

# Briefing note

Just what the CMA ordered



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On 6 June the Government published their final response to the consultation on the oversight of investment consultants and fiduciary managers. This was followed by the publication of draft regulations for occupational pension schemes which will bring new requirements into force and replace most sections of the CMA Order. This note summarises the new requirements and how they differ from the original CMA order.

## Key points

- The draft legislation is due to come into force on 1 October 2022.
- Compliance-reporting and policing responsibilities will shift from the Competition and Markets Authority (CMA) to the Pensions Regulator
- The regulator will have authority to issue compliance notices with fines of up to £5,000 for an individual and £50,000 for corporate entities if they fail to heed a compliance notice.
- Trustees must take advice before making most investment decisions and can be fined as much as £5,000 per individual trustee or £50,000 per corporate body if they breach that requirement.

## What's changing?

Draft regulations have been laid before Parliament to bring requirements for trustee oversight of investment consultants and fiduciary managers within the body of private-sector pensions law.<sup>1</sup> If approved by both Houses, compliance-reporting and policing responsibilities will shift from the Competition and Markets Authority (CMA) to the Pensions Regulator.

### Background

Following an investigation of the market for investment consultancy and fiduciary services to institutional investors, the CMA in 2019 made an order requiring (broadly summarised) that occupational pension scheme trustees:

- Put their fiduciary management contracts out to tender in certain circumstances;

<sup>1</sup> The draft Occupational Pension Schemes (Governance and Registration) (Amendment) Regulations 2022 <[www.legislation.gov.uk/ukdsi/2022/9780348235777](http://www.legislation.gov.uk/ukdsi/2022/9780348235777)>.

- set objectives for their investment consultants and review performance against those goals annually.<sup>2</sup>

Trustees (and others) are currently required to submit compliance statements to the CMA by 7 January each year. However, the requirements of the CMA order are designed to fall away automatically when replaced by equivalent provisions within the sphere of a 'relevant sector regulator', such as the Pensions Regulator. The Department for Work and Pensions (DWP) consulted on proposals for accomplishing just that, in 2019, but resolution of the issue was put on hold during the initial stages of the coronavirus pandemic.<sup>3</sup>

### Consultation outcome and legislation

The DWP has now published details of the responses to the consultation exercise and its outcome.<sup>4</sup> The (draft) *Occupational Pension Schemes (Governance and Registration) (Amendment) Regulations 2022* have been laid before Parliament for approval, and are set to enter into force on 1 October 2022.

The draft regulations would supersede the CMA order to the extent that it currently puts obligations onto the trustees of private-sector, occupational pension schemes. They would do so by establishing new governance requirements for trust-based schemes<sup>5</sup>, and new reporting obligations<sup>6</sup>. Some types of scheme, most notably small self-administered schemes and executive pension schemes, are explicitly excluded from the scope of the changes.

### Fiduciary management services

As with the CMA order, the draft regulations require trustees to go through a competitive tendering process before obtaining, or continuing to receive, fiduciary management services. In broad terms, the requirement applies when the proportion of the scheme's assets that are or will be covered by a fiduciary mandate (or mandates) reaches 20% of the total assets open to fiduciary management. Trustees must invite at least **three** fiduciary managers to bid for the work.

Competitive tender processes carried out in compliance with the order will not need to be repeated merely because of the commencement of the regulations.

### Investment consultancy services

The draft regulations also replicate the provisions of the order that oblige trustees to set objectives for those providing investment consultancy services. Trustees should review the suitability of those objectives triennially (at least) and after any significant changes in investment policy. The performance of the investment consultancy provider against the objectives must be assessed annually. A newly appointed investment consultancy provider will need to have a set of objectives by the end of the day on which the appointment becomes effective.

Objectives set prior to 1 October 2022, in compliance with the CMA order, will not have to be reviewed immediately upon commencement of the regulations, but will come up for review three years after they were established.

