

# Conflicts of Interests for Pension Scheme Actuaries

Patrick Needham & Philip Smith

Jointly organised by the Society of Actuaries in Ireland and the  
Association of Pension Lawyers in Ireland - 13 May 2008



# A New World in Pensions

- Changed world for professionals
- Equitable Life
- Pensions – Accounting Standards
- High Stakes
- Morris Report



# Appointing advisers

- Unlike the UK there are no specific regulations
- Trustees have a duty to take advice on areas where they are not expert
- Entitled to be indemnified for their reasonable and proper expenses
- Trust Deed and Rules usually prescribes regarding the appointment of the actuary/advisers
- Usually (but not always) the employer has a say over the terms of the appointment



# What is a Conflict of Interests?

- Trustee context – fiduciary – personal interest or duty to another party conflicts with fiduciary duty to scheme
  - E.g. finance director as trustee
- Advisor context - not dealing with the conflict of interest between the interests of the adviser and those of client
- Managing the conflicts arising from two clients



# Conflict of Interests

Solicitors' code of practice:

- must cease to act where there is an actual conflict or significant risk of conflict (exceptionally may continue to act with consent)
- factors include strength of relations; perception of conflict and its impact – perception becoming an issue, additional expense
- solicitor owes a duty to do his best for client



# Conflict of Interests

Actuaries' code of practice:

- Clients entitled to assume no other interests affect advice (taking account of third party duties owed by client)
- If potential conflict, actuary must consider the nature and extent of conflict and whether it is “improper” to give advice
- Obligation to notify and disclose
- Restriction on disclosure of information




# Acting for two clients

- Solicitors' code – generally not permitted (between Vendor and Purchaser) but exceptions include:
  - Associated companies
  - Both established clients advised to seek separate advice but informed consent given
  - Different offices with different teams are acting
- Chinese Walls

