



**Aon**  
Empower Results

**DRAFT INVESTMENT CONSULTANCY AND FIDUCIARY MANAGEMENT MARKET  
INVESTIGATION ORDER 2019**

**AON RESPONSE TO CONSULTATION**

1.1 Aon is grateful for the opportunity to provide a response to the CMA's consultation on the draft Investment Consultancy and Fiduciary Management Market Investigation Order 2019 (the "**Draft Order**") and the associated draft Explanatory Note (the "**Draft EN**").

1.2 Overall Aon commends the CMA's efforts in its drafting of the Draft Order and the Draft EN. However, we do have concerns and suggestions in respect of various aspects of these documents. We set out below the key areas that we consider need to be resolved by the CMA. A more detailed commentary in respect of each document is set out in Schedules 1 and 2 to this response respectively in the form of a marked-up version of each, which should be read in conjunction with the below.

**Potential circumvention of the definition of Fiduciary Management Services should be closed down.**

1.3 Aon broadly supports the proposed definition of "Fiduciary Management Services" (which we refer to in this response as FM Services). We consider the breadth of the term 'advice' when used in the context of this definition is sufficiently broad that it (i) should capture most services that we consider to be fiduciary management ("**FM**"), and (ii) will be difficult to structure comparable services in a manner which places them outside the remit of this definition.

1.4 Our main concern in respect of this definition is that the CMA should ensure that it cannot be circumvented by the implementation of a structure that would sit between the trustees and the person making investment decisions (of the nature described in paragraph (b) of the definition). Such structure may have the effect that the person making investment decisions is not (a) "appointed by" the trustees, and/or (b) "making investment decisions on their behalf", and/or (c) "acting pursuant to discretion delegated by the trustees", thus putting their services outside the scope of the definition of FM Services, despite being equivalent in effect.

1.5 One example of this would be the provision of FM services via a life insurance policy. In such circumstances, the trustees would simply purchase a policy. The person making investment decisions would be appointed by the life company and investment decisions would be made on behalf of the life company (which is the legal and beneficial owner of the assets) pursuant to discretion delegated by the life company.

**A clear definition of 'advice' is required in respect of the prohibition on supplying advice and Marketing Material on FM services within the same document.**

- 1.6 The Draft EN notes that, for the purpose of the prohibition contained in Part 4 of the Draft Order, “*‘advice’ means advice on any aspect of Investment Consultancy Services or Fiduciary Management Services*”<sup>1</sup>. This clarifies the topic, but not the nature, of such ‘advice’. Clarity in this regard is essential and key to whether this prohibition is workable.
- 1.7 For the purpose of the definition of FM Services ‘advice’ captures any ‘recommendation or guidance’. If such a broad interpretation is adopted for the purposes of Part 4 it would render the segregation of advice and Marketing Material unworkable. This is because the definition of Marketing Material captures any material which “*in any way seeks to invite or induce [existing Investment Consultancy Clients]...to purchase FM Services*”. It is difficult to envisage a circumstance in which material which seeks to provide a recommendation or guidance would not also comprise an invitation or inducement. As such, advice will almost always be indistinguishable from Marketing Material.
- 1.8 We therefore encourage the CMA to specify that, for the purpose of the Part 4 prohibition, information will comprise advice where it is tailored to a specific client. This is to be distinguished from Marketing Material which is generic in nature. Requiring documentation to be segregated on the basis of these definitions, which reflect the standard interpretation of these terms, will achieve the CMA’s aim of providing trustees with clarification as to whether they require separate advice in respect of the purchase of FM Services. This is particularly the case when combined with the mandatory wording contained in Article 6 of the Draft Order.
- FM Providers should be able to rely on the written confirmation that a competitive tender process has taken place.**
- 1.9 The Draft Order prohibits FM providers from entering into Fiduciary Management Agreements with trustees where the 20% threshold is exceeded unless a two limb test is satisfied. This test requires that (a) the trustees have carried out a compliant competitive tender process and, (b) the trustees have provided the FM provider with written confirmation that such a process has taken place. Both limbs of this test must be satisfied in order to avoid the prohibition.
- 1.10 As drafted, an FM provider that relies on written confirmation that a competitive tender process has taken place when, in fact, it has not would act in breach of the prohibition if it proceeded to provide FM services to the trustee. This runs counter to the provision in the Draft EN which states that an FM provider “*may rely upon the written confirmation provided*” by the trustees.<sup>2</sup>
- 1.11 As previously submitted, an FM provider does not have full visibility over the tender process that is adopted by trustees and should not be required to undertake detailed due diligence in order to assess trustees’ compliance with tendering requirements. Aon therefore submits that FM providers should not be penalised where limb (a) of the above test has not been satisfied.

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<sup>1</sup> See paragraph 44 of the Draft EN.

<sup>2</sup> See paragraph 34 of the Draft EN

**Additional clarity on the application of the Draft Order in respect of GPP products would be welcomed.**

- 1.12 Although it is clear that master trusts established by IC-FM firms which use their own FM Services are excluded from the scope of the Draft Order, the position in respect of group personal pensions (“GPPs”) is less clear.
- 1.13 The Draft Order clearly envisages throughout that the purchaser of the relevant FM Services will be a trustee. Further, on a call with the CMA we were informed that its intention is not to capture any schemes that do not currently fall within the reporting regime of the pension’s regulator (“TPR”).
- 1.14 GPPs are purchased by the relevant employer, not a trustee, and are overseen by the FCA, not TPR. The suggestion is therefore that GPPs will not fall within the scope of the application of the Draft Order. Additional clarity that this is the case would be welcomed.

**The 20% threshold that triggers mandatory tendering should only aggregate the mandates that have been awarded to a single FM provider.**

- 1.15 Adopting a methodology which aggregates the mandates of multiple FM providers does not address the AEC that the CMA has found. The selection of multiple FM providers clearly evidences that the relevant trustees have taken active and informed decisions as to which FM provider is best placed to meet its varying objectives. In such circumstances that trustees have clearly engaged with the decision making process and have not been steered to their incumbent provider.
- 1.16 The concerns that the CMA is seeking to resolve with the introduction of competitive tendering for FM Services would be addressed by calculating the 20% threshold by reference to the assets that are being managed under an FM mandate by a single FM Services provider.
- 1.17 Further, the proposed aggregation presents practical difficulties. A prospective FM provider may not have the requisite information to calculate the level of pension scheme assets that are already subject to an FM mandate. It will therefore be unable to determine whether its potential mandate will cause the trustee to cross the 20% threshold and so require a compliant tender process to take place. This will clearly be less problematic if the threshold is calculated by reference to the percentage of assets that have been delegated to a single FM provider.

