

[F1] SCHEDULE

Regulation 33

Duties of trustees of relevant trust schemes in connection with provision of FM services

F1 Sch. inserted (1.10.2022) by [The Occupational Pension Schemes \(Governance and Registration\) \(Amendment\) Regulations 2022 \(S.I. 2022/825\)](#), reg. 1(2), **Sch.**

PART 1

Introductory

Scope

1. This Schedule sets out the duties of the trustees of a relevant trust scheme in respect of the carrying out of qualifying tender processes in connection with the provision of fiduciary management services.

General Interpretation

2. In this Schedule—

“the AMT” means the asset management threshold (see paragraph 4);

“competitive tender process” has the meaning given in Article 2.1 of the 2019 Order, as it had effect immediately before the commencement date;

“continuing in-scope FM provider” has the meaning given in paragraph 3(12);

“excepted person”, in relation to a relevant trust scheme, means—

- (a) a trustee of the scheme,
- (b) a trustee owned company,
- (c) the employer that has the power to act on behalf of all employers in the scheme in relation to the scheme rules,
- (d) the principal employer for the purposes of the scheme in accordance with the scheme rules,
- (e) if the scheme is a Master Trust scheme (within the meaning given in section 1 of the Pension Schemes Act 2017)—
 - (i) the scheme funder (as defined by section 39 of that Act), if that person is an IC-FM firm or a body corporate connected to an IC-FM firm, or
 - (ii) the scheme strategist (as defined by section 39 of that Act), if that person is an IC-FM firm or a body corporate connected to an IC-FM firm, or
- (f) a person who is connected to any of the persons mentioned in paragraph (c), (d) or (e);

“FM provider” has the meaning given in paragraph 3(2);

“IC-FM firm” means a person who provides both investment consultancy services and fiduciary management services to the trustees of a relevant trust scheme;

“in-scope assets” has the meaning given in paragraph 4(3);

“in-scope FM provider” is to be read in accordance with paragraph 3(11);

“manageable assets” has the meaning given in paragraph 3(5);

“NRP FM provider” has the meaning given in paragraph 9(2);

“out-of-scope FM provider” has the meaning given in paragraph 3(13);

“qualifying tender process” has the meaning given in paragraph 5;

“relevant tender process” means—

- (a) a qualifying tender process,
- (b) a competitive tender process,
- (c) where the trustees are a contracting authority for the purposes of the Public Contracts Regulations 2015, a procurement carried out in accordance with those Regulations, or
- (d) where the trustees are a contracting authority for the purposes of the Public Contracts (Scotland) Regulations 2015, a procurement under those Regulations.

Meaning of “FM provider”, “in-scope FM provider”, “continuing in-scope FM provider”, “out-of-scope FM provider”, “manageable assets” and related expressions

3.—(1) This paragraph defines “FM provider”, “in-scope FM provider”, “continuing in-scope FM provider”, “out-of-scope FM provider”, “manageable assets” and related expressions for the purposes of this Schedule.

(2) “FM provider”, in relation to a relevant trust scheme, means a person who provides fiduciary management services to the trustees of the scheme.

(3) A person (“P”) provides fiduciary management services to the trustees of a relevant trust scheme if the conditions in sub-paragraphs (4) and (8) are met.

(4) The condition in this sub-paragraph is that P is appointed to manage any of the manageable assets of the scheme.

(5) The manageable assets of a relevant trust scheme are the assets of the scheme which could be managed by a person who has a relevant delegated authority (irrespective of whether they are in fact so managed).

(6) A person manages manageable assets of a relevant trust scheme if—

- (a) they have a relevant delegated authority in relation to the scheme, and
- (b) that authority was not given to them solely for the purpose of restructuring a portfolio of investments to facilitate the removal or replacement of any person (including the person themselves) who has a delegated authority.

(7) A person has a relevant delegated authority in relation to a relevant trust scheme if they—

- (a) are a fund manager to whom a discretion has been delegated under section 34 of the 1995 Act, or
- (b) are not such a fund manager but can make decisions about investments (including decisions about, or in connection with, the appointment of a fund manager) in exercise of any discretion of the trustees which has been delegated to them by, or on behalf of, the trustees.