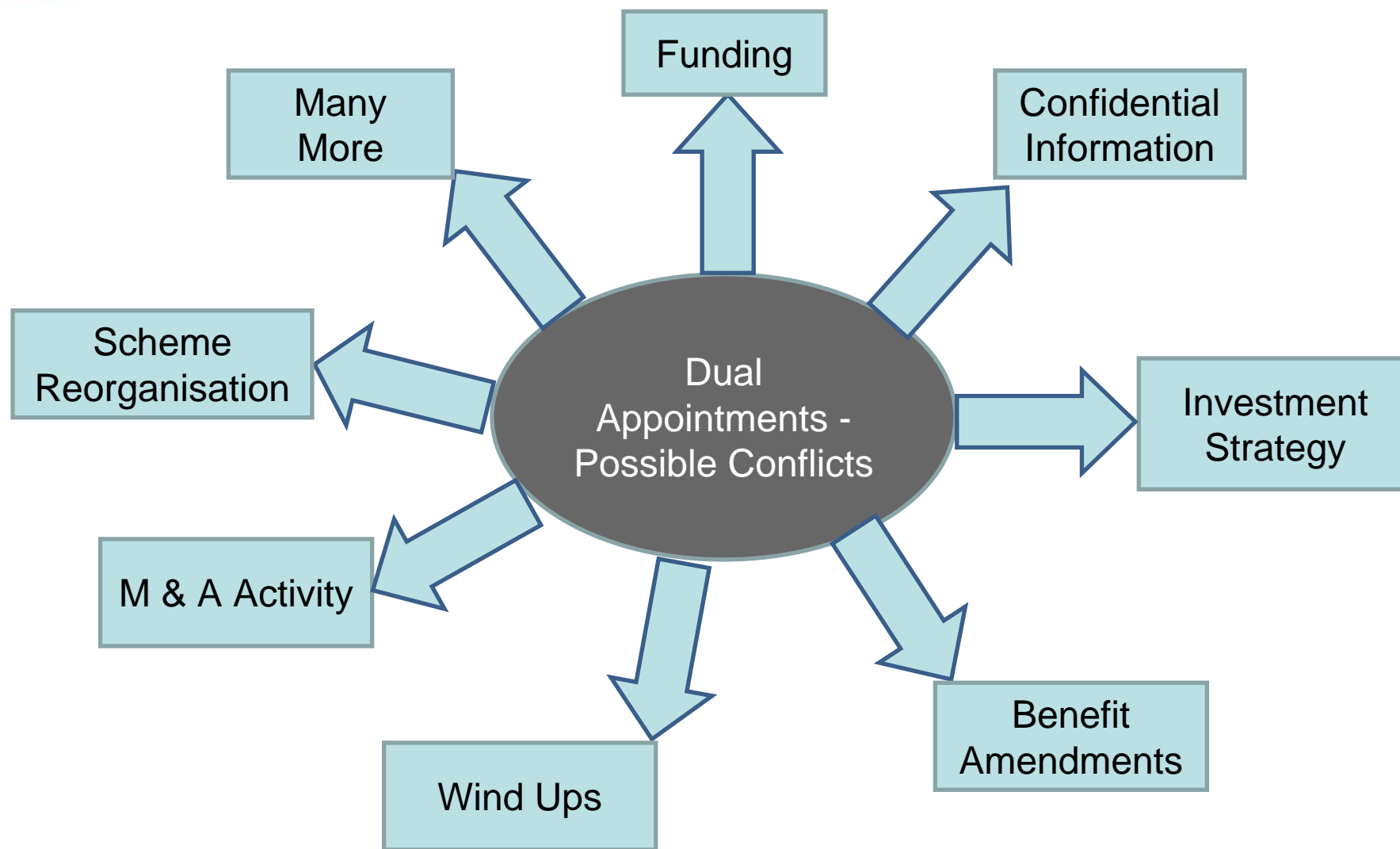


# Dual Appointments

## Why all the concern?

- Morris
- Advice to the Trustees and Employer, same scheme
- Always potential
- Lots of Dual Appointments out there.
- Potential  Actual Conflict??
- May be too late!







# Possible Conflicts Funding

- Advice to Trustees not compromised by relationship with Employer
- e.g. Scheme in Deficit & ER Financial Difficulties
- Employer seeks to minimise contributions under Funding Proposal? What do you do?
- Acting in Trustees best interests?
- Trustees presented with options which line up with their objectives?



# Possible Conflicts Confidential Information

- Inform Trustees on ER Financial difficulties?
- Would Trustees act differently?
- Contributions/Investment Strategy/Wind-up



# Possible Conflicts Investment Strategy

- Trustees may seek to maximise security
- ER seeks to minimise cost
- Suitability of investment strategy or recommending an investment strategy for a liability structure
- Trustees objectives taken into account ?



# Possible Conflicts Benefit Amendments

- Augmented benefits one category
- Giving information on benefit amendments to the Employer without telling the Trustees
- Trustees at a disadvantage
- Trustees must balance interests of all members
- Possible pressure on assumptions



# Possible Conflicts Wind-Ups

- Clarity on client
- Understand where interests differ
- TD&R - Member Entitlements may be vague
- Eg Scheme winds up in surplus Vs min TVs
- Possible conflicts over calculation of TVs and
- Use of surplus?