**The scope of the Draft Order should be restricted to the purchase and supply of IC and FM services by and to UK pension schemes.**

- 1.18 The Draft Order currently captures services purchased by and supplied to pension schemes that are not established in the UK. This extension beyond the UK pension scheme market presents a number of difficulties:
  - 1.18.1 It introduces unwarranted implementation complexities as the TPR, which is set to take over the implementation of certain remedies, has a remit which is limited to UK pension schemes;

- 1.18.2 It could cause the implementation of remedies in markets that have not been subject to scrutiny during the course of this market investigation; and
  - 1.18.3 It could place UK FM providers at a competitive disadvantage when tendering to provide services to non-UK pension schemes as other, non-UK FM providers, will not be subject to comparable obligations.
- 1.19 We request that the CMA provides as much clarity on the territorial scope of the Order as possible. Within a regulatory context this can often be a complex issue despite the existence of detailed guidance and case law.

**DRAFT INVESTMENT CONSULTANCY AND FIDUCIARY MANAGEMENT  
MARKET INVESTIGATION ORDER 2019  
AON RESPONSE TO CONSULTATION**

**Schedule 1: Aon commentary on the Draft Order**

## INVESTMENT CONSULTANTS MARKET INVESTIGATION

### DRAFT ORDER – CONSULTATION

#### The Investment Consultancy and Fiduciary Management Market Investigation Order 2019

##### Background

1. On 14 September 2017, in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the Act) as provided for by section 234I of the Financial Services and Markets Act 2000, the Financial Conduct Authority (FCA) made an ordinary reference to the Chair of the Competition and Markets Authority (CMA) for the constitution of a group to conduct a market investigation of the supply and acquisition of investment consultancy services and fiduciary management services to and by institutional investors and employers in the UK.
2. On 12 December 2018 the CMA published its report on the market investigation reference entitled Investment Consultants Market Investigation Final Report (the Final Report).
3. In the Final Report, the CMA decided (among other matters) that:
  - (a) features of the investment consultancy market, individually and in any combination, restrict or distort competition in connection with the supply and acquisition of investment consultancy services in the UK to and by pension scheme trustees and thereby have an adverse effect on competition (AEC) in respect of investment consultancy services;
  - (b) features of the fiduciary management market, individually and in any combination, prevent, restrict or distort competition in connection with the supply and acquisition of fiduciary management services in the UK to and by pension scheme trustees and thereby have an AEC in respect of fiduciary management services; and
  - (c) the CMA should take action to remedy, mitigate or prevent each AEC and the detrimental effect on customers that may be expected to result from each AEC.

**Commented [BS1]:** We note that the explanatory note defines this as the 'Final Report' whereas the draft order uses the defined term 'report'. For the sake of consistency we would suggest adopting the same term for each. We have suggested that 'Final Report' may be clearer.

**Commented [BS2]:** We note that this is not consistent with the wording in the explanatory note, which instead refers to 'pension schemes'. The reference to pension schemes is consistent with the terms of the Final Report, however each of the remedies in the order clearly envisages that the purchaser of the relevant services will be a trustee. We therefore suggest retaining the wording in the Draft Order, and amending the explanatory note.

4. The CMA indicated in the [Final Report](#) that it intended that the CMA would implement some of the remedies by an Order.
5. On Monday 11 February 2019, in accordance with section 165 of, and paragraph 2(1)(a) of Schedule 10 to, the Act, the CMA published a Notice of its intention to make an Order and the proposed Order as part of a package of remedies to remedy, mitigate or prevent the AECs and resulting customer detriment which it had found in the [Final Report](#). In accordance with paragraph 2(1)(b) of Schedule 10 to the Act, the CMA has considered representations made in accordance with the Notice and not withdrawn.
6. The Explanatory Note accompanying the Order provides an explanation of how the Order is expected to operate.
7. On [\[date\]](#), 2019 this Order was notified to the European Commission pursuant to Article 24(12) Directive 2014/65/EU (on markets in financial instruments) in respect of additional requirements intended to be imposed by the Order and the standstill period concluded on [\[date\]](#) 2019 *[two months from the date of notification]*.



## ORDER

The CMA makes this Order in performance of its duty under section 138 of the Act, within the period permitted by section 138A of the Act, and in exercise of its powers under section 161 of, and paragraphs 2, 10 and 17 to 23 of Schedule 8 to, the Act and under sections 86 and 87 (as applied by section 164) of the Act.

### Part 1

#### General

#### 1 Title, commencement, application and scope

- 1.1 This Order may be cited as the Investment Consultancy and Fiduciary Management Market Investigation Order 2019.
- 1.2 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 day this Order is made.
- 1.3 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 this Order is made.
- 1.4 The provisions of this Order shall continue in force to the extent that and until:
  - (a) the date on which equivalent provisions are brought into force as part of the regulatory regime of a Relevant Sector Regulator; or
  - (b) the expiry of 10 years beginning with the date on which the provisions of this Order came into force, whichever is the earlier; or
  - (c) they are varied or revoked under the Act. The variation or revocation of any provision of this Order shall not affect the validity or enforceability of any rights or obligations that arose prior to such variation or revocation.
- 1.5 Any requirement imposed by this Order does not apply to the extent that it applies pursuant to an existing requirement under the regulatory regime of a Relevant Sector Regulator.
- 1.6 This Order shall not apply to the Pension Scheme Trustees of Occupational Pension Schemes listed below in relation to any such scheme:

**Commented [BS3]:** We note that throughout this Draft Order it is clearly envisaged that the purchaser of the relevant services will be a trustee. However, GPPs are purchased by employers. We therefore consider GPPs to fall outside the scope of this Draft Order. However, it would be appreciated if the CMA could provide clarity on this, either in the Draft Order or the Explanatory Note.

- (a) a scheme that is not a registrable scheme as defined in section 59 Pensions Act 2004;
- (b) a scheme that is a public service pension scheme as defined in section 318 Pensions Act 2004;
- (c) a Master Trust for which an IC-FM firm is the scheme strategist or scheme funder, and for these purposes:
  - (i) 'scheme strategist' means a person who is responsible for making business decisions relating to the commercial activities of the scheme; and
  - (ii) 'scheme funder' means a person who is liable to provide funds to or in respect of the scheme in circumstances where administration charges received from or in respect of members are not sufficient to cover the costs of establishing or running the scheme or is entitled to receive the profits of the scheme in circumstances where those charges exceed those costs.

