

INVESTMENT CONSULTANTS MARKET INVESTIGATION

Draft Explanatory Note – Consultation

The Investment Consultancy and Fiduciary Management Market Investigation Order 2019

This note is not a part of the Order

Introduction

1. The Competition and Markets Authority (CMA) published its findings in the Investment Consultants Market Investigation in a report under section 136 of the Enterprise Act 2002 (the Act) entitled Investment Consultants Market Investigation: Final Report on 12 December 2018 (the Final Report).
2. The Final Report set out the CMA's findings that there are features of the markets for Investment Consultancy Services and Fiduciary Management Services which individually and in any combination adversely affect competition in connection with the supply and acquisition of those services in the United Kingdom to and by pension schemes.
3. The CMA decided on a package of remedies to be implemented by it in order to remedy, mitigate or prevent the adverse effects on competition (AECs) that it found and the detrimental effect on customers that may be expected to result from the AECs. The AECs arise from the following features:
 - (a) in respect of Investment Consultancy Services:
 - (i) Low levels of engagement by some customers;
 - (ii) Lack of clear information for customers to assess the quality of their existing Investment Consultancy Provider;
 - (iii) Lack of clear and comparable information for customers to assess the value for money of alternative Investment Consultancy Providers.

(b) in respect of Fiduciary Management Services:

- (i) IC-FM firms steering their advisory customers towards their own Fiduciary Management Services;
 - (ii) Low levels of customer engagement at the point of first moving into Fiduciary Management;
 - (iii) Lack of clear and comparable information for customers to assess the value for money of alternative Fiduciary Management Providers;
 - (iv) Lack of clear information for customers to assess the value for money of their existing Fiduciary Management Provider;
 - (v) Barriers to switching Fiduciary Management Provider.
4. The Investment Consultancy and Fiduciary Management Market Investigation Order 2019 (the Order) gives effect to these remedies. Different articles in the Order will come into force on different dates. Unless otherwise stated, there is no further transitional period in relation to any of the provisions contained within the Order.

Possible consequences of not complying with the Order

5. Section 167 of the Act places a duty on any person to whom the Order relates to comply with it. That duty is owed to any person who may be affected by a contravention of the Order. Any person who sustains loss or damage that is caused by a breach of this duty may bring an action before the court.
6. The CMA has the power under the Order to give directions, including directions to a person in their capacity as an office holder, for the purpose of carrying out, or ensuring compliance with, the Order.
7. Section 167 of the Act also provides that the CMA can enforce compliance with the Order by civil proceedings for an injunction or for any other appropriate relief or remedy.

Review of the Order

8. The CMA has a duty under section 162 of the Act to keep under review the carrying out of the Order. This includes a duty to consider, from time to time,

whether the Order needs to be varied or revoked by reason of any change of circumstances.

Status of this Explanatory Note

9. Nothing in this Explanatory Note is legally binding. In the event of a conflict between this Explanatory Note and any provision of the Order, the Order shall prevail. Terms defined in the Order have the same meaning in the Explanatory Note.

Structure of the Order

10. The Order is divided into eleven parts:
 - (a) Part 1 contains general provisions, which include specifying when the Order comes into force and the scope of the Order.
 - (b) Part 2 contains definitions that are used throughout the Order and which are also used in this Explanatory Note.
 - (c) Part 3 prohibits Pension Scheme Trustees from receiving, and Fiduciary Management Providers from providing, Fiduciary Management Services unless the Pension Scheme Trustees have carried out a Competitive Tender Process.
 - (d) Part 4 prohibits the supply by IC-FM firms of advice and Marketing Material within the same document and sets out mandatory wording that must be used in all Marketing Material.
 - (e) Part 5 requires Fiduciary Management Providers to report disaggregated Fiduciary Management fees to existing clients and sets out minimum requirements to be met by Fiduciary Management Providers regarding disclosure of costs and charges when selling Fiduciary Management Services.
 - (f) Part 6 requires the use of a standardised methodology and template for reporting past performance of Fiduciary Management Services to potential clients and provides that the CMA may appoint an independent person to oversee their implementation.

- (g) Part 7 prohibits Pension Scheme Trustees from receiving Investment Consultancy Services unless the Pension Scheme Trustees have set Strategic Objectives for their Investment Consultancy Provider.
- (h) Part 8 requires Investment Consultancy Providers and Fiduciary Management Providers to adhere to basic requirements when reporting to potential clients on the past performance of their recommended Asset Management products and in-house investment products (financial instruments).
- (i) Part 9 contains obligations on Pension Scheme Trustees, IC-FM firms, Fiduciary Management Providers and Investment Consultancy Providers to produce various Compliance Statements and submit them to the CMA.
- (j) Part 10 contains provisions empowering the CMA to give, and subsequently vary or revoke, directions as to compliance with the Order.
- (k) Part 11 contains a duty to supply information and documents to the CMA for the purposes of monitoring compliance with the Order and reviewing the effectiveness of its operation.