# Possible Conflicts M&A Activity

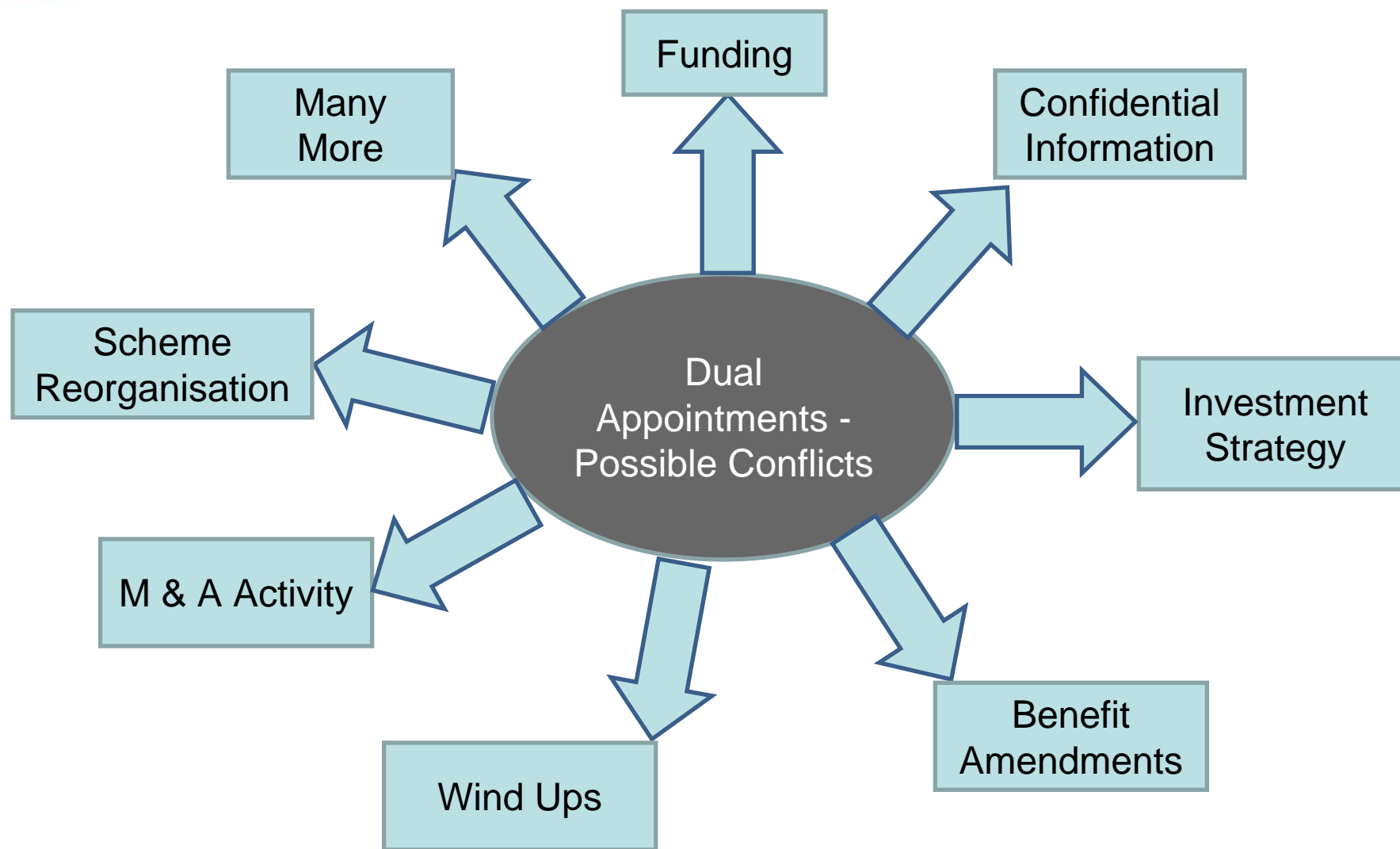
- Calculation of bulk transfer value
- ER sells off part of business
- ER may have views on size of bulk transfer
- Trustees concerned with benefit security
- How to calculate transfer value?



