

# UK Pensions Briefing

## The CMA trustee order to be replicated in DWP Legislation

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### Introduction

The Department for Work and Pensions (**DWP**) has responded to its 2019 consultation on Regulations to incorporate obligations relating to investment consultancy (**IC**) and fiduciary management (**FM**) services to pension schemes within its own legislation. Very similar obligations are currently contained within the Competition and Market Authority's (**CMA**) Investment Consultancy and Fiduciary Management Market **Order** 2019 (the **CMA Order**), and will be replaced when the new Regulations become law. The DWP has announced that, subject to parliamentary approval, the Regulations will come into force on October 1, 2022. The DWP published its **response** to its consultation on June 6, 2022, along with **draft regulations** (the **DWP Regulations**).

### Background

In June 2019, the CMA issued the CMA Order which requires occupational pension scheme trustees to run a competitive tender process when selecting a fiduciary manager for 20 per cent or more of a pension scheme's assets. This applied to new appointments following that date and also required trustees to put pre-existing appointments up for tender within specified time periods (usually five years from the original appointment).

The CMA Order also required trustees to set strategic objectives for their investment consultancy provider, whether new appointments or incumbent investment advisers.

The CMA Order, brought fully into force on December 10, 2019, was implemented following the CMA's in-depth investigation into the investment consultants market in the context of pensions, which found significant competition concerns. It was seen as the final step in the competition regulator's reform of the IC and FM sectors.

The same year, the CMA recommended that the DWP pass the necessary legislation to enable The Pension Regulator (TPR) to oversee the duties on trustees, integrating the CMA Order into the main body of pensions law. Though DWP aimed to have legislation in place in 2020, this was delayed until this year due to Covid-19.

### What do the DWP Regulations contain?

The DWP's Regulations largely replicate the relevant provisions of the CMA Order. Where scheme trustees have already complied with the CMA Order, they will be deemed as having complied with the corresponding requirements under the incoming DWP Regulations and will not need to re-run tender processes etc. There are two

main requirements which have been replicated across from the CMA Order:

#### 1. Mandatory tendering for FM:

Trustees already using the services of a FM provider in relation to at least 20 per cent of the pension scheme's "manageable assets" must carry out a competitive tender process (within five years of the date on which the FM provider was appointed if they were originally appointed without one). If the five-year deadline has already expired (or will expire within the next two years), the trustees must carry out a competitive tender process within the next two years.

The DWP Regulations have revised the scope of "manageable assets" to exclude any asset-backed contributions, as well as continuing to exclude buy-in policies which were already excluded under the CMA Order.

Trustees will also be required to carry out a competitive tender process when first purchasing FM services covering 20 per cent or more of the scheme's assets (or when extending an existing mandate to cover 20 per cent or more of the scheme's assets).

#### 2. Setting objectives for ICs:

Trustees must not enter into an agreement for the provision of IC services unless objectives have been set for the provider. For existing arrangements which pre-date the coming into force of the DWP Regulations, objectives should be set with immediate effect.

Trustees must also review and, if appropriate, revise an IC service provider's objectives at least every three years and without delay after any significant change in investment policy. They must also review the performance of each IC service provider against its objectives at least every 12 months. TPR has published [guidance](#) for trustees when setting objectives for their IC service providers, though this guidance may be updated to reflect the finalised DWP Regulations ahead of their commencement.

The DWP Regulations refer to "objectives" as opposed to "strategic objectives" used in the CMA Order to avoid the unintended perception

that only objectives relating to investment strategy should be included.

## What's changing?

Key differences between the CMA Order and the DWP Regulations include:

- The DWP Regulations use a wider definition to determine whether organisations are connected (i.e. "group undertakings") for the purposes of categorising whether a scheme is sponsored by an IC/FM or connected body, or a service meets the definition of FM. Where they are deemed connected, such schemes are exempt from the scope of the DWP Regulations.
- Unlike the CMA Order, the DWP Regulations will not treat an IC provider participating in a joint venture with an FM provider as an "IC-FM firm". As such, where sponsors and FMs are connected via a joint venture, there is still a requirement to run a competitive tender.
- Certain in-house fund manager/investment consultant firms (known as an "OPS Firm") were exempt from complying with the CMA Order, however this has not been replicated in the DWP Regulations. The Regulations will apply to both those OPS firms wholly-owned by trustees of a single occupational pension scheme and those owned by trustees of a number of different schemes.
- The CMA Order excluded from its scope:
  - schemes where the principal or controlling employer of a scheme is themselves a provider of FM and/or IC services to the schemes; and
  - defined contribution master trusts for which an IC-FM firm (or an interconnected body corporate of the IC-FM firm) is the scheme strategist or scheme funder.

The DWP's consultation stated "*it would be impractical in these circumstances to expect the trustees to carry out a competitive tender for FM services where they would have a clear and legitimate preference to use the services of the sponsoring employer.*" The DWP has therefore excluded these schemes from complying with the

Regulations, however, it will require trustees to set their IC objectives and monitor performance against them (regardless of whether the IC is connected with the sponsoring employer of the scheme).

## What does this mean for trustees?

As noted above, the DWP's Regulations mostly replicate the CMA Order, however the scope of the Regulations are slightly wider than the CMA Order. Despite this, as the CMA Order came into force on December 10, 2019, trustees should have already been complying with the vast majority of the requirements to be introduced under the DWP Regulations. The CMA Order requires trustees to submit compliance statements to the CMA. The DWP's Regulations will now provide TPR the power

to carry out the appropriate monitoring, compliance and enforcement activity. As such, trustees will be required, within the existing scheme return process, to report compliance in relation to the DWP's Regulations.

Due to amendments to the Register of Occupational and Personal Pension Schemes Regulations 2005 (the **Registration Regulations**), TPR will also be able to ask additional questions on the scheme returns for trustees to complete. This will provide TPR with intelligence which it may be beneficial to investigate further.

The final Regulations are expected to take effect on October 1, 2022. Trustees will be further guided by TPR who will update its current guidance, to reflect the revised framework, ahead of the commencement of the new Regulations.

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