



OPSC Directives	D – 01/2016	english
Requirements for investment foundations		

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*The Occupational Pension Supervisory Commission (OPSC),
having regard to Article 64a of the Federal Act of 25 June 1985 on Occupational Old Age,
Survivors and Invalidity Pension Provision (BVG; SR 831.40),
issues the following directive:*

1 Scope

These provisions apply to investment foundations in accordance with Art. 53g et seq. BVG.

2 Requirements for investment foundations

2.1 Organisation

The organisational structure will be appropriate to the business activities being conducted and comply with the law, the directives and communications issued by the OPSC and the investment foundation's own articles of association and regulations.

At the very least it will comprise an organizational chart and a definition of the areas of responsibility of the key position holders and their deputies.

2.2 Infrastructure

The infrastructure, including the IT system, will be appropriate to the business activities being conducted and sufficient for their performance.

2.3 Agreements

The regulatory bases stipulate that it must be possible to terminate asset management agreements and contracts for management services without detriment or disadvantage to the investment foundation within no more than five years of their being entered into (Art. 48h para. 2 BVV 2). Asset management agreements must include the following in particular:

- scope of the asset manager's authority
- investment objectives and restrictions
- reference currency
- method and frequency of reports rendering account of the foundation's activities to clients
- asset manager's compensation
- possibility of delegating tasks to third parties

2.4 Processes and tasks

The processes and tasks essential to the conduct of the business activities and the allocation of these tasks must be documented in a clear and comprehensible manner and appropriately designed.

2.5 Risk policy and risk management

A formalised risk policy that is appropriate to the business activities being conducted must be put in place; it should set out the basic principles to be followed by the Board of Trustees, the foundation's management and the asset manager in handling risks, both externally and internally.

A formalised risk management system that is appropriate to the business activities being conducted must be put in place; it should form the basis of risk management by providing the risk information required to monitor risk.

2.6 Internal control system

A formalised internal control system that is appropriate to the size and complexity of the investment foundation and its business activities must be put in place.

2.7 Persons in positions of responsibility

2.7.1 General requirements

The following persons must be of good repute and able to provide an assurance of proper business conduct (Art. 51b para. 1 BVG):

- Members of the Board of Trustees
- Members of investment bodies (e.g. investment committee, investment commission or the like) who have decision-making powers
- Persons with decision-making powers in relation to the management of the business
- Persons with decision-making powers in relation to asset management (persons who make investment decisions)
- Natural persons in positions of responsibility within a legal entity (or a partnership, as the case may be) who are entrusted with managing the investment foundation's business or assets

2.7.2 Professional requirements

a) For members of the Board of Trustees

Between them, the individual members of the Board of Trustees must possess the necessary professional qualifications (training and experience) in such a way as to ensure that the Board of Trustees as a whole is able to properly perform each of the tasks assigned to it.

b) For members of investment bodies who have decision-making powers

The majority of the members of investment bodies who have decision-making powers must meet the professional requirements set out under letter d below.

c) For persons with decision-making powers in relation to the management of the business

Persons with decision-making powers in relation to the management of the business must possess both the practical and theoretical knowledge required to properly perform their duties.

d) For persons with decision-making powers in relation to asset management

Persons with decision-making powers in relation to asset management must have a professional qualification commensurate with the requirements for asset management as well as at least five years' practical experience in managing third-party assets.

2.7.3 Verifying the requirements to be met by persons in positions of responsibility

Persons in positions of responsibility must satisfy both the general and professional requirements (points 2.7.1 and 2.7.2) at all times. The OPSC may check at any time whether persons in positions of responsibility meet these requirements. Investment foundations and persons in positions of responsibility must provide the necessary information and documents on request. If there is reason to believe that persons in positions of responsibility no longer meet the requirements, the OPSC must be notified immediately.

On receiving an application to set up an investment foundation (point 3.1), the OPSC verifies whether the persons in positions of responsibility meet the requirements.

Investment foundations must notify the OPSC immediately of any change in personnel (Art. 48g para. 2 BVV 2). This notification must be accompanied by all the requested information and documents (in accordance with the official form).

The OPSC may take suitable action against persons in positions of responsibility who fail to meet the requirements (e.g. temporary suspension or removal from office).

2.7.4 Establishing the requirements for the Board of Trustees

The main requirements for the Board of Trustees as a whole and for its individual members are to be outlined in writing. When a new member is elected, the Board of Trustees will verify that the requirements are met.

