 April 2021?

All of the investment rules that are set out in section 59AB of the Act apply to investments made on or after 22 April 2021 in the same way that they apply to arrangements that are subject to the Act but are not OMAs.

5. What does ‘invested on regulated markets’ mean for an OMA?

One of the requirements of section 59AB of the Act is that investments made by an OMA on or after 22 April 2021 must be investments which are predominantly on regulated markets. Invested on a regulated market refers to investment in assets which are admitted to trading on a regulated market as defined in point (21) of Article 4(1) of Directive 2014/65/EU i.e., MiFID II. Trustees or their advisers can currently check whether a particular market is a regulated market by searching the website of the European Securities and Markets Association.

The term ‘predominantly’ in relation to investment on regulated markets means that investments made on or after 22 April 2021 must be more than 50% invested on regulated markets at all times.

The trustees of an OMA must in making investments otherwise than on a regulated financial market, keep such investments to a prudent level taking account of the nature of the scheme, its need for liquidity, and the duration and quantum of its liabilities. In particular, the trustees must take account of the need for sufficient ongoing liquidity in the scheme to pay fees and anticipated benefits on death, disability and retirement of the member. Even when an investment is permitted under the legislation, trustees should always remain mindful of their fundamental duty to act in the member’s best interests.

6. What is expected of trustees if investment performance causes the assets to move such that the arrangement fails to satisfy section 59AB of the Act?

If as a result of market movements, an OMA fails to comply with any of the provisions of section 59AB (ignoring the part of the portfolio which is ring-fenced because it comprises investments made before 22 April 2021), the trustees must take steps to make the arrangement compliant with section 59AB within a reasonable period of time. The Authority expects this to be resolved within one year or such time as any of the necessary investments in the OMA can be encashed without significant penalties being incurred.

If the rules of the OMA require the consent of the member in respect of the trustees’ investment of the resources of the OMA, the Authority expects the trustees and the member to work co-operatively together to enable the trustees to make the arrangement compliant within this period.

7. What if a member directs the trustees to make an investment that will cause the assets to move predominantly towards investment in unregulated markets?

The trustees must invest in accordance with the investment rules under the Act (taking account of the investment derogation (if applicable) referred to in these FAQs). Therefore, if a member directs an investment that would, if fully implemented, cause the assets to move to a position of being predominantly invested in unregulated markets, the trustees must refuse to make the proposed investment, notwithstanding the member direction. If the member direction can be partially implemented (e.g., investing in a portion but not all of the assets the member direction relates to) without

causing the assets to move to a position of being predominantly invested in unregulated markets, the trustees are not precluded by the investment rules from implementing the member direction in part.

8. What if a member directs the trustees to make an investment that will result in a failure to comply with the investment rules under section 59AB of the Act?

The trustees must invest in accordance with the investment rules under the Act (taking account of the investment derogation (if applicable) referred to in these FAQs). Therefore, if a member directs an investment that is contrary to the investment rules, the trustees must refuse to make the proposed investment (to the extent that compliance with the direction would contravene the investment rules) notwithstanding the member direction.

9. Is investment in derivatives permitted by OMAs?

Investment made in derivatives instruments on or after 22 April 2021 is only permitted insofar as such instruments contribute to a reduction in investment risks or facilitate efficient portfolio management and subject to compliance with the conditions of section 59AB(3)(a) to (c). The Authority expects trustees to satisfy themselves that any proposed investment in derivatives can be justified on these grounds and will be in compliance with the conditions of section 59AB(3)(a) to (c), before the investment is made, and to be in a position to provide documentation of their assessment to the Authority if required. The investment derogation will be regarded as applying to investment made in derivatives before 22 April 2021.

10. How are investments by OMAs in pooled vehicles and insurance policies assessed?

Investment by the trustees of an OMA in a collective investment undertaking shall be treated as invested in a regulated market and diversified to the extent that the assets of that collective investment undertaking are themselves so invested and diversified.

A collective investment undertaking is defined in section 59AB and includes (provided that they satisfy the requirements of the definition) unit trusts, common contractual funds, and undertakings for collective investment in transferable securities and alternative investment funds situated in a Member State.

There are different rules for different types of insurance policies. Investment by trustees of an OMA in a unit-linked policy will be treated as invested in a regulated

market and diversified but only to the extent that the assets to which the policy is linked are themselves so invested and diversified.

Investment by trustees in a non-unit-linked insurance policy, including a with-profits policy, will be treated as invested in a regulated market and diversified if:

- the policy proceeds are guaranteed at maturity to be at least equal to the sum of all of the premiums, or
- the policy is an annuity policy.

B. Restriction on borrowing

11. To what borrowings does the borrowing derogation apply?

A borrowing arrangement entered into by the trustees of an OMA before 22 April 2021 includes money borrowed by the trustees on or before that date or which the trustees were entitled to borrow or draw on or before that date, but which had not, at that date, been drawn.

12. Can trustees continue to repay existing borrowings under a borrowing arrangement entered into before 22 April 2021 in accordance with the terms of the borrowing arrangement?

Yes.

13. Can existing borrowings under a borrowing arrangement be restructured or moved to an alternative lender without being considered a new borrowing arrangement?

Existing borrowings under a borrowing arrangement entered into by the trustees of an OMA before 22 April 2021 may be restructured or moved to an alternative lender but the capital value must not exceed the value of the pre-existing borrowings as at the date of restructuring the existing borrowings or moving them to an alternative lender. Additional borrowing (including interest roll-up) is not permitted.

Trustees will need to keep adequate records and details in relation to restructured borrowings or borrowings moved to alternative lender, to evidence that they have satisfied this requirement. These records must be made available to the Authority if required.



C. More than one OMA

14. Can an individual with more than one OMA measure compliance by considering investments across all of their arrangements?

No, each OMA must comply with section 59AB and section 61B of the Act at all times.

D. Are Revenue requirements relevant?

The requirements of the Act should be read alongside any requirements of the Revenue Commissioners and the Taxes Consolidation Act, 1997 (as amended) and other relevant legislation.