## Part 2

### Interpretation

## 2 Interpretation

### 2.1 In this Order:

**'Act'** means the Enterprise Act 2002;

**'AEC'** means adverse effect on competition for the purposes of section 134(2) of the Act;

**'Ancillary Service'** has the same definition as that set out in the Glossary to the FCA Handbook;

**'Asset Management'** means the management of investments, including selecting and trading individual securities, on behalf of individual retail investors or institutional investors such as pension schemes;

**'Asset Manager'** means a person carrying on the activity of Asset Management;

**'Bid'** means a written offer to provide Fiduciary Management Services at a stated price;

‘**CMA**’ means the Competition and Markets Authority;

‘**Commencement Date**’ means the date specified for the relevant provision in Article 1.2 or 1.3;

‘**Competitive Tender Process**’ means a process by which Pension Scheme Trustees have invited and ~~used their best endeavours~~ made a reasonable effort to obtain bids for the provision of Fiduciary Management Services from three or more unrelated Fiduciary Management Providers and have evaluated the bids received; and for these purposes ‘unrelated’ means independent of each other and thereby in a position to compete with each other;

‘**Compliance Statement**’ means a statement in the following format:

**Investment Consultancy and Fiduciary Management Market  
Investigation Remedy Compliance Statement for [insert name]**  
[I/We], [insert name(s)], confirm on behalf of [insert name] that during the period commencing on [insert date] and ending on [insert date], [insert name] [has] complied with Part [insert Part number] of the Investment Consultancy and Fiduciary Management Market Investigation Order 2019.  
FOR AND ON BEHALF OF [insert name]  
Signature: .....  
Name: .....  
Title: .....

‘**Controlling Employer**’ means the employer that has the power to act on behalf of all employers in the relevant pension scheme in relation to the scheme rules;

‘**EU**’ means the European Union;

‘**FCA**’ means the Financial Conduct Authority;

‘**Fiduciary Management Agreement**’ means a contract for the provision of at least the service described in paragraph (b) in the definition of Fiduciary Management Services;

‘**Fiduciary Management Performance Standard**’ means a standardised methodology and template for reporting the past investment performance of a Fiduciary Management Provider’s Full Fiduciary Management clients, agreed by the CMA pursuant to Article 10 of this Order<sup>3</sup>;

‘**Fiduciary Management Provider**’ means a person who provides Fiduciary Management Services;

**Commented [BS4]:** We note that the draft Order proposes to place a more stringent requirement on trustees than is provided for in the Final Report at paragraph 12.25. We have therefore suggested an amendment to the Order to reflect the Final Report.

We note that we would expect additional guidance on how to satisfy this requirement, and other aspects of the ‘Competitive Tender Process’ definition be included in the enhanced trustee guidance that is to be developed by the TPR. If this is not the case then the CMA should include additional guidance in this Explanatory Note.

**‘Fiduciary Management Services’** means the provision to Pension Scheme Trustees of services that comprise the following:

- (a) the provision of advice by the Provider (or an Interconnected Body Corporate of the Provider) to Pension Scheme Trustees on one or more of the following:
  - (i) investment strategy;
  - (ii) investments that may be made by or on behalf of the Pension Scheme Trustees;
  - (iii) the service described in (b) below; and
- (b) within 12 months from the date on which the advice in (a) is last provided, the Provider (or an Interconnected Body Corporate of the Provider) is appointed by the Pension Scheme Trustees to provide the service of making investment decisions on their behalf on an on-going basis, in respect of all or some of the relevant pension scheme's assets, acting pursuant to the written authority and discretion delegated by the Pension Scheme Trustees to do so and irrespective of whether the investment decisions require the consent of, or are subject to veto by, the Pension Scheme Trustees.
- (c) The reference in (a) to ‘advice’ means advice on the merits and includes a recommendation or guidance as regards prudent future action.
- (d) The reference in (b) to ‘investment decisions’ means decisions in relation to investments that may be made and includes but is not limited to decisions in respect of asset allocation and fund/manager selection.
- (e) A Fiduciary Management Service does not include the provision of the services in (a) and (b) above by a Provider to the Pension Scheme Trustees of a pension scheme of which the Provider (or an Interconnected Body Corporate of the Provider) is the Principal Employer or Controlling Employer.

**‘Financial Instrument’** has the same definition as that set out in the Glossary to the FCA Handbook

**‘Full Fiduciary Management’**, ~~in relation to a client,~~ means the provision of Fiduciary Management Services to a Pension Scheme Trustee who is receiving the service in part (b) of the definition of Fiduciary Management Services from its Fiduciary Management Provider in respect of 100% of the relevant pension scheme's ~~the client's~~ assets;

**Commented [BS5]:** We are concerned that this definition could be circumvented by the implementation of a structure that would sit between the trustees and the person making investment decisions (of the nature described in paragraph (b) of the definition). Such structure may have the effect that the person making investment decisions is not (a) “appointed by” the trustees and/or (b) “making investment decisions on their behalf” and/or (c) “acting pursuant to discretion delegated by the trustees”, thus putting their services outside the scope of the definition of FM Services, despite being equivalent in effect.

**Commented [BS6]:** Full Fiduciary Management is essentially a form of FM Service, it does not describe a client. The definition has been reworded to reflect this.

**Commented [BS7]:** There are various instances throughout the Order where the phrase ‘client’ is used. However, the remedies tend to apply in respect of services that are provided to Pension Scheme Trustees, indeed the definition of FM Services and IC Services are limited to the provision of such services to Pension Scheme Trustees. In order to add clarity, we would therefore suggest making sure that it is clear throughout that any reference to a client is to a Pension Scheme Trustee client.

**'IC-FM'** in relation to firms, means firms that offer both Investment Consultancy Services and Fiduciary Management Services to ~~clients~~ [Pension Scheme Trustee clients](#) and includes an Investment Consultancy Provider which is an Interconnected Body Corporate or has any form of partnership or joint venture with a Fiduciary Management Provider;  
**'Interconnected Body Corporate'** means a body corporate which is a member of the same group as other bodies corporate and for the purposes of this definition: -

'group' means a group consisting of two or more bodies corporate all of whom are interconnected with each other;

any two bodies corporate are interconnected if one of them is a subsidiary of the other, or if both of them are subsidiaries of the same body corporate;

'subsidiary' has the meaning given by section 1159 of the Companies Act 2006.

**'Investment Consultancy Agreement'** means a contract for the provision of Investment Consultancy Services;

**'Investment Consultancy Provider'** means a person providing Investment Consultancy Services;

**'Investment Consultancy Services'** means the provision to Pension Scheme Trustees of services where the Provider advises the Pension Scheme Trustees in relation to one or more of the following: -

(a) investments that may be made;

[\(b\)](#) 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;

[\(c\)](#) ~~(e)~~ strategic asset allocation;

~~(b)~~ [\(d\)](#) ~~(d)~~ manager selection.

