

Trustee oversight of investment consultants and fiduciary management - DWP response to consultation



Introduction

On 6 June 2022, the DWP published the long awaited [response](#) to its consultation on trustee oversight of investment consultants and fiduciary managers, along with [draft regulations](#) (the “Regulations”), which are intended to come into force on 1 October 2022.

Key points

- The Regulations are designed to integrate into pensions law relevant aspects of an [order produced by the CMA](#) in 2019 following its investigation into the investment consultants market (the “Order”), and will enable TPR to oversee compliance and enforcement of the requirements.
- By way of recap, the Order broadly requires occupational pension scheme trustees to carry out a competitive tender process for fiduciary management (“FM”) services if their scheme uses such arrangements for at least 20% of their funds and to set strategic objectives for their investment consultancy (“IC”) provider.
- The Regulations “largely replicate” the current requirements, subject to certain changes intended to reflect policy decisions. They also include provisions to ensure that where trustees have taken action to comply with the Order, they will not be expected to duplicate that action when the Regulations take effect.
- The Regulations are intended to come into force on 1 October 2022, with revised TPR guidance expected before that date.

Background

The CMA carried out a market investigation into FM and IC services to pension schemes back in 2018. FM involves the delegation by trustees of some investment decisions to advisers. In broad terms, IC is the provision of advice to trustees on investment strategy and related matters.

Following its investigation and subsequent report, the CMA published the Order, which was brought fully into force on 10 December 2019 and set out various obligations on trustees in relation to FM and IC services.

The DWP **originally consulted** on draft regulations to integrate the requirements of the Order into pensions law back in 2019, with those regulations originally expected to come into force in 2020. In the DWP's response, it explains that the delay is due to "reprioritisation" brought on by the COVID-19 pandemic.

What do the Regulations do?

The Regulations will apply to DB and DC registrable occupational pension schemes with more than one member, subject to limited exceptions.

As well as "largely replicat[ing]" the relevant parts of the Order with "minor alterations" based on slight policy differences (see below), the Regulations also:

- ensure that where trustees have complied with the Order, they will be treated as having complied with the corresponding requirements under the Regulations
- introduce reviewing and monitoring obligations on trustees in respect of their IC provider's performance against its objectives (see below)
- more closely reflect the requirements in the Order
- bring the monitoring and compliance requirements into TPR's remit. Trustees will have to report compliance in relation to the requirement within the existing scheme return process, which will replace the current requirement to submit compliance statements to the CMA.

As with the Order, where the FM or IC services are provided by a scheme trustee, or a company wholly owned by pension scheme trustees, they fall outside the scope of the Regulations.

Key policy differences

The DWP **identifies** certain key policy differences, including:

- schemes where the principal or controlling employer is themselves a provider of IC / FM services and master trusts for which an IC and / or FM firm is the scheme strategist or scheme funder are excluded from the requirements to tender for FM services and to set IC objectives under the Order. The Regulations exclude these cases from the requirement to tender for FM services, on the basis that it would be "impractical" to expect trustees to carry out a competitive tender process, as they would have a "clear and legitimate preference" to use the services of the sponsoring employer or scheme strategist / funder (as appropriate). However, the DWP has kept them in scope for the requirements to set IC objectives and monitor performance (see below), on the basis that failure to do so could result in member detriment
- the Regulations capture a "lacuna" in the current Order, which doesn't cover FM providers appointed between 10 June and 10 December 2019 (ie the period between the Order being made and coming fully into force).

Mandatory tendering for FM

Like the Order, the Regulations require trustees to carry out a “qualifying tender process” before appointing an FM provider, or increasing the amount of assets managed by an FM provider, where either would result in the “asset management threshold” being met for the first time.

A “qualifying tender process” includes:

- inviting, and using reasonable endeavours to obtain, bids for the provision of the relevant FM services from at least three unconnected persons, and
- evaluating the bids which are obtained.

The “asset management threshold” is met if 20% or more of the “manageable assets” of the scheme are managed by FM providers. The DWP has revised the scope of “manageable assets” with the aim of excluding any asset-backed contributions, as well as buy-in policies (which were already excluded), to bring it in line with the Order.

Setting objectives for ICs

Under the Regulations, trustees will be required, as they are currently under the Order, to set objectives for each IC provider. In addition, they will have to:

- review and, if appropriate, revise an IC provider’s objectives at least every three years and without delay after any significant change in investment policy
- review the performance of each IC provider against its objectives at least every 12 months.

The Regulations intentionally refer to “objectives” rather than “strategic objectives” (as in the Order) to avoid any unintended perception that only objectives relating to investment strategy should be included.

Carve out for “high level” actuarial commentary

Following feedback from the consultation, the DWP have added a provision to the Regulations that is intended to make clear that the provision of high level commentary by an actuary in an actuarial valuation is not, by itself, IC services. This is intended to align with the existing exclusion in the Order.

Next steps

The Regulations are intended to take effect on 1 October 2022. TPR is due to publish updated guidance ahead of their commencement.

As the Regulations are intended to broadly replicate the current requirements, there are no immediate actions for the majority of trustees. In due course, they will need to factor in time to respond to the additional compliance questions in the scheme return but this should be a more streamlined process than the current requirement to submit a compliance statement to the CMA.

If you have any questions on any of the above, please speak to your usual Sackers contact.