2.7.5 Delegating tasks

The process of selecting the persons who are to be entrusted with business management and administration tasks in accordance with Art. 7 of the Ordinance of 10 and 22 June 2011 on Investment Foundations (ASV; SR 831.403.2) is to be conducted on a transparent basis and with reference to a set of predetermined criteria. The entrusted persons must satisfy both the general and professional requirements (points 2.7.1 and 2.7.2 above). The Board of Trustees will ensure that the entrusted persons receive appropriate instructions and are sufficiently monitored.

The Board of Trustees will ensure that the entrusted persons comply with their fiduciary duty of care and avoid conflicts of interest (Art. 51b para. 2 BVG and point 2.7.6).

The Board of Trustees' tasks in this respect are to be set down in writing.

2.7.6 Avoiding conflicts of interest

The Board of Trustees takes organisational measures appropriate to the size and structure of the investment foundation to identify, prevent and eliminate conflicts of interest.

The investors' meeting approves the regulations governing the avoidance of conflicts of interest and legal transactions with close associates. This right can be transferred to the Board of Trustees in the articles of association (Art. 8 para. 4 ASV).

If a conflict of interest cannot be avoided, the Board of Trustees will disclose and justify this fact in the notes to the annual financial statements.

2.8 Accounting and financial reporting

The accounting system must be organised in a manner appropriate to the business activities being conducted. Accounting and financial reporting must comply with the statutory regulations (in particular Art. 38 et seq. ASV and Art. 47 et seq. BVV 2).

2.9 Compliance with statutory regulations and the directives and communications issued by the OPSC

Investment foundations in accordance with Art. 53g et seq. BVG must comply with the statutory provisions in force, in particular in the field of occupational benefits, and with the OPSC rules.

The OPSC can verify whether the requirements for investment foundations in accordance with this directive are met and request that an audit report be produced by an audit firm under state oversight. Investment foundations must provide the necessary information and documents at the OPSC's request.

3 Procedure for setting up investment foundations

3.1 Application

Anyone wishing to set up an investment foundation within the meaning of Art. 53g et seq. BVG must submit an application to that effect using the official OPSC application form and provide all the requested information and documents.

3.2 Audit report by an audit firm under state oversight

The OPSC will review submitted applications and ask applicants to make any corrections that may be necessary. Once the documents have been amended accordingly, the OPSC will authorise applicants to engage a licensed audit firm under state oversight in terms of the Auditor Oversight Act of 16 December 2005 to produce an audit report on the basis of the official audit engagement and to submit this report to the OPSC.

3.3 Approval

If all of the application documents and the audit report produced by the audit firm under state oversight meet the requirements, the OPSC will approve the setting up of the investment foundation.

3.4 Establishment

In accordance with the provisions of the Swiss Civil Code regarding foundations (Art. 80 et seq. ZGB), investment foundations are established by public deed.

3.5 Decision on agreement to supervise

Once the investment foundation has been set up, the applicant must submit the following documents to the OPSC:

- the articles of association (in four originals)
- all regulations (one duly signed original of each)

- evidence of the endowment of the foundation's assets (Art. 22 BVV 1)

Once the OPSC has received all the documentation, it will issue its decision on agreement to supervise and inform the applicant and competent commercial registry office accordingly.

4 Entry into force

This directive enters into force on 1 September 2016.

Investment foundations already in existence at the time this directive enters into force have until 1 September 2018 to make any modifications required to bring their situation into line with the provisions set out herein.

5 Transitional provision governing change as of 1 January 2020

Investment foundations already in existence have until 1 January 2022 to issue regulations governing the avoidance of conflicts of interest and legal transactions with close associates.

1 September 2016

**Occupational Pension
Supervisory Commission (OPSC)**

The President, Mr. Pierre Triponez

The Director, Mr. Manfred Hüsler

Annexes

- Application form to establish an investment foundation (Annex 1)
- Audit mandate for the audit firm under state oversight (Annex 2)
- Form notifying a change in personnel at investment foundations (Annex 3) – Annexes to the forms

6 Explanatory notes

6.1 Point 2.3 Agreements

In the case of alternative investments that are subject to prior appraisal, following consultation with the OPSC, a longer contract term may be agreed by way of exception if there is good reason for doing so.

6.2 Point 2.7.1 General requirements

The term “assurance of proper business conduct” originally comes from financial market legislation. As defined by the Swiss Financial Market Supervisory Authority (FINMA), this assurance covers all the personal and professional attributes required by an individual to adequately perform their governance and management duties within the supervised institution. That person’s past and present professional experience and its relevance to any future activity is particularly important in assessing compliance with the proper business conduct requirements.