The services do not include:

(a) the provision of advice by a Provider to the Pension Scheme Trustees of a pension scheme of which the Provider (or an Interconnected Body

Corporate of the Provider) is the Principal Employer or Controlling Employer; or

(b) the high-level commentary provided by the scheme actuary in or in respect of triennial valuation reports and with regard to the link between the investment approach and the pension scheme's funding objectives.

**'Investment Services'** means any of the services and activities listed in Part 3 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, relating to any of the instruments listed in Part 1 of Schedule 2 to that order;

**'Marketing Material'** means generic written material provided by an IC-FM firm to their existing Investment Consultancy Service clients (or to an individual acting on behalf of such client) which in any way seeks to invite or induce those clients (or client) to purchase Fiduciary Management Services from the IC-FM firm and which is not presented as being suitable specifically to the Pension Scheme Trustee to whom it is made or based exclusively on a consideration of that Pension Scheme Trustee's circumstances;

**'Master Trust'** means a form of multi-employer trust-based occupational pension scheme established under trust and intended for employers that are not Interconnected Bodies Corporate;

**'Notice'** means notice in writing;

**'Occupational Pension Scheme'** means a ~~retirement savings plan provided by an employer for its employees~~ registered pension scheme established in the UK;

**'Pension Scheme Trustees'** means the trustees ~~or managers~~ of trust-based Occupational Pension Schemes;

**'Principal Employer'** means the principal employer for the purposes of the relevant pension scheme in accordance with the scheme rules;

**'Provider'** means Investment Consultancy Provider or Fiduciary Management Provider or IC-FM firm;

**'Relevant Sector Regulator'** means the FCA or TPR as applicable;

**'Strategic Objectives'** means defined objectives for the Investment Consultancy Provider's investment advice, to meet the ~~trustees'~~ Pension Scheme Trustee's investment strategy or, where the advice concerns the

**Commented [BS8]:** Please see our comments in relation to article 5.1 for an explanation of this amendment.

**Commented [BS9]:** The phrase 'retirement savings plan' is typically used within the context of DC schemes. 'Registered pension scheme' is more accurate.

**Commented [BS10]:** We do not consider that the Order should capture services provided to non-UK pension schemes. Doing so would (i) introduce unwarranted implementation complexities due to the limited remit of TPR, (ii) implement remedies in markets which have not been subject to scrutiny by the CMA, and (iii) could place IC and FM Providers at a competitive disadvantage when tendering to non-UK schemes.

**Commented [BS11]:** It is not clear to us what the CMA is intending to capture by including 'managers' of trust-based schemes.

setting of the investment strategy, to meet the Pension Scheme Trustee's stated needs.

'TPR' means the Pensions Regulator.

- 2.2 The Interpretation Act 1978 applies to this Order as it applies to Acts of Parliament except where a contrary intention appears in this Order.

### 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**

### 3 The Prohibition

- 3.1 Articles 3.2 to 3.4 shall apply subject to Articles 3.5 and 3.6.

- 3.2 Where there is no existing Fiduciary Management Agreement covering any of a pension scheme's assets, Pension Scheme Trustees and Fiduciary Management Providers must not enter into one or more than one Fiduciary Management Agreement which, in respect of that Fiduciary Management Provider~~individually or when aggregated with each other~~, would cover 20% or more of ~~a~~ that pension scheme's assets at the date of the Fiduciary Management Agreement unless:

- (a) the Pension Scheme Trustees have carried out a Competitive Tender Process; and
- (b) 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.

- 3.3 Where there exists one or more than one Fiduciary Management Agreement with a single Fiduciary Management Provider 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:

- (i) make or accept any increase in the level of assets under management under the existing Fiduciary Management Agreement or Fiduciary

**Commented [BS12]:** The definition of Strategic Objectives currently assumes that the investment strategy is already in place. However, the definition of IC Services includes the provision of advice in relation to investment strategy (see para 23 of the Draft EN).

It is not clear from this definition how Strategic Objectives are to be set where the only advice provided relates to investment strategy. We have therefore suggested additional wording.

**Commented [BS13]:** Calculating the 20% threshold by aggregating across FM Providers (i) does not address potential steering or lack of trustee engagement, and (ii) raises practical difficulties as the FM Provider may not have the requisite visibility to determine whether the threshold may be triggered.

If the aggregation is to be retained, then the Order should include a provision that an FM Provider is not subject to the prohibition if the Pension Scheme Trustee has confirmed that a Competitive Tender Process is not required.

**Commented [BS14]:** We note that there may be circumstances in which the 20% threshold is not breached at the date when the decision to appoint the FM Provider was made by the Pension Scheme Trustees, but has been breached by the time the FMA is executed (for example, if it has taken time to agree a bespoke solution and arrange suitable legal documentation).

We would therefore suggest either:

(a) Amending clauses 3.2, 3.3(ii), 3.4(ii) so that the assessment of whether the 20% threshold has been triggered takes place on the date on which the mandate is granted, rather than the date of the FMA; or

(b) Include a carve out stating that neither party shall be in breach of the prohibition if the 20% trigger is exceeded by the date of the FMA, but was not on the date on which the mandate was granted.

Management Agreements which would bring the total of a pension scheme's assets under management with that Fiduciary Management Provider to 20% or more on the date of the increase, or

- (ii) enter into a new Fiduciary Management Agreement which, ~~individually or when aggregated with every existing Fiduciary Management Agreement~~ in respect of that Fiduciary Management Provider, would cover 20% or more of a pension scheme's assets at the date of the new Fiduciary Management Agreement

unless:

- (a) the Pension Scheme Trustees have carried out a Competitive Tender Process in respect of all of the pension scheme's assets which would be covered by one or more than one Fiduciary Management Agreement; and
- (b) 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.

3.4 Where there exists one or more than one Fiduciary Management Agreement with a single Fiduciary Management Provider 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:

- (i) make or accept any increase in the level of assets under management under the existing Fiduciary Management Agreement or Fiduciary Management Agreements which would bring the total of a pension scheme's assets under management with that Fiduciary Management Provider to 20% or more on the date of the increase, or
- (ii) enter into a new Fiduciary Management Agreement which, ~~individually or when aggregated with every existing Fiduciary Management Agreement~~ in respect of that Fiduciary Management Provider, would cover 20% or more of a pension scheme's assets at the date of the new Fiduciary Management Agreement

unless:

- (a) 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 than one Fiduciary Management Agreement; and



(b) 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.

3.5 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.