Part 1 – General

11. Articles 1.2 and 1.3 provide that the Order shall come into force on different dates as follows:
 - (a) Part 1, Part 2, Article 4.3, Part 6, Article 12.2, Part 9, Part 10 and Part 11 shall come into force on the date when the Order is made.
 - (b) With the exceptions of Article 4.3 and Article 12.2, Part 3, Part 4, Part 5, Part 7 and Part 8 shall come into force six months from the date on which the Order is made.
12. Article 1.4 sets out the ‘sunsetting’ provisions applicable to the Order. The ‘equivalent provisions’ brought into force as part of the regulatory regime of a Relevant Sector Regulator do not have to be identical to the provisions contained in the Order, as it may be necessary to conform certain terms and expressions with those used within the relevant regulatory regime. It will be sufficient, for the purposes of Article 1.4, that they have the same effect as the provisions of the Order.

13. On the date when equivalent provisions are brought into force as part of the regulatory regime of a Relevant Sector Regulator, the relevant provisions of the Order, including the associated provision requiring compliance reporting, will cease to have effect. The equivalent provisions need not all be brought into force on the same date.
14. Article 1.5 clarifies that any requirement imposed by the Order will not apply to the extent that it applies pursuant to existing regulatory requirements. For example, the remedy requiring IC-FM firms to identify clearly any marketing in the materials provided to existing advisory clients in relation to Fiduciary Management Services would not apply to investment firms in respect of their MiFID II business because they are already subject to such a requirement under Article 24(3) of the MiFID II Directive.
15. Article 1.6 sets out the exclusions which apply to the Order as a whole.
16. The Order applies to the supply and acquisition of Investment Consultancy Services and Fiduciary Management Services in the United Kingdom to and by Pension Scheme Trustees.

Part 2 – Interpretation

17. Part 2 includes definitions of various terms used in the Order.
18. In the definition of Fiduciary Management Provider and Investment Consultancy Provider, the reference to a 'person' includes a body of persons corporate or unincorporate (section 11 of, and Schedule 1 to, the Interpretation Act 1978). Therefore, it includes a firm as well as an individual.
19. The definition of Fiduciary Management Services comprises two cumulative requirements, set out in part (a) and part (b), in recognition of the fact that some elements of the service may overlap with similar services provided by Asset Managers, whereas the Order is intended to apply to firms where they act as Fiduciary Management Providers. Accordingly, part (b) covers those elements of the service provided by Fiduciary Management Providers which may overlap with similar services provided by Asset Managers and the additional requirement in part (a) ensures that firms which do not provide the elements of the service covered by that paragraph are not subject to the Order.
20. As regards part (a), the reference to 'advice' in respect of the specified matters is to advice on the merits and it includes a recommendation or guidance as regards

prudent future action. It does not extend to the mere provision of information about the specified matters.

21. The provision of advice by the Fiduciary Management Provider may be oral or written and the services may be provided under one or more contracts.
22. For the avoidance of doubt, a firm with no previous history of providing a client with the services set out in part (a) of the definition of Fiduciary Management Services, which is then appointed by that client simultaneously to provide the services covered by parts (a) and (b), falls within the definition of Fiduciary Management Provider.
23. Investment Consultancy Services are defined to mean the provision of services where the Provider advises the Pension Scheme Trustees in relation to one or more of: investments that may be made; any matters in respect of which the Pension Scheme Trustees are required by law to seek advice in relation to the preparation or revision of the statement of investment principles; strategic asset allocation; manager selection. The services may also include advice in relation to investment strategy or the appointment of a Fiduciary Management Provider:

Part 3 – Mandatory tendering for Fiduciary Management – prohibition on trustees entering into or continuing a Fiduciary Management Agreement without carrying out a Competitive Tender Process and corresponding obligations on Fiduciary Management Providers

24. The aim of this Part is that Pension Scheme Trustees achieve the best outcomes for scheme members by making an informed, active choice when selecting a Fiduciary Management Provider.

The Prohibition

25. Article 3.1 clarifies that the application of Articles 3.2 to 3.4 is subject to the exclusion set out in Article 3.5.
26. Article 3.2 requires Pension Scheme Trustees to conduct a Competitive Tender Process when there is no existing Fiduciary Management Agreement covering any of a pension scheme's assets and they are appointing a Fiduciary Management Provider or Providers for a total of 20% or more of the scheme's assets. It also provides that Fiduciary Management Providers are prohibited from accepting a new mandate for Fiduciary Management Services by Pension

Scheme Trustees in these circumstances, if no Competitive Tender Process has taken place.