# Possible Conflicts Scheme Reorganisation

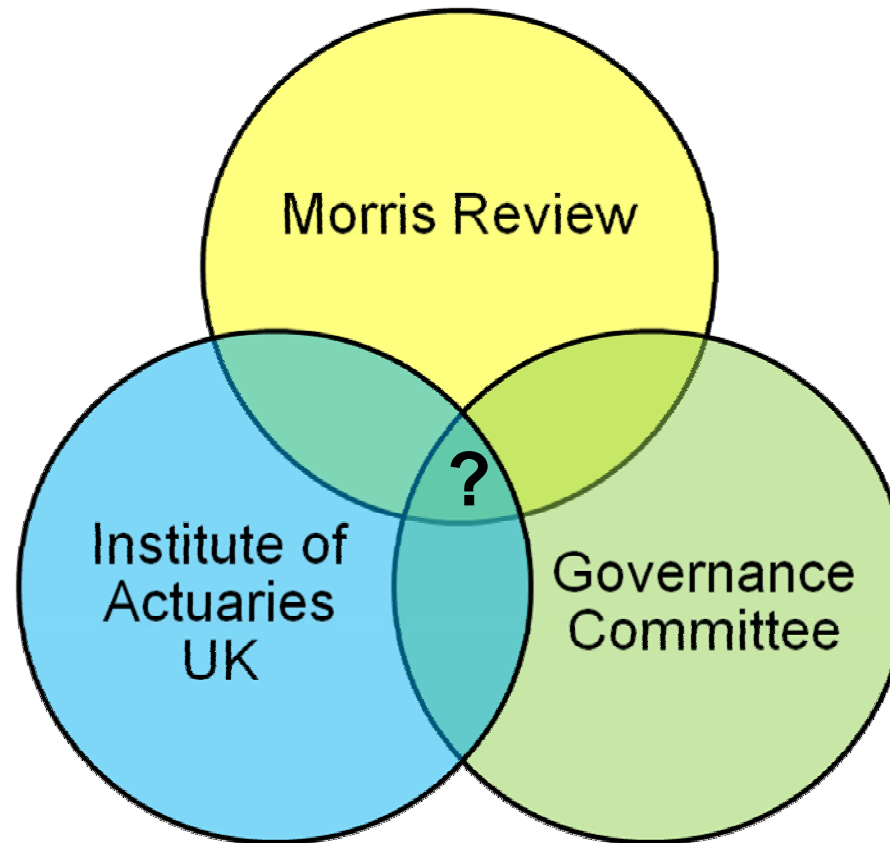
- Consolidation of schemes in large employers
- Merger of 2 schemes, one in deficit, other in surplus
- Different views on how deficit is managed?
- Cash injection?







# Tackling Conflicts under the Dual Appointment???





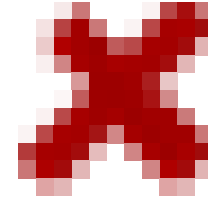
# Morris Proposals

- Separation of Roles at all times
- No Separation of Roles  
=>New Conflict Management Role
  - for Trustees
  - for Actuary
- Separation of Roles in special circumstances e.g. wind-up



# Morris Conclusions

- Separation of Roles at all times
  - Not Practical (common interests, cost)
- Note of Caution
- Focus on Conflict Management
- Conflict Management Role Shared by the Trustees, the Employer and the Actuary
- Written Agreement
- Trustees = Scheme Actuary's primary client