3.6 A Fiduciary Management Provider will not act in breach of Articles 3.2, 3.3 or 3.4 if it enters into a Fiduciary Management Agreement with a Pension Scheme Trustee in reliance on written confirmation that:

(i) it has been selected as a result of a Competitive Tender Process; or

(ii) no Competitive Tender Process is required;

in circumstances where a Competitive Tender Process was required but has not in fact been carried out.

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

4.1 Articles 4.2 and 4.3 shall apply subject to Article 4.4.

4.2 Where Pension Scheme Trustees have entered into one or more than one Fiduciary Management Agreement with one or more than one Fiduciary Management Provider before this Order comes into force in respect of a total of 20% or more of a pension scheme's assets without conducting a Competitive Tender Process, they must not continue to obtain Fiduciary Management Services from the Fiduciary Management Provider(s) in question for more than five years from the commencement date of the first Fiduciary Management Agreement unless they have carried out a Competitive Tender Process as a result of which the Fiduciary Management Provider in question has been selected to provide Fiduciary Management Services.

4.3 Where the five year period specified in Article 4.24 has expired at the date on which this Order is made or will expire within two years beginning with that date, Pension Scheme Trustees must not continue to obtain Fiduciary Management Services from the Fiduciary Management Provider in question for more than two years beginning with the date on which this Order is made

**Commented [BS15]:** Although the Explanatory Note suggests that the FM Provider should be able to rely on the written confirmation and not be required to conduct extra due diligence or verification of the tender process that was adopted by the Pension Scheme Trustee (see para 34), this is not currently reflected in the drafting of the Order.

As currently drafted an FM Provider is not able to rely on the written confirmation provided by Pension Scheme Trustees. If the Pension Scheme Trustee has, in fact, failed to carry out a compliant Competitive Tender Process then the FM Provider will also be in breach of the relevant prohibition. This is because, Articles 3.2 to 3.4 provide that prohibition will apply unless (i) written confirmation that a Competitive Tender Process has taken place is provided, **and** (ii) the FM Provider is appointed as a result of a Competitive Tender Process. Both elements must therefore be satisfied in order for an FM Provider to fall outside the prohibition.

An FM Provider will not be in a position to ascertain whether or not a compliant Competitive Tender Process has in fact taken place and so should not be held to account if it has not.

Equally, if a trustee confirms that no Competitive Tender Process is required then an FM Provider should be able to rely on such confirmation. This is particularly the case if the CMA retains the requirement that the 20% threshold be calculated on an aggregate basis across multiple providers (see our comments above for further detail).

unless they have carried out a Competitive Tender Process as a result of which the Fiduciary Management Provider has been selected to provide Fiduciary Management Services.

- 4.4 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.

## Part 4

### Separation of advice and Marketing Material and use of mandatory wording in respect of Fiduciary Management Services

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

- 5.1 [Subject to Article 5.3](#), IC-FM firms must not provide to their Pension Scheme Trustee clients within the same document Marketing Material in respect of Fiduciary Management Services and **advice** in respect of Investment Consultancy Services or Fiduciary Management Services.

[5.2 The reference in Article 5.1 to advice means a recommendation concerning any aspect of Investment Consultancy Services or Fiduciary Management Services which is presented as being specifically suitable to the Pension Scheme Trustee to whom it is made or based exclusively on a consideration of that Pension Scheme Trustee's circumstances.](#)

[5.3 An IC-FM firm will not act in breach of Article 5.1 when providing Marketing Material which includes advice to an existing Pension Scheme Trustee if such documentation is provided in response to a formal tender request for FM Services.](#)

#### 6 Mandatory wording

- 6.1 All Marketing Material provided by IC-FM firms in respect of Fiduciary Management Services must:

- (a) be labelled as such and clearly identifiable as Marketing Material;
- (b) contain the wording specified in Article 7.1; and
- (c) comply with Articles 7.2 and 7.3.

**Commented [BS16]:** We note that it may not be possible for Pension Scheme Trustees to confirm whether a Competitive Tender Process took place in respect of the FMA's that are already in place. For example, the Trustee board may have changed in the interim or the records of the original appointment are not sufficiently detailed. The CMA should clarify what is to happen in such circumstances.

**Commented [BS17]:** Although the Explanatory Note contains a definition of advice at para 44, this specifies what the advice should be about rather than what actually comprises 'advice'. The only clear definition of 'advice' is provided in the context of the definition of FM Services. In the latter instance 'advice' is broadly drafted so as to capture a recommendation or guidance as regards prudent future action concerning, amongst other things, the fiduciary management of its assets (as described in (b) to the FM Services definition). This is appropriate in the context of the FM Services definition, but not in the context of the Part 4 prohibition.

Marketing Material is broadly drafted so as to, essentially, capture documentation which in any way seeks to invite or induce clients to purchase FM Services. If the above definition of 'advice' is used in the context of Part 4 then it is difficult to see how a document could provide a 'recommendation or guidance' without also 'inviting or inducing'. As such advice would always comprise Marketing Materials and vice versa.

We would therefore suggest that the definition of advice in article 5.1 should be more restrictive and include a requirement that the advice be tailored to the particular client (see our suggested wording at article 5.2), as is the standard understanding of the meaning of 'advice'.

We would also suggest that the definition of Marketing Material should clarify that it be generic in nature and not tailored to a specific client (see our suggested amendment to this definition).

Keeping documentation segregated on the basis of the definitions we set out above should achieve the aim of clarifying to Pension Scheme Trustees whether or not they need separate advice in respect of the purchase of FM Services (see Final Report para 12.114), particularly when combined with the mandatory wording set out in Article 6.

**Commented [BS18]:** Tender requests often ask providers about the services which they provide, as well as posing questions about how the provider would deliver a solution that suits their need. Requiring an incumbent IC-FM firm to provide separate documentation for such responses is unnecessary and could place that provider at a disadvantage within the tender process. We have therefore proposed a carve out in respect of tender responses.

## 7 Content and format

### 7.1 The wording required by Article 6.1 is:

'This document contains marketing material about our fiduciary management service. This document does not represent impartial advice on this service.

In certain cases, you are required to conduct a competitive tender process prior to appointing a fiduciary manager.

Guidance on running a tender process is available from the Pensions Regulator.'

### 7.2 The wording in Article 7.1 must be included on the first page of each Marketing Material document.

### 7.3 The wording required by Articles 6.1 and 7.1 must be in at least the same font size as the predominant font size used throughout the remainder of the document. The text ~~should~~ must not be disguised, diminished or obscured by graphics or in other ways.

