



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

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**RESPONSE TO CONSULTATION ON DRAFT ORDER**

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**12 March 2019**

## INVESTMENT CONSULTANCY AND FIDUCIARY MANAGEMENT SERVICES MARKET INVESTIGATION ORDER 2019

### WTW<sup>1</sup> RESPONSE TO CONSULTATION ON DRAFT ORDER AND DRAFT EXPLANATORY NOTE

- 1.1 WTW welcomes the opportunity to provide comments on the Draft Investment Consultancy and Fiduciary Management Services Order 2019 (the "**Order**") and the Draft Explanatory Note (the "**Explanatory Note**"). The majority of our comments relate to the Interpretation section set out in Part 2 of the Order and its interaction with the mandatory tendering regime set out in Part 3. It is fundamentally important that the definitions set out in the Order leave little subjectivity in interpretation so as to ensure that there are no loop-holes which could lead to a distortion in competition.

#### *Comments on Part 1*

- 1.2 WTW does not have any material comments with respect to Part 1. We note that
- (a) the CMA has set out how the Order will operate in terms of when relevant sections come into force; and
  - (b) WTW has no issues with respect to the exclusions or the definition of "Master Trust".

#### *Part 2 – Interpretation*

- 1.3 As noted in previous submissions, the definitions of "Fiduciary Management Services" and "Investment Consultancy Services" are integral to the effectiveness of the Order. We understand that the CMA wishes to define "Fiduciary Management Services" as those services where there are elements of both advice on execution and execution with the same provider either simultaneously or consecutively within a reasonable timeframe (12 months) whether under one agreement or several.

#### *Definition of Fiduciary Management Services*

- 1.4 In terms of the structure of the definition itself, section (a) refers to section (b) and vice versa, which leads to a lack of clarity. We would encourage the CMA to restructure the definition of "Fiduciary Management Services" to ensure clear and distinct activities under each sub-section or remove the sub-section structure entirely. An example is the "Full Fiduciary Management" definition, which references the service in part (b) for 100% of the client's assets but part (b) incorporates part (a).
- 1.5 The CMA previously noted that advice does not necessarily have to precede execution (i.e. first (a) then (b)). We agree that in fact many of our relationships involve the provision of (a) and (b) simultaneously. However, based on our reading of the definition, advice must *precede* (by no more than 12 months) the appointment of a provider instructed to make investment decisions on the trustees' behalf on an on-going basis, in respect of all or some of the pension scheme's assets. This would mean that execution services would only fall within the definition of Fiduciary Management Services (and therefore the scope of the Order as it applies to these services) if they happened to have been supplied by a provider that had previously provided advisory-only services to the pension scheme. We see no justification for drawing such a distinction: on the contrary, it risks undermining the effectiveness of the CMA's remedies package and distorting competition, by imposing the requirements of the Order on some competitors in the Fiduciary Management market but not others.

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<sup>1</sup> In this response and all responses to the CMA, Towers Watson Limited is the main regulated entity. We refer to both this entity and the relevant general business as "We", "Willis Towers Watson" or "WTW" throughout.

1.6 To assist trustees and industry stakeholders with the interpretation of the definitions, we would suggest that examples are provided within the Explanatory Note to illustrate what types of arrangements would fall under the definition of “Fiduciary Management Services” and what types of arrangements would be considered pure “Asset Management” services and therefore be excluded from the activities set out in the Order. We have set out some illustrations below along with our understanding of whether and how these services would be included or excluded from the definition of Fiduciary Management Services as currently proposed and certain aspects of the Order. As we have explained in previous submissions, we are concerned that the proposed definition will exempt a number of competitors in the Fiduciary Management market from a number of the requirements set out in the Order, thereby risking distorting competition for Fiduciary Management Services and reducing the effectiveness of the CMA’s remedies package.