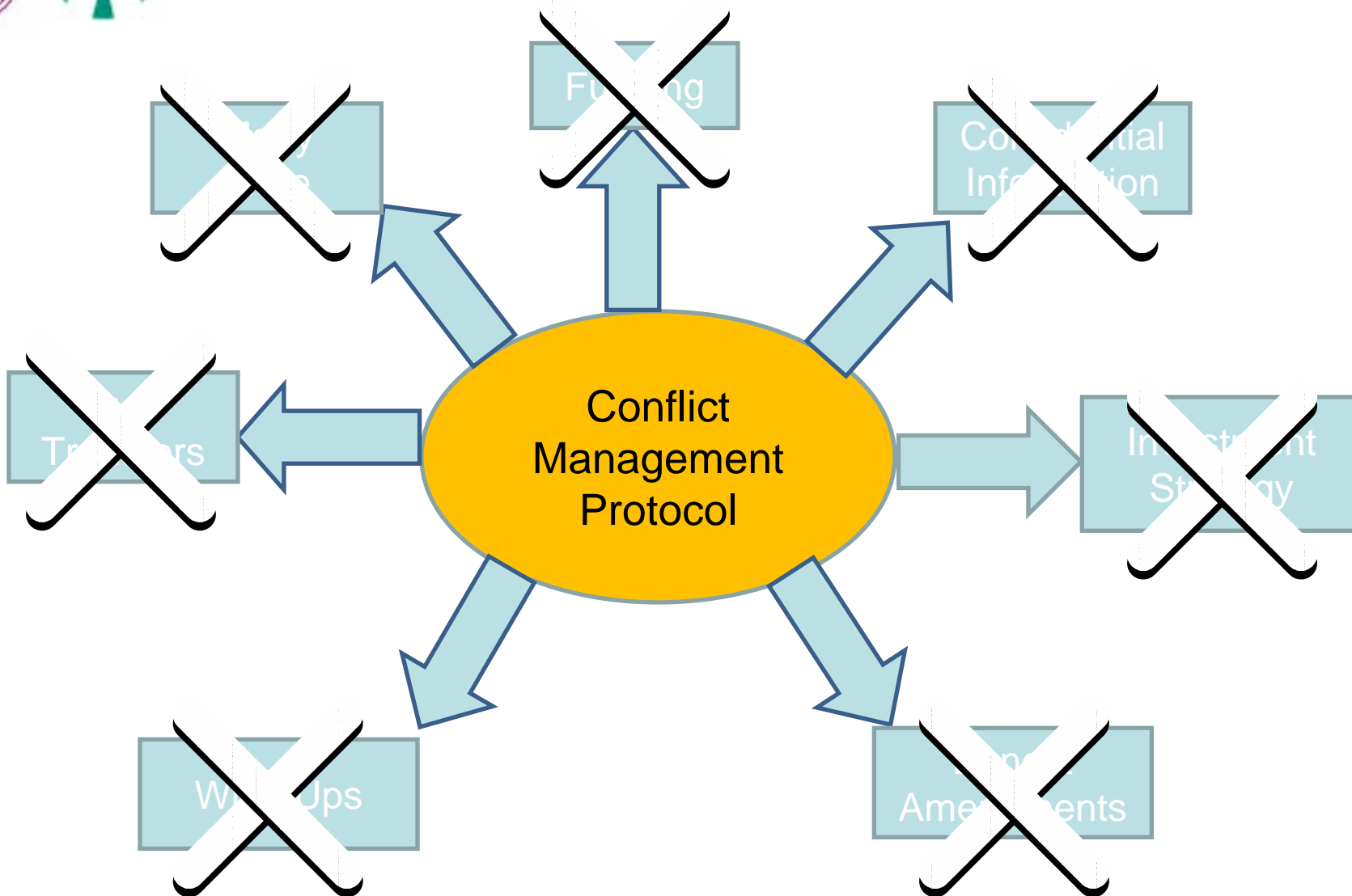
# Institute of Actuaries UK Proposal

- Morris Influence
- Practice Standard Guidance Note
- Several Iterations => Principles Based
- Dual Appointments only
- Not allowed to act if there is an actual conflict
- Written “Conflict Management Protocol” in managing relationships
- Trustees = Scheme Actuary’s primary client
- Covers interaction with Firm’s Appointments



# Governance Subcommittee ROI Proposal

- PCS
- Practice Standard Guidance Note
- Based on similar principles to UK
- No Scheme Actuary appointment in ROI legislation
- Possibly broader scope than the dual appointment





# The Conflict Management Protocol

## Minimum Contents

- Scope of Appointments
- Confidential Information
- Primary Client
- Not allowed to act if there is a material conflict





# The Conflict Management Protocol

## Practical Issues to Consider-

- The Role of the Firm
- Confidential Information
- Intermediaries
- Continuous Monitoring