## Part 5

### Fiduciary Management Services - fee reporting requirements

## 8 Requirement to report disaggregated Fiduciary Management Services fees to existing clients

### 8.1 A Fiduciary Management Provider must provide a fee statement to each of its Pension Scheme Trustee clients in good time, on a regular basis and at least annually. This fee statement must set out in a comprehensible form the following information, such that each Pension Scheme Trustee client is reasonably able to understand it

and to take decisions in relation to the Fiduciary Management Services on an informed basis:

(a) A disaggregated itemisation of the overall costs and related charges incurred during the reporting period. The following fee elements must be clearly itemised:

(i) All costs and associated charges charged by the Fiduciary Management Provider for the Fiduciary Management Service,

**Commented [BS19]:** Please could the CMA clarify whether this is intended to be a reference to the end of the relevant period to which the fee statement relates.

covering advice and implementation, and including 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 and 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, including custodian fees, administration charges and any charges that are related to Ancillary Services. These cost items may be bundled in one single fee item.

(b) The aggregated costs and charges incurred during the reporting period, to include all costs and charges incurred as part of the Fiduciary Management Service, including those deducted directly from assets, those invoiced separately and those paid to the Fiduciary Management Provider and to third parties.

8.2 The aggregated costs and charges, including the itemised costs and charges, must be totalled and expressed both as a cash amount and as a percentage of assets under management.

8.3 The information in Article 8.1 must be provided on a fund-by-fund or product-by-product basis, including details of the impact of such costs and charges on the return of underlying funds.

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

9.1 When participating in a Competitive Tender Process or any other tender process that Pension Scheme Trustees may carry out in respect of Fiduciary Management Services, Fiduciary Management Providers must disclose and itemise all costs and related charges that will be incurred by the [potential Pension Scheme Trustee](#) client as required by Article 9.2 and 9.3.

9.2 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 fee for the Fiduciary Management Service, covering advice and implementation. Any incidental costs such as performance fees must be separated out from the Fiduciary Management fee 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, to include:

- (i) 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.
- (ii) Any one-off charges for advice, such as for refining the investment portfolio.
- (iii) Any other one-off charges, such as legal fees, or charges for 'onboarding' services.

9.3 Fiduciary Management Providers must disclose the potential exit costs and charges and costs arising if the client were to switch at a future date to another Fiduciary Management Provider for the services being tendered, to include:

- (a) 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.
- (b) 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. The Fiduciary Management Provider must disclose whether there are any features of the proposed portfolio that might increase such transaction costs.

9.4 Any assumptions that have been made by the Fiduciary Management Provider in order to provide the information required by Articles 9.2 and 9.3 must be clearly disclosed to the potential Pensions Scheme Trustee client.

## Part 6

### Fiduciary Management Services - performance reporting requirements

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

10.1 Within six months beginning with the date on which this Order comes into force, Fiduciary Management Providers must put in place a Fiduciary Management Performance Standard, approved by the CMA.

10.2 The submission of a Fiduciary Management Performance Standard to the CMA for approval must be from: -

(a) a majority of Fiduciary Management Providers or an association of investment professionals supported by a majority of Fiduciary Management Providers; and

(b) Pension Scheme Trustees or representatives of ~~pension schemes~~ Pension Scheme Trustees.

10.3 The submission must include:

- (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

**Commented [BS20]:** Various assumptions must be made by the FM Provider when calculating certain potential future fees, particularly performance fees (Article 9.2(b)(i)), transaction costs (Article 9.2(c)(i)) and exit costs (Article 9.3). We would encourage the CMA to include a requirement that FM Providers disclose the assumptions it has made in order to calculate the applicable performance fees.

**Commented [BS21]:** The performance standard is to apply to Fiduciary Management Providers, who are defined by reference to the service that they provide to Pension Scheme Trustees. We therefore consider that Pension Scheme Trustees should be involved in the submission of this performance standard, but not representatives of other pension schemes which are not directly impacted by this Order.

- (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.

10.4 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, it must be used by all Fiduciary Management Providers when reporting the past investment performance of their Full Fiduciary Management clients, including in all tender submissions and marketing communications.

**Commented [BS22]:** It would be helpful for the CMA and/or the TPR to clarify its reasonable expectations of FM Providers in this regard.

## **11 Appointment of an independent person by the CMA**

11.1 The provisions of Article 11.2 to 11.5 shall apply if a Fiduciary Management Performance Standard is not put in place in accordance with Article 10.

11.2 As soon as is reasonably practicable from 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, at the expense of Fiduciary Management Providers in proportion to their Fiduciary Management Services revenues, to oversee the development and implementation of the Fiduciary Management Performance Standard that is to be used by all Fiduciary Management Providers in accordance with Article 10.4. The terms and conditions must include a timetable (not exceeding six months from the date of the appointment of the independent person) for the development and implementation of the Fiduciary Management Performance Standard.

11.3 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 this Order.

11.4 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.

11.5 The terms and conditions of the appointment will include the requirement that the independent person 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**

### **12 The Prohibition**

12.1 Subject to Article 12.2, Pension Scheme Trustees must not enter into a contract with an Investment Consultancy Provider for the provision of Investment Consultancy Services or continue to obtain Investment Consultancy Services from an Investment Consultancy Provider unless the Pension Scheme Trustees have set Strategic Objectives for the Investment Consultancy Provider.

#### **Exclusion**

12.2 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.

### **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**

### **13 The minimum standard**

13.1 Investment Consultancy Providers and Fiduciary Management Providers must adhere to the requirements in Articles 13.2 to 13.4 when reporting to potential Pension Scheme Trustee clients on the past performance of their recommended Asset Management products and in-house financial instruments.

13.2 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:

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



13.3 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:

- (a) that indication is not the most prominent feature of the communication;
- (b) the information must include appropriate performance information which covers the preceding 5 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 5 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;
- (c) the reference period and the source of information is clearly stated;
- (d) 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;
- (e) where the indication relies on figures denominated in a currency other than [pound sterling] / [that of the Member State jurisdiction in which the pension scheme for which the Pension Scheme Trustee client, or potential Pension Scheme Trustee client, acts as trustee is resident based], the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
- (f) where the indication is based on gross performance, the effect of commissions, costs or other charges are disclosed.

13.4 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:

- (a) 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;
- (b) in respect of the actual past performance referred to in point 13.4 (a), the conditions set out in points (a) to (c), (e) and (f) of Article 13.3 are satisfied;

**Commented [BS23]:** As set out above, we consider that this Order should be limited in scope to UK pension schemes only. If this is adopted then Article 13.3(e) can simply refer to currencies denominated in anything other than pound sterling.

Alternatively, if non-UK pension schemes are to be within scope, then there is no reason to link this provision to EU member states.

Also, there may be circumstances in which the trustees of a scheme may each be based in differing jurisdictions. It is more logical, and more practical, to apply this requirement to circumstances where the currency is different to that of the jurisdiction in which the scheme itself is based.