27. Article 3.3 requires that, where there is one or more than one Fiduciary Management Agreement covering in total less than 20% of a pension scheme's assets and that Fiduciary Management Agreement or those Fiduciary Management Agreements were not entered into as a result of a Competitive Tender Process, Pension Scheme Trustees and Fiduciary Management Providers must not make or accept any increase in the level of assets under management under the existing Fiduciary Management Agreement or Fiduciary Management Agreements or enter into a new Fiduciary Management Agreement which, individually or when aggregated with every existing Fiduciary Management Agreement, would cover 20% or more of a pension scheme's assets at the date of the increase or the new Fiduciary Management Agreement unless certain conditions are satisfied. These are that the Pension Scheme Trustees have carried out a Competitive Tender Process in respect of all assets which would be covered by one or more Fiduciary Management Agreements and the Pension Scheme Trustees have provided to the Fiduciary Management Provider written confirmation that they have selected the Fiduciary Management Provider as a result of a Competitive Tender Process.
28. The reference to 20% or more of a pension scheme's assets means either the allocation of 20% or more of the scheme's assets to Fiduciary Management Services in a single transaction or the allocation of a smaller percentage of the scheme's assets which results in the total of the scheme's assets under Fiduciary Management Services being 20% or more. The assets can be under the management of one or more than one Fiduciary Management Provider.
29. For the avoidance of doubt, under Article 3.3, the proposed allocation of any percentage of the pension scheme's assets which would result in the total of the pension scheme's assets under Fiduciary Management Services being 20% or more, whether with one or more than one Fiduciary Management Provider, means that the Pension Scheme Trustees must carry out a Competitive Tender Process in respect of *the total* of the pension scheme's assets under Fiduciary Management Services (unlike the situation covered by Article 3.4, which requires a Competitive Tender Process in respect only of *the increment* to the pension scheme's assets under Fiduciary Management Services - see paragraph 31 below). In those circumstances, those Fiduciary Management Providers who are already providing Fiduciary Management Services to the Pension Scheme Trustees would need to participate and be successful in the Competitive Tender

Process in order to continue to provide Fiduciary Management Services to that client in respect of any of its assets.

30. Article 3.4 requires that where there exists one or more than one Fiduciary Management Agreement covering in total less than 20% of a pension scheme's assets and that Fiduciary Management Agreement or those Fiduciary Management Agreements were entered into as a result of a Competitive Tender Process, Pension Scheme Trustees and Fiduciary Management Providers must not make or accept any increase in the level of assets under management under the existing Fiduciary Management Agreement or Fiduciary Management Agreements or enter into a new Fiduciary Management Agreement which, individually or when aggregated with every existing Fiduciary Management Agreement, would cover 20% or more of a pension scheme's assets at the date of the increase or the new Fiduciary Management Agreement unless certain conditions are met. These are that the Pension Scheme Trustees have carried out a Competitive Tender Process in respect of the increment in the assets which would be covered by one or more Fiduciary Management Agreements and that the Pension Scheme Trustees have provided to the Fiduciary Management Provider written confirmation that they have selected the Fiduciary Management Provider as a result of a Competitive Tender Process.
31. For the avoidance of doubt, under Article 3.4, the proposed allocation of any percentage of the pension scheme's assets which would result in the total of the pension scheme's assets under Fiduciary Management Services being 20% or more, whether with one or more than one Fiduciary Management Provider, means that the Pension Scheme Trustees must carry out a Competitive Tender Process in respect only of *the increment* to the pension scheme's assets under Fiduciary Management Services (unlike the situation covered by Article 3.3, which requires a Competitive Tender Process in respect of *the total* of the pension scheme's assets under Fiduciary Management Services - see paragraph 29 above).
32. Competitive Tender Process is defined in Part 2 of the Order. It is for the Pension Scheme Trustees to decide whether an open or closed tender process best suits the needs of their scheme and to invite as many Providers to tender as they see fit, provided they invite and use their best endeavours to obtain at least three bids from Providers who are independent of each other and thereby in a position to compete with each other.

33. The Competitive Tender Process may be conducted directly by the Pension Scheme Trustees or by another person appointed by them to act on their behalf, such as a third-party evaluator.
34. The Fiduciary Management Provider may rely upon the written confirmation provided by the Pension Scheme Trustees that they have selected the Fiduciary Management Provider as a result of a Competitive Tender Process. There is no requirement for the Fiduciary Management Provider to conduct due diligence or other verification process as regards the confirmation provided.
35. Article 3.5 states that Articles 3.2 to 3.4 do not apply to the Pension Scheme Trustees of a pension scheme, in relation to which the Pension Scheme Trustees are contracting authorities for the purposes of the Public Contracts Regulations 2015 and appoint or have appointed a Fiduciary Management Provider in compliance with those Regulations.