### Consultation proposals vs final draft regulations

There are some differences between the regulations laid in Parliament and the DWP's 2019 consultation-draft legislation. For example:

- Asset-backed contributions are now excluded (in addition to buy-in policies) when determining whether a scheme has surpassed the 20% threshold for mandatory fiduciary management tendering

<sup>2</sup> The *Investment Consultancy and Fiduciary Management Market Investigation Order 2019*.

<sup>3</sup> *Consultation on delivering the Competition and Markets Authority (CMA) recommendation for trustee oversight of investment consultants and fiduciary managers* (July 2019) <[www.gov.uk/government/consultations/trustee-oversight-of-investment-consultants-and-fiduciary-managers/consultation-on-delivering-the-competition-and-markets-authority-cma-recommendation-for-trustee-oversight-of-investment-consultants-and-fiduciary-managers](http://www.gov.uk/government/consultations/trustee-oversight-of-investment-consultants-and-fiduciary-managers/consultation-on-delivering-the-competition-and-markets-authority-cma-recommendation-for-trustee-oversight-of-investment-consultants-and-fiduciary-managers)>.

<sup>4</sup> <[www.gov.uk/government/consultations/trustee-oversight-of-investment-consultants-and-fiduciary-managers/outcome/government-response-delivering-the-competition-and-markets-authority-cma-recommendation-for-trustee-oversight-of-investment-consultants-and-fiducia](http://www.gov.uk/government/consultations/trustee-oversight-of-investment-consultants-and-fiduciary-managers/outcome/government-response-delivering-the-competition-and-markets-authority-cma-recommendation-for-trustee-oversight-of-investment-consultants-and-fiducia)>.

<sup>5</sup> In the *Occupational Pension Schemes (Scheme Administration) Regulations 1996* (SI 1996 No. 1715).

<sup>6</sup> In the *Register of Occupational and Personal Pension Schemes Regulations 2005* (SI 2005 No. 597).

- 'High-level commentary' about the investment strategy from an actuary performing a funding valuation will not count as investment 'advice' for the purposes of the regulations.<sup>7</sup>

## Compliance

The Pensions Regulator (rather than the CMA) would be responsible for ensuring compliance, and compliance reporting information would become part of the '*registrable information*' that the regulator collects from trustees via its scheme returns. The regulator will update its guidance on the trustee-oversight obligations in time for the 1 October 2022 commencement date.

The regulator will have the power to issue a compliance notice if it thinks that a person is in breach of the requirements. The notice will specify the steps required to fix the problem. A third-party compliance notice will be available if the regulator believes that the responsible person's failure to comply is attributable to the action or inaction of someone else.

Penalties may be imposed for contravention of the requirements or failure to heed a compliance notice. The maximum fine will be £5,000 for an individual and £50,000 for corporate entities.

## Policy review

The draft regulations suggest that the DWP will review the suitability and efficacy of the new governance requirements and the underlying policy by 31 December 2028 at the latest, and at least every five years thereafter.

Trustees must take advice before making most investments decisions, and can be fined as much as £5,000 per individual trustee or £50,000 per corporate body if they breach that requirement. So, compliance with the objective-setting requirements will be critical to avoid the risk of investment paralysis and regulatory penalties.

## Obligations for investment consultancies and fiduciary managers

The CMA order also places some obligations, for example concerning compliance reporting, on investment consultancies and fiduciary managers themselves, as well as on Local Government Pension Scheme (LGPS) funds. As those requirements are not replaced by the provisions of the draft regulations, the relevant CMA order provisions will presumably continue to apply for now. The DWP notes that LGPS regulation is the purview of the Department for Levelling Up, Housing and Communities, which we understand may tackle the relevant aspects of the order later this year. The CMA recommended that the government extend the Financial Conduct Authority's 'regulatory perimeter' to cover investment consultants, but that has yet to take effect.

To discuss the circumstances specific to your scheme, please contact your usual Hymans Robertson consultant. We'd be delighted to help.

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<sup>7</sup> The exception for high-level commentary in conjunction with actuarial valuations appeared in the CMA Order, but was not replicated in the consultation-draft legislation. It has been inserted following requests from consultation respondents.