- (c) 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.

## **Part 9**

### **Monitoring and compliance**

#### **14 Investigation powers**

- 14.1 Section 174 of the Act shall apply to the enforcement functions of the CMA under this Order.

#### **15 Compliance reporting**

- 15.1 Pension Scheme Trustees and Fiduciary Management Providers subject to Part 3 must submit Part 3 Compliance Statements to the CMA within 12 months and one week from the date on which each of Articles 3.2 to 3.4, and Articles 4.2 and Article 4.3 come into force and annually thereafter. Each Part 3 Compliance Statement shall confirm the extent to which those Articles of Part 3 that were in force during the reporting period have been complied with during that period.
- 15.2 IC-FM firms subject to Part 4 must submit Part 4 Compliance Statements to the CMA within 12 months and one week from the date on which each of Article 5.1, Article 6.1 and Articles 7.1 to 7.3 comes into force and annually thereafter. Each Part 4 Compliance Statement shall confirm the extent to which those Articles of Part 4 that were in force during the reporting period have been complied with during that period.
- 15.3 Fiduciary Management Providers subject to Part 5 must submit Part 5 Compliance Statements to the CMA within 12 months and one week from the date on which each of Articles 8.1 to 8.4 and Articles 9.1 to 9.6 comes into force and annually thereafter. Each Part 5 Compliance Statement shall confirm the extent to which those Articles of Part 5 that were in force during the reporting period have been complied with during that period.
- 15.4 Fiduciary Management Providers subject to Part 6 must submit Part 6 Compliance Statements to the CMA within 3 months and one week from the date on which Article 10.4 comes into force and every 3 months thereafter. Each Part 6 Compliance Statement shall confirm the extent to which those Articles of Part 6 that were in force during the reporting period have been complied with during that period.

15.5 Pension Scheme Trustees subject to Part 7 must submit Part 7 Compliance Statements to the CMA within 12 months and one week from the date on which Article 12.1 comes into force and annually thereafter. Each Part 7 Compliance Statement shall confirm the extent to which those Articles of Part 7 that were in force during the reporting period have been complied with during that period.

15.6 Investment Consultancy Providers and Fiduciary Management Providers subject to Part 8 must submit Part 8 Compliance Statements to the CMA within 12 months and one week from the date on which Article 13.1 comes into force and annually thereafter. Each Part 8 Compliance Statement shall confirm the extent to which those Articles of Part 8 that were in force during the reporting period have been complied with during that period.

## **16 Additional compliance reporting requirements**

16.1 As applicable, Investment Consultancy Providers, Fiduciary Management Providers and Pension Scheme Trustees must ensure that any Compliance Statement required by this Part 9 is submitted together with a signed certificate stating that:

- (a) the relevant Compliance Statement has been prepared in accordance with the requirements of this 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 respects with the requirements of this Order and reasonably expect to continue to do so.

16.2 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 director with responsibility for a relevant business unit.

16.3 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.

16.4 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.

16.5 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.

16.6 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.

## **Part 10**

### **Directions by the CMA as to compliance**

#### **17 Directions**

17.1 The CMA may give directions falling within Article 17.2 to:

(a) a person specified in the directions; or

(b) a holder for the time being of an office so specified in any body of persons corporate or unincorporated.

17.2 The directions referred to in Article 17.1 are directions in writing:

(a) to take such action as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, this Order; or

(b) to do, or refrain from doing, anything so specified or described which the person is required by this Order to do or refrain from doing.

17.3 The CMA may vary or revoke any directions so given.

## **Part 11**

### **Supply of information to the CMA**

#### **18 Duty to supply information to the CMA**

18.1 Any person to whom this Order applies shall have a duty, as may be required by the CMA, to provide any information and documents for the purposes of enabling the CMA to monitor the carrying out of this Order or any provisions of this Order or to review the effectiveness of the operation of this Order or any provision of this Order.

18.2 Any person to whom this 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 this Order.

18.3 Any person to whom this 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 this Order shall have a duty, as may be required by the CMA to attend and provide such information in person.

18.4 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 this Order or any provision of this Order for the purpose of assisting the CMA in the discharge of its functions under or in connection with this Order.

(signed)

Group Chair

[date]

**DRAFT INVESTMENT CONSULTANCY AND FIDUCIARY MANAGEMENT  
MARKET INVESTIGATION ORDER 2019  
AON RESPONSE TO CONSULTATION**

**Schedule 2: Aon commentary on the Draft Explanatory Note**

## 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 scheme trustees**.
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.

**Commented [BS1]:** We note that the explanatory note defines this as the 'Final Report' whereas the draft order uses the defined term 'report'. For the sake of consistency we would suggest adopting the same term for each. We have suggested that 'Final Report' may be clearer and so retained the wording in the explanatory note.

**Commented [BS2]:** We note that this is not consistent with the wording in the draft order, which instead refers to 'pension scheme trustees'. The reference to pension schemes is consistent with the terms of the Final Report, however each of the remedies in the order clearly envisages that the purchaser of the relevant services will be a trustee. We therefore suggest retaining the wording in the draft order, and amending the explanatory note.

(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 exclusions set out in Article 3.5 [and 3.6](#).
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~~ [it has not received written confirmation that a](#) 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

**Commented [BS3]:** This has been amended to reflect the intention that FM Providers should be able to place reliance on the written confirmation that is provided by Pension Scheme Trustees, as set out at para 34 below. Please see our comments in relation to Article 3.6 of the Order for full details on our reasons for proposing this amendment.

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~~ make a reasonable effort 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. This is provided for by way of Article 3.6.
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

**Commented [BS4]:** We note that this is a more stringent requirement on trustees than is provided for in the Final Report at paragraph 12.25. We have therefore suggested an amendment to the Explanatory Note, and the Order, to reflect the Final Report.

**Commented [BS5]:** We note that this is not currently reflected in the drafting of articles 3.2 to 3.4 of the Order. Please see our suggested article 3.6 in the Order and the associated comment.

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 Pension Scheme Trustee 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 which is presented as being specifically suitable to the Pension Scheme Trustee to whom it is made or based exclusively on a consideration of that Pension Scheme Trustee's circumstances. This is to be distinguished from generic Marketing Material which intends to incite or induce Investment Consultancy Services clients to purchase Fiduciary Management Services from the IC-FM firm, but which is not presented as being specific to the circumstances of that client.

**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.

**Commented [BS6]:** We consider that, when receiving advice from IC-only firms, Pension Scheme Trustees should have a clear understanding of whether they are being presented with all available solutions. As such, IC-only firms should be required to disclose to clients that FM solutions have not been included in their advice where this is the case.