Requirement to hold a Competitive Tender Process where Fiduciary Management Agreement(s) covering 20% or more of a pension scheme's assets already exist

36. Article 4.1 clarifies that the application of Articles 4.2 and 4.3 is subject to the exclusion set out in Article 4.4.
37. Article 4.2 provides that Pension Scheme Trustees who have previously appointed one or more than one Fiduciary Management Provider in respect of a total of 20% or more of a pension scheme's assets without conducting a Competitive Tender Process are required to conduct a Competitive Tender Process within five years from the commencement date of the first Fiduciary Management Agreement, that is within five years from the first appointment of a Fiduciary Management Provider.
38. Article 4.3 provides a two-year grace period to ensure that all Pension Scheme Trustees whose mandate already exceeds the five-year period or is approaching it have sufficient time to organise a Competitive Tender Process. Pension Scheme Trustees will need to have completed a Competitive Tender Process not later than two years from the date on which the CMA's order is made.
39. Article 4.4 states that Articles 4.2 and 4.3 do not apply to the Pension Scheme Trustees of a pension scheme, in relation to which the Pension Scheme Trustees are contracting authorities for the purposes of the Public Contracts Regulations

2015 and have appointed a Fiduciary Management Provider in compliance with those Regulations.

40. For the avoidance of doubt, following a Competitive Tender Process under the Order, Pension Scheme Trustees are not precluded from (a) splitting the assets under management between several Fiduciary Management Providers if they consider this to be in the best interests of the scheme; or (b) re-appointing their existing Fiduciary Management Provider if it is the successful bidder (or one of several successful bidders) as a result of a Competitive Tender Process.
41. The Competitive Tender Process may be conducted directly by the Pension Scheme Trustees or by another person appointed by them to act on their behalf, such as a third-party evaluator.

Part 4 – Separation of advice and Marketing Material and use of mandatory wording in respect of Fiduciary Management Services

42. The aim of this Part is that Pension Scheme Trustees better understand whether information on Fiduciary Management Services received from an Investment Consultancy Provider is advice or Marketing Material. To support the mandatory tendering requirements, this Part also requires IC-FM firms to include a reminder in Marketing Material to their Pension Scheme Trustee clients of the requirement to conduct a Competitive Tender Process in certain cases.

Prohibition on supplying advice and Marketing Material in respect of Fiduciary Management Services within the same document

43. Article 5.1 provides that IC-FM firms must provide Marketing Material in respect of Fiduciary Management Services and advice to their Pension Scheme Trustee clients in separate documents. This Part of the Order requires IC-FM firms to include a prominent notice in their written materials for advisory clients when marketing their own Fiduciary Management Services. This will give clarity and context to the different types of information these firms provide to Pension Scheme Trustees.
44. In this Article, ‘advice’ means advice on any aspect of Investment Consultancy Services or Fiduciary Management Services.

Mandatory wording

45. Article 6.1 provides that the Marketing Material must be labelled as marketing and must comply with Article 7.

Content and format

46. Article 7.1 sets out the prescribed text which must be used by IC-FM Firms for transparency, accountability and to avoid circumvention of this Part and Part 3.
47. Article 7.2 provides that the prescribed text must be included by IC-FM Firms on the first page of each Marketing Material document.
48. Article 7.3 provides that the text must be in at least the same font size as the predominant font size used throughout the remainder of the document and should not be disguised, diminished or obscured by graphics or in other ways. This is in order to guarantee that the prescribed text has sufficient prominence.

Part 5 – Fiduciary Management Services - fee reporting requirements

Requirement to report disaggregated Fiduciary Management Services fees to existing clients

49. The aim of Article 8 is that Fiduciary Management Providers will provide information in a way that will allow Pension Scheme Trustees better to monitor both the overall costs and charges paid for the Fiduciary Management Services provided to them and the costs and charges paid for the distinct underlying elements.
50. Article 8.1 provides that a Fiduciary Management Provider must provide in good time a regular and at least annual fee statement to each of its Pension Scheme Trustee clients that clearly sets out:
 - (a) A disaggregated itemisation of the overall costs and related charges incurred during the reporting period. The following costs and charges must be clearly itemised:
 - (i) All costs and associated charges for the Fiduciary Management Service, covering advice and implementation. This must include any incidental costs, such as performance fees, paid during the reporting period;