# The Conflict Management Protocol

## The Role of the Firm

- Check for conflicting appointments
- Global/Multinational appointments
- Wide enough geographically/type of business
- Central list of Appointments
- Use of Information Barriers



# The Conflict Management Protocol


## Confidential Information

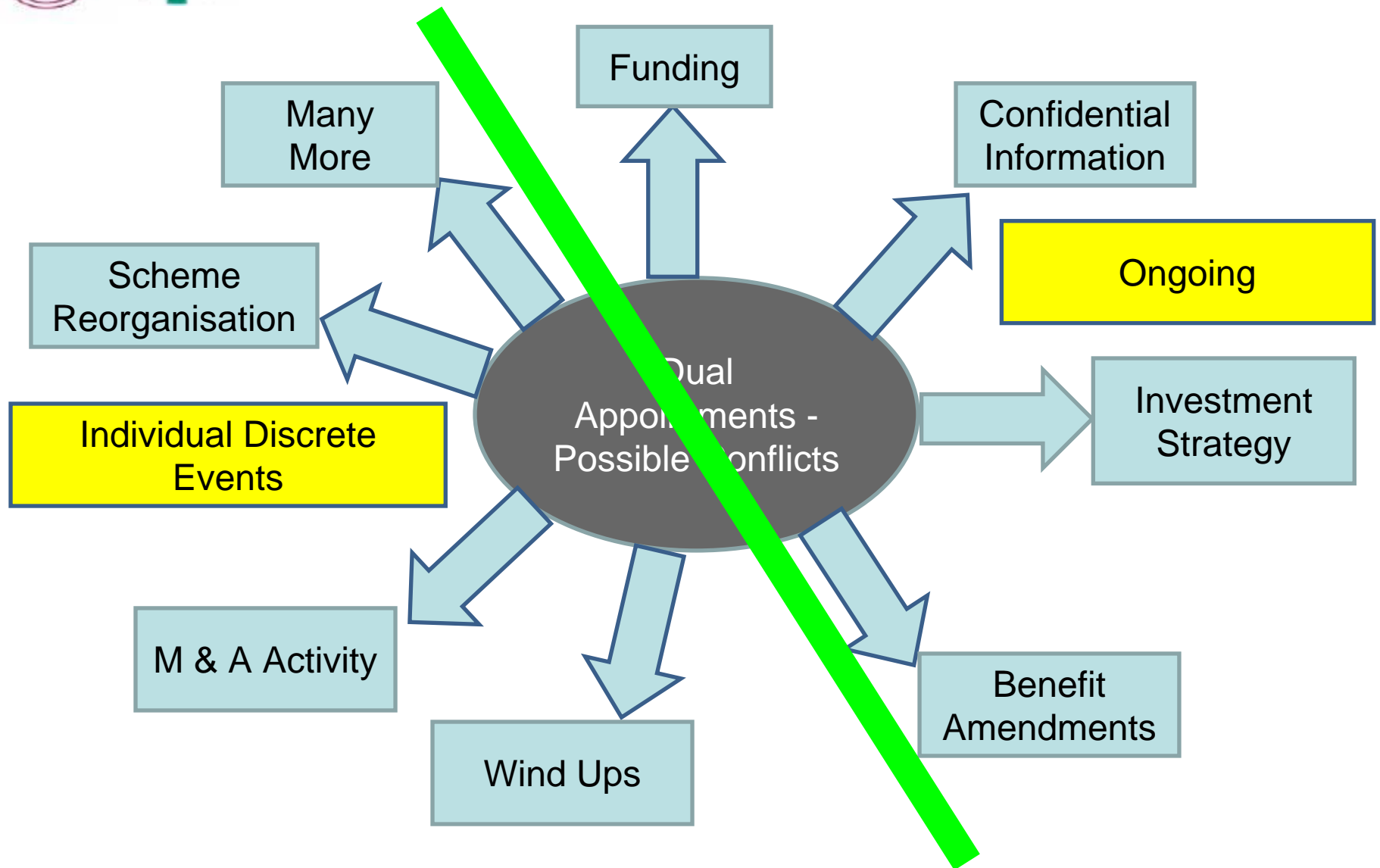
- Rules for dealing with confidential information
- What you will do with it.
- Must be workable.
- Impact of passage of time
- Intermediaries