We have raised this point a number of times and recognise that this has not been taken up by the CMA. However, we do intend to suggest to the FCA that this be included as a requirement in future legislation.

**Commented [BS7]:** We note that many providers use digital formats to provide this material. It would be useful for the Explanatory Note to include guidance as to how 'within the same document' should be interpreted in relation to digital materials. For example:

- Aon uses 'microsites' to interact with prospects, which are bespoke secure-accessed websites on which marketing materials and tender responses are stored. The information is presented in "website format" and not always as a document; there are therefore no 'documents' to separate.

- Aon uses an electronic filing system with clients which collates meeting papers into one location and which clients can then access via an iPad app. This system has the ability to create a "board pack" which collates all the meeting papers together that have been uploaded and generates a single PDF document. Would this contravene Article 5.1 if marketing materials and advice were included as two separate documents but then bundled together into the single board pack PDF?

**Commented [BS8]:** Please see our comments in relation to Article 5.1 of the Order for an explanation of the amendments made to this paragraph.

**Commented [BS9]:** Please could CMA clarify whether 'first page' means the front cover of the documentation, or page one (inside the front cover).

Further, the CMA should include guidance as to how this should be interpreted in the context of digital formats. For example, in the context of the 'microsites' used by Aon (discussed above) the requirement to add the wording described in Article 7.1 is unclear as there is no "first page" on a webpage.



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.

**Commented [BS10]:** Aon considers that this is too open to interpretation, both across the market and, indeed, within a single organisation. We suggest that the CMA prescribes a standard Windows font and font size to avoid confusion. This will also be far more consistent for the client.

## **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

**Commented [BS11]:** Could the CMA please clarify whether advice and implementation costs are to be separated, or shown as a single item.

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 should 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

**Commented [BS12]:** Aon would encourage the CMA to provide additional clarity on this point. If the intention is that the FM Provider should provide User Templates in respect of each underlying investment manager this could involve in excess of 70 Use Templates being provided. Further, NDA's may be in place with the relevant manager, which would need to be renegotiated with the result that fees could be increased.

**Commented [BS13]:** Aon would encourage the CMA to provide stronger direction for the use of the CTI templates here to ensure improved and consistent disclosure across the market.

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:
- ~~(i)~~ (i) 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.
  - ~~(ii)~~ (ii) Any one-off costs and charges for advice, such as for refining the investment portfolio.
  - ~~(iii)~~ (iii) 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.

~~66.67.~~ For consistency, to the extent possible the presentation of the above information should follow the user templates prepared by the Cost Transparency Initiative (formerly the Institutional Disclosure Working Group) for disclosures in respect of existing clients.

~~67.68.~~ 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**

~~68.69. 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*

~~69.70.~~ 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.

~~70.71.~~ 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~~ Pension Scheme Trustees, or representatives of Pension Scheme Trustees. 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.

~~71.72.~~ 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

**Commented [BS14]:** With a view to encouraging greater consistency and comparability of information Aon suggests that use of the CTI user templates should be encouraged in respect of disclosures to prospective clients to the extent that these cover the information that is stipulated by the CMA.

**Commented [BS15]:** The performance standard is to apply to Fiduciary Management Providers, who are defined by reference to the service that they provide to Pension Scheme Trustees. We therefore consider that Pension Scheme Trustees should be involved in the submission of this performance standard, but not representatives of other pension schemes which are not directly impacted by this Order.

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.~~73. 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.~~74. 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.~~75. 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.~~76. 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).

**Commented [BS16]:** We would recommend that the Explanatory Note clarified that the use of the FM Performance Standard is a mandatory additional disclosure, and is not the only acceptable form of reporting on past performance. The Performance Standard sets out a methodology for the calculation and disclosure of composite performance calculations. Prospective clients, third party evaluators and Fiduciary Management Providers all, for valid reasons, require and/or disclose past performance information in additional formats.

#### *Appointment of an independent person by the CMA*

~~76.~~77. 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.~~78. 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 independent person will be encouraged to use to use the form of Fiduciary Management Reporting Standard that has been developed at that date as a starting point for his or her work. 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.~~79. 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.~~80. 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.~~81. 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.

**Commented [BS17]:** Aon considers that there is a strong case for using the FM Performance Standard in its current format and that it has the support of the majority of Fiduciary Management Providers. However, if the Article 11 backstop is required, we consider that the independent person must be encouraged by the CMA to continue the work that has already been carried out in this area.

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

~~81.~~82. 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.~~83. 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.~~84. 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.~~85. 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*

86. 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.

87. This exclusion applies only to this Part of the Order.

~~85.~~88. TPR guidance is expected to assist Pension Scheme Trustees in complying with the new requirements imposed under this Part of the Order including how Pension Scheme Trustees should set and monitor appropriate strategic objectives on which Investment Consultant Providers can report their performance.

**Commented [BS18]:** We note that paragraph 12.512 of the Final Report indicates that the TPR is to provide enhanced trustee guidance on how to set and monitor appropriate objectives for IC Providers. We would recommend including a paragraph clarifying that this is the case as is done in paragraph 68 above.



**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.~~89. 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.~~90. 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.~~91. ‘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.~~92. 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~~ jurisdiction in which the pension scheme for which the Pension Scheme Trustee client, or potential Pension Scheme Trustee client, acts as trustee is ~~resident~~ established, 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.

**Commented [BS19]:** There is no reason to link this provision to EU member states.

Also, there may be circumstances in which the trustees of a scheme may each be based in differing jurisdictions. It is more logical, and more practical, to apply this requirement to circumstances where the currency is different to that of the jurisdiction in which the scheme itself is based.

~~90.~~93. 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.

~~94.~~94. 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.~~95. 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.~~96. 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.~~97. 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.~~98. 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.

~~96-99.~~ 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*

~~97-100.~~ 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.

~~98-101.~~ 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:

- (c) the Chief Executive Officer;
- (d) the Managing Director;
- (e) any non-executive director; or
- (f) any senior director with responsibility for a relevant business unit.

~~99-102.~~ 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.

~~100-103.~~ 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.

~~404.~~104. Where the certificate is completed by Pension Scheme Trustees, it must be signed by:

- (g) a director of any sole corporate trustee; or
- (h) the Chair of the Board of Trustees; or
- (i) only if there is no Chair or the Chair is not available, any other member of the Board of Trustees.

~~402.~~105. This information is required to assist the CMA in complying with its statutory duty to monitor compliance with the Order.

~~403.~~106. 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.

~~404.~~107. 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***

~~405.~~108. 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***

~~406.~~109. 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.

~~407.~~110. 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.

~~408.~~111. 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.

~~409.~~112. 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.