- (ii) Asset Management fees in respect of the financial products and funds provided by the Fiduciary Management Provider and those provided by third-party Asset Managers. This must include any incidental costs and performance-related payments;
 - (iii) In respect of (ii) above, all costs and charges associated with execution must be itemised separately from the Asset Management fees;
 - (iv) All other investment costs and charges. This must include custodian fees, administration charges and any charges that are related to Ancillary Services. These cost items may be bundled in one single item.
- (b) The aggregated costs and charges incurred during the reporting period. This must include all costs and charges incurred as part of the Fiduciary Management Service, including both those deducted directly from assets and those invoiced separately and those paid to the Fiduciary Management Provider and to third parties.
51. The information must be in a comprehensible form, such that clients are reasonably able to understand it and to take investment decisions on an informed basis.
 52. The use of 'in good time' is intended to ensure that a client has sufficient time to read and understand the information provided before taking a key decision in respect of the Fiduciary Management Services (for example, a decision whether to renew or make a material change to a mandate with its existing Fiduciary Management Provider). The use of 'on a regular basis and at least annually' is intended to ensure that where fee statements are provided more than once a year there is a sufficiently meaningful gap between the various fee statements (for example, every three or six months) and that there is no more than a full year between the fee statements.
 53. The 'incidental costs' referred to in Article 8.1(a)(i) may be separated from the core fiduciary management costs and charges and itemised separately.
 54. The fee statement must be provided even if the Fiduciary Management Provider also makes costs and charges information available on an ongoing basis online.
 55. Article 8.2 provides that the aggregated costs and charges, including the itemised costs and charges, must be totalled and shown both as a cash amount and as a percentage of assets under management.

56. Article 8.3 provides that Fiduciary Management Providers must also provide clients with fund-by-fund or product-by-product information on the costs and charges incurred over the reporting period and the impact of such costs and charges on the return of underlying funds. This will ensure that clients have access to fund-by-fund information on both a gross and net of costs and charges basis.
57. For consistency, the presentation of the above information would ideally follow the user templates prepared by the Cost Transparency Initiative (formerly the Institutional Disclosure Working Group). The aggregation of the charges should equal the overall asset management fees.
58. The Fiduciary Management Provider may choose to provide the disaggregated information on costs and charges required by this Part of the Order together with any existing periodic reporting to clients that is required under the applicable financial services regime.
59. For the avoidance of doubt, Article 8 does not discharge Fiduciary Management Providers from their duty to comply with requirements under the applicable financial services regime to provide aggregated information to clients. Those requirements will continue to apply (for so long as they are in force) in addition to the requirements in the Order to disaggregate information.

Minimum requirements on Fiduciary Management Providers for fee disclosure to potential clients

60. The aim of Article 9 is to enable Pension Scheme Trustees better to understand the costs to be charged by Fiduciary Management Providers prior to deciding to award a contract for the supply of Fiduciary Management Services. This remedy requires the information on costs and charges provided by Fiduciary Management Providers to be consistent and comparable across bids in a tender process. The information provided will include granular breakdowns which are intended to enable Pension Scheme Trustees accurately to assess the cost of competing offers.
61. Article 9.1 provides that, when participating in a Competitive Tender Process or any other tender process, Fiduciary Management Providers must disclose and itemise all costs and related charges that will be incurred by the client.

62. Article 9.2 provides that costs and charges must be totalled and expressed both as a cash amount and as a percentage of assets under management and clearly set out each of the following:
- (a) The total ongoing costs and charges to be incurred for the provision of the Fiduciary Management Service each year, including costs and charges related to it, those deducted directly from assets and those invoiced separately.
 - (b) An itemisation of the total costs and charges, including the following elements:
 - (i) The costs and charges for the Fiduciary Management Service, covering advice and implementation. Any incidental costs, such as performance fees, must be separated out from the core Fiduciary Management costs and charges and itemised separately.
 - (ii) Asset Management fees, covering products and funds or fund-of-funds provided by the Fiduciary Management Provider, and those provided by third-party Asset Managers. These costs and charges must include any costs associated with execution, such as transaction costs, and incidental costs, such as performance-related payments.
 - (iii) All other investment costs and charges, such as custodian fees and administration charges and any charges that are related to Ancillary Services likely to be incurred.
 - (c) Any one-off costs and charges that will be, or are likely to be, incurred by the client. These must include:
 - (d) Estimated transaction costs in moving assets into the proposed portfolio. These must include both the implicit and explicit costs of transferring assets, even if these costs are paid to third-parties, such as brokers.
 - (i) Any one-off costs and charges for advice, such as for refining the investment portfolio.
 - (ii) Any other one-off charges, such as legal fees, or charges for 'onboarding' services.

63. The reference to 'legal fees' is to legal fees that will be, or are likely to be, incurred by the Fiduciary Management Provider and passed on to the client.
64. Article 9.3 sets out the requirements for clear disclosure of any explicit exit costs and charges that would be incurred as a result of a change of Fiduciary Management Provider, such as any exit charges or 'lock-in' costs and charges in the contract, a clear statement that transaction costs might be incurred in switching Fiduciary Management Provider and that such costs may be similar in magnitude to those disclosed.
65. Article 9.3 also provides that the Fiduciary Management Provider must also disclose whether there are any features of the proposed portfolio that might increase such transaction costs. This could include, for example, the use of proprietary funds or an increased exposure to illiquid assets.
66. Best estimates should be provided in respect of any costs and charges that cannot be exactly specified.
67. TPR guidance is expected to assist Pension Scheme Trustees in complying with the new requirements imposed under this Part of the Order and also to cover the information that Pension Scheme Trustees should provide to their Fiduciary Management Provider in order to obtain meaningful estimates of costs and charges.

