

Investment consultancy and fiduciary management

New UK pension scheme trustee and service provider requirements from December 2019

The Competition and Markets Authority (CMA) has published the [remedies order](#) (the order) following its market investigation into the provision of investment consultancy and fiduciary management services. The CMA has also published an [explanatory note](#) accompanying the order.

In December 2018, the CMA published the final report in its investigation setting out its findings and recommendations (for more information, please see our [legal update](#)).

REMEDIES AFFECTING TRUSTEES

Appointment of fiduciary managers

When appointing (or re-appointing) a fiduciary manager in respect of 20% or more of scheme assets, trustees will be required to run a competitive tender process. Trustees will be required to provide written confirmation to the successful manager that their appointment is the result of a competitive tender process. Scheme assets for these purposes means those assets which are capable of being allocated to a fiduciary manager rather than assets such as a buy-in policy. The competitive tender process must involve at least three managers that are independent of one another being invited to bid.

Where trustees have already appointed a fiduciary manager in respect of 20% or more of scheme assets without running a competitive tender process, they will be required to put the role out to competitive tender within five years of the commencement date of the fiduciary management agreement. Where, as at

10 June 2019, more than three years have already elapsed since the commencement date of the fiduciary management agreement, a two year grace period applies and the trustees must put the role out to competitive tender by 10 June 2021.

Special rules apply where trustees have entered into, or wish to enter into, more than one fiduciary management agreement and/or where trustees wish to increase the assets under management under one or more agreements to a level that exceeds 20% of scheme assets.

Fiduciary managers will be prohibited from accepting a mandate where there is a requirement to run a competitive tender process unless the trustees confirm that one has taken place.

Investment consultancy objectives

Trustees will be required to set strategic objectives for their investment consultant. These objectives must relate to the advice provided by the consultant to the extent that this advice covers one or more of the following:

- the investments that can be made or held by or on behalf of the trustees;
- any matters on which the trustees are required by law to seek advice in relation to the preparation or revision of the scheme's statement of investment principles;
- strategic asset allocation; and
- manager selection.

The CMA expects the objectives to be closely linked to the scheme's investment strategy and for the objectives to be reviewed at least every three years and after any significant change in the scheme's investment strategy. The CMA also expects the objectives to include a clear expected outcome and the timescale over which that outcome should be delivered and to be reasonably achievable.

REMEDIES AFFECTING SERVICE PROVIDERS

Marketing materials

Investment consultants will be required to separate documents marketing their fiduciary management services from their investment advice documents. They will also be required to include prescribed text in such marketing documents, identifying the documents as marketing materials, and reminding trustees of their duty to tender competitively for fiduciary management services in certain cases.

Information on fees and performance

Fiduciary managers will be required to provide better information on fees for existing and potential customers to enhance the ability of trustees to assess value for money. Fiduciary managers will also be required to develop and use a standardised methodology and template for reporting past investment performance to prospective customers (the performance standard) so that trustees are better placed to assess the quality of alternative fiduciary managers.

The performance standard must be submitted to the CMA for approval by (a) a majority of fiduciary managers or an association of investment professionals supported by a majority of fiduciary managers, and (b) pension scheme representatives. In preparing the performance standard, the fiduciary managers/investment association will need to have regard to the requirements of competition law, notably the rules on exchange of commercially sensitive information between competitors and the need to demonstrate that the performance standard would not create any competitive disadvantage between providers. Substantial work has already been done to develop the performance standard. The performance standard must be submitted to the CMA by 10 December 2019.

Investment consultants and fiduciary managers will also be required to report performance of any recommended asset management products or funds using basic minimum standards to enable trustees to compare performance better.

MONITORING AND ENFORCEMENT OF THE REMEDIES

The new requirements will take effect on 10 December 2019. Trustees and service providers will be required to submit annual compliance statements to the CMA confirming the extent to which they have complied with the requirements of the order. The compliance statement must be accompanied by a certificate, signed on behalf of the trustees/service provider. The first compliance statement and accompanying certificate must be submitted to the CMA within four weeks of 10 December 2020.

Trustees and service providers must also notify the CMA within 14 days if they become aware of any non-compliance on their part with the requirements of the order.

The CMA will initially monitor compliance with and enforce the remedies. However, the government has [confirmed](#) that it will consult on regulations putting the remedies that apply to trustees into the main body of pensions law. Subject to the outcome of that consultation and parliamentary time, the regulations will be brought into force to replace the requirements under the order in 2020. Compliance with those regulations will then be monitored and enforced by the Pensions Regulator. The Financial Conduct Authority will be responsible for imposing replacement requirements on service providers, and for monitoring and enforcing compliance with those requirements.

PENSIONS REGULATOR GUIDANCE

In its final report, the CMA recommended that the Regulator publish guidance to support trustees in complying with their duties under the order. The Regulator is expected to consult this summer on this guidance.

If you have any questions about the issues raised in this legal update, please get in touch with [Edward Jewitt](#) on +44 20 3130 3661, [David Harrison](#) at +44 3130 3050, [Katherine Carter](#) at +44 20 3130 3901 or [Rebecca Timms](#) at +44 20 3130 3104.

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