# The Conflict Management Protocol

## Continuous Monitoring

- Potential  Actual ?
- Your Firm's & Own appointments
- Procedures Aligned with Protocols
- Flow of Confidential Information
- Guard the Scope of Appointments





# Practical situations: General themes

- Who is the client – trustee or company?
  - Where on the conflict spectrum is the proposed course of action
- 
1. No current conflict
  2. Possibility of theoretical conflict
  3. Potential for conflict
  4. Expectation of conflict
  5. Actual conflict.



# Practical situations: Ongoing advice

- Who is the client – trustee or company?
- Where are we on the conflict spectrum?
- Beware of role/conflict drift
- Ongoing situation makes it harder to spot, more difficult to manage, probably easier issues



# Practical management of conflict

- How is transparency affected by one adviser acting? Can one adviser continue to act?
  - Is the conduct of the conflict transparent and bona fides?
  - Can the conflict be managed transparency without prejudice to the interests of either side?
- How is confidential information going to be dealt with?





# Practical situations: Scheme merger ("surplus" release)

- Who is the client – trustee (which set) or company?
- Confidential information issues (how much can the company really afford/how strongly opposed are the trustees)
- Fiduciary view of liabilities and member expectations vs corporate view of same



# Practical situations: Winding-up

- Who is the client – trustee or company?
- Importance of perception of conflict
- Who controls determination of base liabilities (refer trust deed and rules)
- When do you augment, when do you stop augmenting?
- Recent case law: the amount required to “secure” benefits is not the buy-out cost necessarily.



# Practical situations: Sale and purchase transactions

- Who is the client – trustee or company?
- Can the Trustees' actuary act for the company in sale negotiations (only if transparent and instructions come from trustees/are consistent with trustees approach?)
- What if contract terms differ from known trustee practices or commit trustees to admission of employers (with adverse funding impact)
- Confidential information issues



# Limited case law and guidance

- Marks and Spencer v Freshfields 2004
  - Cannot act where there is a real or serious risk of conflict
  - No ad hoc or post hoc Chinese Walls
- Bolkiah v KPMG 1999 (duty of confidentiality case)
  - Applies solicitor's duty of confidentiality to other advisers (including potentially actuaries)
  - Must ensure that Chinese Walls are credible



# Managing 'Chinese Walls'

- Printers/secretaries/filing cabinets
- Client agreements/no meetings other than accompanied by client/ no solicitor/solicitor communication
- Burden of proof is on the firm to show they are secure
- BEWARE: Does the requirement to prove the independence of advice create an issue in its own right where two actuaries from one firm act on either side?



# Assessing conflicts

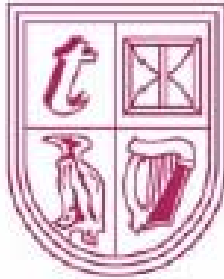
## Some practical suggestions

- Who is your main and ongoing client – trustee or company?
- Who is the second client – two rival bidders (blinker horses); or receiving and transferring trustees (whites of eyes)
- Where are you on the scale of conflicts
- Is perceived conflict an issue?
- Can you get consent to act for both sides (and should you)?
- How will ‘Chinese Walls’ operate and are they practicable in the circumstances



# The Future?

- Other problem areas
  - Advising individual scheme members
  - Conflict with your own interests
- New guidance gives us the tools
- Identify, monitor, manage Conflicts
- Constant education
- Consider Reputation



# Conflicts of Interests for Pension Scheme Actuaries

Patrick Needham & Philip Smith

Jointly organised by the Society of Actuaries in Ireland and the  
Association of Pension Lawyers in Ireland - 13 May 2008