Part 6 – Fiduciary Management Services - performance reporting requirements

68. The aim of Part 6 is to provide greater transparency and comparability between alternative Fiduciary Management Providers, thereby enabling Pension Scheme Trustees to drive competition between Fiduciary Management Providers.

Use of standardised methodology and template for reporting past performance of Fiduciary Management Services to potential clients

69. Article 10.1 provides that within six months of the date when the Order comes into force, Fiduciary Management Providers must put in place a Fiduciary Management Performance Standard, approved by the CMA, for reporting their historic performance. Specifically, the remedy covers the historic investment performance of the firm's Full Fiduciary Management clients.
70. Article 10.2 provides that a Fiduciary Management Performance Standard submitted to the CMA must be from both (a) a majority of Fiduciary Management

Providers or an association of investment professionals supported by a majority of Fiduciary Management Providers and (b) representatives of pension schemes. This is to ensure that the Fiduciary Management Performance Standard has the support of representatives of both the suppliers of Fiduciary Management Services and the Pension Scheme Trustees who purchase those services.

71. Article 10.3 sets out what must be included in the submission, namely:
 - (a) A description of the Fiduciary Management Performance Standard and an explanation of how it: (i) is non-discriminatory; and (ii) would not otherwise create any competitive disadvantage between Fiduciary Management Providers;
 - (b) A list of Fiduciary Management Providers that have agreed to adopt the Fiduciary Management Performance Standard;
 - (c) A description of the process to ensure that the Fiduciary Management Performance Standard is updated when needed so that it remains current; and
 - (d) A description of the activities that Fiduciary Management Providers are undertaking, or are going to undertake, to help TPR provide Pension Scheme Trustees with guidance on using the Fiduciary Management Performance Standard.
72. The CMA expects that Fiduciary Management Providers will complete the development of the Fiduciary Management Performance Standard by working with Pension Scheme Trustees or groups representing their interests and independent advisers including professional trustees and third-party evaluators.
73. Article 10.4 provides that from the date on which the Fiduciary Management Performance Standard is approved by the CMA pursuant to Article 10 or following the process set out in Article 11, its use by Fiduciary Management Providers becomes mandatory when reporting the historic investment performance of their full Fiduciary Management clients, including in all tender submissions and marketing communications. The mandatory use of the Fiduciary Management Performance Standard applies to all Fiduciary Management Providers, irrespective of whether they participated in its development.
74. Fiduciary Management Providers are expected to work with TPR to provide the information needed by TPR in order to develop materials and tools to support

Pension Scheme Trustees using the Fiduciary Management Performance Standard.

75. For the avoidance of doubt, in the event that Fiduciary Management Providers fail to put in place a Fiduciary Management Performance Standard in accordance with Article 10, the consequential application of Article 11 (appointment of an independent person by the CMA) would not absolve Fiduciary Management Providers from the duty to comply with Article 10 or any enforcement action that may be brought by the CMA or any person affected by the contravention (section 167 of the Act).

Appointment of an independent person by the CMA

76. Article 11.1 states that the contingency steps set out in the remainder of Article 11 will apply in the event that a Fiduciary Management Performance Standard is not put in place in accordance with Article 10.
77. Article 11.2 provides that as soon as is reasonably practicable after the expiry of the period in Article 10.1, the CMA will put in place and set the terms and conditions of the appointment of an independent person to oversee the development and implementation of the standard, including the timetable for so doing. The timetable will be for a maximum period of six months from the date of the appointment of the independent person. This appointment would be funded by Fiduciary Management Providers on a reasonable basis determined by the CMA in proportion to their Fiduciary Management Services revenues in their last financial year. The cost of the appointment of the independent person will depend upon the progress made towards agreeing the Fiduciary Management Performance Standard during the six-month period referred to in Article 10.1 (that is, from the date on which the Order comes into force).
78. Article 11.3 provides that the independent person must take such steps as he or she reasonably considers necessary to carry out his or her function effectively and must comply with any reasonable requests made by the CMA for the purpose of carrying out his or her function under the Order.
79. Article 11.4 provides that the Fiduciary Management Providers shall remunerate and reimburse the independent person for all reasonable costs properly incurred in accordance with the terms and conditions of the appointment and in such a way so as not to impede the independence or the ability effectively and properly to carry out his or her function.

80. Article 11.5 sets out the reporting requirement that will be imposed upon the independent person, namely that he or she must promptly inform the CMA of any material developments arising from the operation of his or her function and provide to the CMA a written report every two weeks.