- (a) **Full Fiduciary Management (with strategic advice)** – An arrangement where trustees appoint a fiduciary manager which has an element of advice on overall investment strategy. The advisory element of the arrangement may be provided (i) prior to a Fiduciary Management Agreement and on an ongoing basis or (ii) once the Fiduciary Management Agreement is in place and on an ongoing basis. We understand that the definition should cover both cases. We are of the view that this might be clarified in the Order and/or Explanatory Note. There is a risk that some would argue that the latter is not covered as the advice has to be provided prior to the agreement.
- (b) **Full Fiduciary Management (without strategic advice)** – While relatively rare in our experience, there are some instances in the market where trustees choose to appoint different providers for strategic advice and execution through a fiduciary management agreement. In these types of arrangements, there is minimal difference between the services provided by the fiduciary manager and a pure asset management service. As currently drafted, this type of arrangement would not fall within the definition of “Fiduciary Management Services”. We are concerned that the wording of the definition would exclude this type of arrangement which would be problematic for a number of reasons. Firstly, there is a concern that parties may pursue this type of arrangement to avoid the requirements set out in the Order as it would be exempt from them as follows:
  - (i) the requirements on mandatory tendering set out in Part 3 of the Order;
  - (ii) the requirements on separation of marketing materials set out in Part 4 of the Order;
  - (iii) the requirements on disaggregated reporting of fees to clients set out in Part 5 of the Order; and
  - (iv) the performance reporting requirements set out in Part 6 of the Order.

[X] The current wording of the Order risks the unintentional consequence of making Full Fiduciary Management without strategic advice appear more attractive to trustees given that it would appear to be exempt from certain of the additional requirements set out in the Order.
- (c) **Partial Fiduciary Management** – An arrangement whereby decision making is delegated to a provider where previously (within 12 months), the providers advised on these decisions. This could include pooled solutions or separate accounts. We understand that fund of fund products provided by IC-FM firms would come under the definition if the trustees had received advice on the particular area of investment previously.
- (d) **Fund of Funds provided by IC-FM firms** – We believe that situations where trustees use an IC-FM fund of funds mandate and where there is no advisory relationship would not fall

within the definition of Fiduciary Management Services. This is due to the fact that there is no difference between this arrangement and another fund of fund or multi-asset product provided by asset management firms.

- 1.7 Therefore, our view is that the activities described under (a), (b) and (c) should be caught under the definition of Fiduciary Management Services and the activity described under (d) should not be caught under the definition of Fiduciary Management Services. In addition to this:
- (a) the CMA should adjust its definition to remove the requirement that providers of an execution service must previously have provided an advisory-only service in order for the service to count as a Fiduciary Management Service (see paragraph 1.5 above); and
  - (b) as previously raised with the CMA, we would encourage a specific carve out that investment decision making set out under (a) does not include operational decision making and activities (e.g. cash management), meaning that such activities are not caught in the definition of Fiduciary Management Services.

#### ***Definition of Investment Consultancy Services***

- 1.8 The current definition of "Investment Consultancy Services" in the Order refers to advice on "*investments that may be made*". This is very widely drawn. The use of the word "advice" is qualified in the Fiduciary Management Services definition to say that advice means advice on the merits and includes a recommendation or guidance as regards prudent future action. It may be helpful to also have similar clarification in this situation.
- 1.9 Moreover, though capturing the activities of Investment Consultancy Providers, the current definition may also inadvertently capture the activities of other providers, for example those who advise on settlement activity and insurance products. We understand that it is not the intention of the CMA to capture advice on settlement activity and insurance and so would propose that this be carved out of the definition. We propose that the carve out be worded as follows: "*the services do not include the provision of advice on settlement activity including but not limited to buy in policies, longevity swaps and other insurance products entered into for the purposes of managing longevity risk.*"
- 1.10 We also think it would be helpful to carve out any short terms projects, or projects that just touch on investment but do not link with the trustee's investment strategy, so setting strategic objectives with this in mind may not make sense. We have made a suggestion to the wording in paragraph 6.1(b) below to take this into account.
- 1.11 Lastly, if it is the intention of the CMA that general DC consulting is caught in the definition, then we would suggest that this is made clearer either in the Order itself or the Explanatory Note.

#### ***Definition of 'IC-FM'***

- 1.12 The definition of "Fiduciary Management Provider" is broadly the same as the definition of an "IC-FM" firm due to the incorporation of advice in the Fiduciary Management Provider definition. We suggest that the definition be made clearer by explaining that an "IC-FM" firm is a firm which can provide Investment Consultancy Services only, Fiduciary Management Services only or a combination of both Investment Consultancy Services and Fiduciary Management Services.