Reference is made to practice and case law, particularly that which has developed in the fields of financial market supervision and auditor oversight. For example, in its judgment of 4 March 2008 (B-3708/2007) the Federal Administrative Court states in section E. 3.1 on the proper business conduct requirement in accordance with Art. 3 para. 2c of the Banking Act and Art.10 para. 2d of the Stock Exchange Act:

“(translation)) Fit and proper business conduct requires professional expertise and correct behaviour in business dealings. First and foremost, correct behaviour in business dealings means observing the rule of law, i.e. complying with acts and ordinances, specifically those under banking and stock exchange legislation but also those under civil and criminal law, in addition to the [organisation’s own] articles of association and internal body of regulations. In other words, the requirement of assuring fit and proper business conduct is not compatible with business practices that breach applicable legal standards, internal rules, professional codes of conduct or contractual agreements with clients or that breach the duty of loyalty and duty of care that is due to clients (...)”

6.3 Point 2.7.2 Professional requirements

In accordance with letter d), persons with decision-making powers in relation to asset management must have at least five years’ practical experience in managing third-party assets. In this respect, it should be noted that for certain alternative investments and real estate, under certain circumstances, specialist knowledge other than that involved in third-party asset management may be required (e.g. engineering, architecture); in such cases, the requisite professional experience will suffice. This also applies to members of investment bodies who have decision-making powers in accordance with letter b).

6.4 Point 2.7.3 Verifying the requirements to be met by persons in positions of responsibility

If there is reason to believe that a person in a position of responsibility no longer meets the requirements, the OPSC must be notified immediately. For example, such reasons may include the initiation of criminal proceedings, especially in relation to asset management.

Changes in personnel are to be notified using the form officially designed for this purpose (Annex 3 to this directive, published on the OPSC website at www.oak-bv.admin.ch). The information and documents specified on the form must be submitted for each individual in question.

Changes of legal entities (or partnerships) entrusted with managing the assets in accordance with Art. 48f para. 4 BVV 2 must be reported. If the change merely concerns natural persons in positions of responsibility within a legal entity (or partnership) who are accredited in accordance with Art. 48f paras. 4 BVV 2, notification does not have to be made.

6.5 Avoiding conflicts of interest

It is not possible to provide an exhaustive list of conflicts of interest as these can arise from many different situations and take many different forms. Therefore, it is important to establish the rules to be followed by the investment foundation and to record such in regulations governing the avoidance of conflicts of interest and legal transactions with close associates.

Asset transactions must be carried out on an arm's length basis. A conflict of interest is deemed to arise where asset transactions are conducted between the investment foundation and companies in which persons in positions of responsibility at the investment foundation hold office or are qualified participants and must be disclosed and justified in the notes to the annual financial statements.

6.6 Point 3 Procedure for setting up investment foundations

The setting up of investment foundations is guided in particular by Arts. 12f. and 21f. BVV 1.

6.7 Point 3.1 Application

The official application form to establish an investment foundation, including the information and documents to be submitted, is annexed to this directive and published on the OPSC website (www.oak-bv.admin.ch).

The information and documents submitted along with the application form are used to determine whether the persons in positions of responsibility meet the general and professional requirements (points 2.7.1 and 2.7.2 above). This assessment is performed on the basis of Art. 12 para. 3 and Art. 13 para. 3 BVV 1.

The application form is divided into three parts:

Section I: General information

General information is to be provided under section 1 about the founder and the individual bodies of the investment foundation being established. Draft articles of association and regulations are to be submitted along with service agreements if tasks are to be delegated to third parties.

Section II: Information on legal entities or partnerships

If the management of the business or assets of the investment foundation being established are to be delegated to a company, the information and documents specified in section II must be submitted for this company.

Section III: Information on natural persons

The information and documents specified in section III must be submitted for each person in a position of responsibility (members of the Board of Trustees, members of an investment body who have decision-making powers, persons with decision-making powers in relation to the management of the business or the assets), regardless of whether or not they are employed directly by the investment foundation. Thus e.g., information and documents must be submitted for persons who work for an outside company that has been entrusted with managing the foundation's business within the meaning of section II. However, no information and documents need to be submitted for persons who work for an external asset manager in accordance with Art. 48f para. 4 BVV 2 and within the meaning of section II as their personal and professional requirements have already been verified by the responsible authorities.

6.8 Point 3.2 Audit report produced by the audit firm under state oversight

The first step is for the OPSC to check the submitted application (concept, organisation, regulations, agreements, etc.). Once this process has been completed and the OPSC has given its basic approval, the next step is for the applicant to commission an audit firm under state oversight to produce an audit report and submit it to the OPSC. The audit is to be conducted in accordance with the "Audit mandate for the audit firm under state oversight", which forms Annex 2 to this directive and is published on the OPSC website (www.oak-bv.admin.ch).