Part 7 – Investment Consultancy Services - objective setting and performance reporting requirements

81. The aim of Part 7 is that Pension Scheme Trustees better monitor the performance of their Investment Consultancy Provider by setting and measuring them against an appropriate set of Strategic Objectives.

The Prohibition

82. Article 12.1 provides that Pension Scheme Trustees must not enter into a contract for the provision of Investment Consultancy Services or continue to obtain Investment Consultancy Services unless the Pension Scheme Trustees have set Strategic Objectives for the Investment Consultancy Provider.
83. The expectation is that the Strategic Objectives set under Article 12.1 will be closely linked to the scheme's investment objectives in most cases, that they will be reviewed at least every three years and after any significant change to the scheme's investment strategy and objectives and that Investment Consultancy Providers will be asked by Pension Scheme Trustees to report periodically on their performance in meeting the Strategic Objectives set under Article 12.1.
84. The Strategic Objectives should include a clear definition of the outcome expected to be delivered and the timescale over which it would be delivered. They should also be appropriate for the appointment of the Investment Consultancy Provider in question and be reasonably achievable. The Strategic Objectives should also enable the Pension Scheme Trustees to measure the quality of the services provided.

Exclusion

85. Article 12.2 sets out an exclusion, which is that Article 12.1 does not apply to contracts for the provision of Investment Consultancy Services which are due to terminate within six months beginning with the date on which this Order is made. This exclusion applies only to this Part of the Order.

Part 8 – Minimum standard for how Investment Consultancy Providers and Fiduciary Management Providers report performance of recommended Asset Management products and funds to potential clients

86. The aim of Part 8 is to require Investment Consultancy Providers and Fiduciary Management Providers to adhere to common standards when reporting on the performance of their recommendations, so that Pension Scheme Trustees will be better able to assess the value for money offered by alternative Investment Consultancy Providers and Fiduciary Management Providers and the quality of the advice provided.

The minimum standard

87. Article 13.1 provides that Investment Consultancy Providers and Fiduciary Management Providers must adhere to certain requirements when reporting to potential Pension Scheme Trustee clients on the past performance of their recommended Asset Management products and in-house financial instruments.

88. 'Asset Management products and in-house financial instruments' refers to anything into which Pension Scheme Trustees might invest the scheme's assets using the services of the Investment Consultancy Provider or the Fiduciary Management Provider.

89. Articles 13.2 to 13.4 set out the requirements referred to in Article 13.1, which are:

(a) Where the information compares Investment Services or Ancillary Services, financial instruments, or persons providing Investment Services or Ancillary Services, Investment Consultancy Providers and Fiduciary Management Providers shall ensure that the following conditions are satisfied:

- (i) the comparison is meaningful and presented in a fair and balanced way;
- (ii) the sources of the information used for the comparison are specified;
- (iii) the key facts and assumptions used to make the comparison are included.

(b) Where the information contains an indication of past performance of a financial instrument, a financial index or an Investment Service, Investment

Consultancy Providers and Fiduciary Management Providers shall ensure that the following conditions are satisfied:

- (i) that indication is not the most prominent feature of the communication;
 - (ii) the information must include appropriate performance information which covers the preceding five years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the Investment Service has been provided where less than five years, or such longer period as the Investment Consultancy Provider or Fiduciary Management Provider may decide, and in every case that performance information is based on complete 12-month periods;
 - (iii) the reference period and the source of information is clearly stated;
 - (iv) the information contains a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
 - (v) where the indication relies on figures denominated in a currency other than that of the Member State in which the Pension Scheme Trustee client or potential Pension Scheme Trustee client is resident, the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
 - (vi) where the indication is based on gross performance, the effect of commissions, costs or other charges are disclosed.
- (c) Where the information includes or refers to simulated past performance, Investment Consultancy Providers and Fiduciary Management Providers shall ensure that the information relates to a financial instrument or a financial index, and the following conditions are satisfied:
- (i) the simulated past performance is based on the actual past performance of one or more financial instruments or financial indices which are the same as, or substantially the same as, or underlie, the financial instrument concerned;
 - (ii) in respect of the actual past performance referred to in point (i), the conditions set out in points (i) to (iii), (v) and (vi) of paragraph (b) are satisfied;

- (iii) the information contains a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.
90. The requirements set out in Articles 13.2 to 13.4 of the Order are the equivalent of existing requirements under the financial services regime. In Article 13.3(e), 'Pension Scheme Trustee' has been substituted for 'retail client' for consistency with the rest of the Order.
91. For the avoidance of doubt, the requirements of this Part of the Order apply only where Investment Consultancy Providers or Fiduciary Management Providers choose to report to potential Pension Scheme Trustee clients on the past performance of their recommended Asset Management products and in-house financial instruments. They are not required by the Order to do so.
92. This Part applies to products specifically recommended to clients and to generic buy lists whenever Investment Consultancy Providers or Fiduciary Management Providers present potential clients with quantitative evidence to demonstrate their abilities.
93. Although this Part of the Order applies in respect of the provision of information (including in tender submissions and marketing information) provided to potential clients, the CMA expects Investment Consultancy Providers and Fiduciary Management Providers also to comply with the requirements of this Part when reporting information of this type to existing clients.