#### ***Other definitions within Part 2***

- 1.13 The definition of "Ancillary Services" as set out in the Glossary to the FCA Handbook relates to Part 5 of the Order on fee reporting requirements. The term "Ancillary Services" does not explicitly mention any fees relating to performance measurement services. We suggest that this be either

appended to this definition or explicitly mentioned within Part 5 of the Order. Performance measurement services are often carried out as part of pension scheme custodial arrangements and often charged for separately.

- 1.14 The definition of “Competitive Tender Process” specifically relates to a “Fiduciary Management Provider” who provides “Fiduciary Management Services”. Therefore, the definition of “Competitive Tender Process” relies heavily on the definition of Fiduciary Management Services being interpreted correctly. Given our comments in relation to 1.6, there are a number of alternative arrangements that trustees could consider in the provision of Fiduciary Management Services which would demonstrate trustees are actively engaging and considering their options. We therefore strongly encourage the CMA to broaden the types of bids which could be considered by trustees under the “Competitive Tender Process” definition to encompass the full range of services that are not currently caught by the definition of “Fiduciary Management Services”; in particular:

- (a) In the case of a full fiduciary management mandate, bids should also be counted from providers which allow trustees to adopt the arrangement described in 1.6(b); and
- (b) In the case of partial fiduciary management mandates, bids should be counted from other fund of fund providers and other multi asset products.

- 1.15 The definition of “Marketing Material” as written is subjective. It refers to written material provided by IC-FM firms which seeks “in any way” to invite or induce clients to purchase Fiduciary Management. We would suggest removing the words “in any way” given the subjective nature of the question of whether advisory material would be considered an invitation or inducement to consider fiduciary management. “Marketing Material” should clearly be setting out the advantages and benefits of fiduciary management and/or describing the provider’s fiduciary management services. We would suggest that this definition is linked to the definition of “Financial Promotion” as detailed in the FCA handbook. The FCA handbook provides detailed guidance on what is considered an invitation or an inducement.

## **2. Part 3 – Mandatory tendering for Fiduciary Management**

- 2.1 The definition of “Fiduciary Management Services” as set out above, alongside the impact it has for the definition of “Competitive Tender Process”, are fundamental to the effectiveness of this part of the Order. As it stands, the Order would not apply to arrangements that do not fit the definition of “Fiduciary Management Services” provided and it therefore has the potential to distort competition.
- 2.2 Under section 3 of the Order, Fiduciary Management Providers are prohibited from entering into an agreement that represents more than 20% of assets where schemes have not conducted a Competitive Tender Process. Although we recognise the benefits of tendering processes, the running of a tender is not within the control or, necessarily, within the visibility of the Fiduciary Management Provider. Therefore, we believe that this Part should be re-drafted to ensure that the onus of carrying out a Competitive Tender Process lies solely with the Trustee.
- 2.3 The wording within the Explanatory Note stipulates that trustees conduct a Competitive Tender Process when it uses Fiduciary Management for 20% or more of its total assets regardless of the number of Fiduciary Management Providers it has appointed. We believe the 20% limit should apply when assets are held under fiduciary management mandates with *one* provider, not several. If a trustee is already using several, there is no or no material incumbency advantage. We also note that the wording in the Final Report refers only to one fiduciary manager having 20% or more of the scheme’s assets. The wording under paragraph 12.8 of the Final Report is as follows: *“Pension scheme trustees will be required to conduct a competitive tender process when first appointing a fiduciary management services provider for 20% or more of the scheme’s assets”*. We also note that this point is

not made clear within the Order itself, as it refers only to “aggregated agreements” and could refer to aggregated agreements with one Fiduciary Management Provider, not several.