Part 9 – Monitoring and compliance

Investigation Powers

94. Article 14.1 provides that section 174 of the Act shall apply to the enforcement functions of the CMA under the Order.

Compliance reporting

95. Articles 15.1 to 15.3, 15.5 and 15.6 provide that Pension Scheme Trustees, Investment Consultancy Providers and Fiduciary Management Providers who are subject (as applicable) to Parts 3, 4, 5, 7 and 8 must submit Compliance Statements, in relation to each Part to which they are subject, to the CMA within 12 months and one week from the date on which each Part to which they are

subject comes into force and annually thereafter. Article 15.4 provides that Fiduciary Management Providers who are subject to Part 6 must submit Compliance Statements, in relation to that Part, to the CMA within three months and one week from the date on which that Part comes into force and every three months thereafter. The Compliance Statement shall confirm the extent to which those Articles of each Part to which they are subject that were in force during the reporting period have been complied with during that period.

96. Any person required to submit Compliance Statements pursuant to more than one of Articles 15.1 to 15.6 may combine those Compliance Statements into one document for submission to the CMA.

Additional compliance reporting requirements

97. Article 16 provides that Investment Consultancy Providers, Fiduciary Management Providers or Pension Scheme Trustees must ensure that any Compliance Statement required by Part 9 of the Order is submitted together with a signed certificate stating that:
- (a) the relevant Compliance Statement has been prepared in accordance with the requirements of the Order; and
 - (b) for the period to which the Compliance Statement relates, the Investment Consultancy Provider, Fiduciary Management Provider or Pension Scheme Trustees (as applicable) has or have complied in all material aspects with the requirements of the Order and reasonably expect to continue to do so.
98. Where the certificate is completed by an Investment Consultancy Provider or a Fiduciary Management Provider which is a body corporate, it must be signed by two of its directors, who may be:
- (a) the Chief Executive Officer;
 - (b) the Managing Director;
 - (c) any non-executive director; or
 - (d) any senior director with responsibility for a relevant business unit.

99. Where the certificate is completed by an Investment Consultancy Provider or a Fiduciary Management Provider which is an individual, it must be signed by that individual.
100. Where the certificate is completed by an Investment Consultancy Provider or a Fiduciary Management Provider which is a partnership, it must be signed by two of the partners.
101. Where the certificate is completed by Pension Scheme Trustees, it must be signed by:
 - (a) a director of any sole corporate trustee; or
 - (b) the Chair of the Board of Trustees; or
 - (c) only if there is no Chair or the Chair is not available, any other member of the Board of Trustees.
102. This information is required to assist the CMA in complying with its statutory duty to monitor compliance with the Order.
103. Article 16.6 provides that if Investment Consultancy Providers, Fiduciary Management Providers or Pension Scheme Trustees are aware of any failure to comply with any part of this Order, they must report such non-compliance to the CMA within 14 days of becoming aware of the failure to comply and provide a brief description of the steps taken to address the failure.
104. The requirement that the initial Compliance Statements must be submitted within 12 months and one week or three months and one week (as applicable) after the relevant Part comes into force is in order to allow some time after the end of the reporting period to enable the Compliance Statement to be prepared and submitted. The one-week grace period will also apply to the submission of subsequent Compliance Statements.

Part 10 – Directions by the CMA as to compliance

105. Article 17 provides that the CMA may give directions as to compliance with the Order and it may vary or revoke any directions so given.

Part 11 – Duty to Supply information to the CMA

106. Article 18.1 provides that any person to whom the Order applies shall have a duty, as may be required by the CMA, to provide information and documents for the purposes of enabling the CMA to monitor the carrying out of the Order, or to review the effectiveness of the operation of the Order.
107. Article 18.2 provides that any person to whom the Order applies shall have a duty, as may be required by the CMA, to keep and produce those records specified in writing by the CMA that relate to the operation of any provision of the Order.
108. Article 18.3 provides that any person to whom the Order applies and whom the CMA believes to have information which may be relevant to the monitoring or the review of the operation of any provision of the Order shall have a duty, as may be required by the CMA to attend and provide such information in person.
109. Article 18.4 provides that subject to Part 9 of the Act, the CMA may publish any information or documents that it has received in connection with the monitoring or the review of the Order or any provision of the Order for the purpose of assisting the CMA in the discharge of its functions under or in connection with the Order.