- 2.4 Additionally, there seems to be an inconsistency in relation to the Final Report and the Order for circumstances where clients conduct a competitive tender for assets falling under the 20% threshold. Under the Order as currently written, these clients will need to carry out a second Competitive Tender Process should they opt to increase their assets under fiduciary management to over 20% (regardless of whether a different provider is chosen). This seems an unnecessary requirement for those trustees who have already followed best practice and carried out a competitive tender.
- 2.5 The Order does not clearly state that fiduciary management mandates which were appointed with fewer than 20% of assets are not required to carry out a Competitive Tender Process should the mandate increase to more than 20% as a result of market movements or changes in the rest of the portfolio. We would assume that a Competitive Tender Process is only triggered when trustees decide to allocate additional assets to a fiduciary management mandate which at the time would exceed 20% of assets, but consider this would be helpful to clarify.
- 2.6 Within the Explanatory Note under paragraphs 33 and 44, it states that trustees could delegate the activities of a Competitive Tender Process to a third party. The CMA should also confirm that the intention of this is to allow a Competitive Tender Process to include appointments of a third party evaluator (“TPE”) in selecting a fiduciary manager. TPEs research fiduciary management providers as part of their normal business practices and will be able to assess which fiduciary management provider is the most suitable given the trustees' needs and the scheme's objectives.

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

- 3.1 Our concerns in relation to this part of the Order relate mainly to the definition of “Marketing Material” as described in 1.15 above. (We do not repeat our concerns with respect to “Fiduciary Management Services” although these apply to Parts 4-6).
- 3.2 Moreover, we would suggest excluding from the wording of the Order the sentence “*Guidance on running a tender process is available from the Pensions Regulator*” in the event that this guidance is not published at the time this requirement comes into force.

### **4. Part 5 – Fee reporting requirements**

- 4.1 We suggest that, under paragraph 8.1.a.ii and paragraph 9.2.b.ii, the CMA makes it clear that Asset Management product fees paid to the Fiduciary Management Provider (where they use their own asset management products as part of their Fiduciary Management Service) are separated from Asset Management product fees paid to other third parties.
- 4.2 Further to our comments on “Ancillary Services” under 1.13 above, fees and costs relating to performance measurement fees incurred by the Fiduciary Management Provider for the client should also be included under paragraph 8.1.a.iv and paragraph 9.2.b.iii.
- 4.3 Paragraph 8.3 of the Order explains that detailed underlying manager details are provided on a fund by fund or product by product basis. It should be noted that this may be difficult to provide given that the information will not always be accessible to Fiduciary Management Providers. There are many managers and products which will not be FCA authorised and will therefore not be required to provide this. Currently, under MIFID II requirements, in cases where the information is difficult to obtain, reasonable estimates are provided to customers. The same flexibility should be provided under this remedy and referred to in the Order.

## **5. Part 6 – Fiduciary Management Services – performance reporting requirements**

- 5.1 As the CMA is aware, significant progress has been made in relation to a Fiduciary Management Performance Standard which we expect will ultimately be moved to the CFA Institute to oversee and maintain. Under the wording of the Order, the submission to the CMA must provide approval from a majority of Fiduciary Management Providers (note the definitional issue here) and representatives of pension schemes. This will be very difficult in practice to achieve given that there is no institutional trustee group to engage with on the matter.
- 5.2 A large representation of the fiduciary management industry and intermediaries have broadly agreed a performance standard – we would hope that this would satisfy the approval from a majority of Fiduciary Management Providers. This has been challenging to achieve given the bespoke nature of each full fiduciary management mandate and has taken up significant time and resources already. The industry is now at a stage where it can provide suitable and consistent performance data to prospective trustees given their overall strategic objectives.
- 5.3 Furthermore, it will be incredibly challenging and in our view unrealistic to get trustees to understand and approve the structure and detail of the standard within 6 months, particularly taking into account the fact that the majority of trustees are not investment professionals.
- 5.4 The CMA should set out the practicalities of how it wishes the fiduciary management industry to provide the submission – whether it is one submission from one designated party or separate submissions from each fiduciary manager.

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

- 6.1 The requirements set out in Part 7 and the descriptions within the Explanatory Note appear to be sensible, although there are instances where they may be less relevant. We would suggest that the following activities be excluded within the Order:
- (a) Where the provider is assisting the trustees in setting its strategic objectives in the first place, we would suggest that this type of arrangement is excluded from the requirement as there would be no explicit performance reporting to provide.
  - (b) Where advice touches on “investments that may be made...” at a very high level and are not linked to the trustee's overall investment strategy, or short term projects which will last no longer than 6 months.
- 6.2 We look forward to engaging with the CMA on finalising the Order in the coming months.

**WILLIS TOWERS WATSON, 12 March 2019**