(8) The condition in this sub-paragraph is that—

- (a) P, or a person who is, or was, connected to P—
 - (i) is, on the date on which P is appointed as mentioned in sub-paragraph (4) (“the appointment date”), providing relevant services to the trustees of the scheme,
 - (ii) has provided such services at any time within the period of 12 months ending immediately before the appointment date, or
 - (iii) provides such services at any time during P’s appointment as mentioned in sub-paragraph (4), or
- (b) P is, or was, a party to a joint venture with any person which—

- (i) is, on the appointment date, providing relevant services to the trustees of the scheme,
 - (ii) has provided such services at any time within the period of 12 months ending immediately before the appointment date, or
 - (iii) provides such services at any time during P's appointment as mentioned in subparagraph (4).
- (9) For the purposes of this paragraph, a person provides relevant services to the trustees of a relevant trust scheme if they—
- (a) give advice to the trustees of the scheme on, or in connection with—
 - (i) the merits of any of the following—
 - (aa) the exercise of any of the trustee's powers of investment in any particular case (including, but not limited to, the making or retaining of any investment or the selection of a fund);
 - (bb) the appointment of a particular fund manager;
 - (cc) the delegation of authority under section 34 of the 1995 Act to a fund manager;
 - (dd) asset allocation, or
 - (ii) investment strategy, and
 - (b) give that advice otherwise than in their capacity as a legal adviser appointed by the trustees.
- (10) Where P is an actuary, any high-level commentary given by P in, or in relation to, an actuarial valuation on the link between the statutory funding objective and the investment strategy, is not to be treated as advice for the purposes of this paragraph.
- (11) An FM provider ("F") is an in-scope FM provider in relation to a relevant trust scheme if—
- (a) F is not an excepted person, and
 - (b) where F is an FM provider because F is or was connected to a person ("C") who, or F is or was party to a joint venture which, provides or has provided relevant services to the trustees of the scheme—
 - (i) C is not an excepted person, or
 - (ii) one or more of the other persons who are, or were, also parties to the joint venture are not excepted persons.
- (12) "Continuing in-scope FM provider", in relation to a relevant trust scheme, means an in-scope FM provider who—
- (a) was appointed by the trustees of the scheme before the commencement date, and
 - (b) continues to provide fiduciary management services to those trustees on and after that date in accordance with the terms of that appointment.
- (13) "Out-of-scope FM provider" means an FM provider who is not an in-scope FM provider.
- (14) References in this Schedule to fiduciary management services are to be read in accordance with this paragraph.

The asset management threshold

4.—(1) This paragraph makes provision about the AMT, and related matters, for the purposes of this Schedule.

(2) A relevant trust scheme meets the AMT if 20% or more of the in-scope assets of the scheme are managed by one or more in-scope FM providers.

(3) The in-scope assets of a relevant trust scheme are the manageable assets of the scheme other than any of those assets which are managed by an out-of-scope FM provider.

(4) For the purposes of determining whether a relevant trust scheme meets, would meet or falls below the AMT, no account is to be taken of any change in the amount of the assets being managed by any FM provider which arises otherwise than from a change in the arrangements made with that FM provider for the provision of fiduciary management services.

(5) For the purposes of determining whether a relevant trust scheme would meet the AMT were an in-scope FM provider to be appointed, or an increase to be made in the amount of assets managed by any such provider—

- (a) where it is proposed to appoint an out-of-scope FM provider to manage any of the manageable assets of the scheme, or increase the amount of manageable assets managed by an out-of-scope FM provider, at the same time as making the relevant appointment or relevant increase, the assets which will be managed by the out-of-scope FM provider as a result of that appointment or increase are to be treated as if they were already being managed by that provider (and so are not in-scope assets);
- (b) where it is proposed to appoint any other in-scope FM provider to manage any of the assets of the scheme, or increase the amount of assets managed by any such provider, at the same time as making the relevant appointment or relevant increase, the manageable assets which will be managed by the other in-scope FM provider are to be treated as assets which are already being managed by an in-scope FM provider.

Meaning of “qualifying tender process”

5.—(1) In this Schedule “qualifying tender process” means the process of—

- (a) inviting, and using reasonable endeavours to obtain, bids for the provision of the relevant FM services from at least three persons who are not excepted persons and are not—
 - (i) connected to each other, or
 - (ii) party to any joint venture with each other, and
- (b) evaluating the bids which are obtained.

(2) In this paragraph—

“bid” means an offer in writing to provide the relevant FM services at a stated price;

“the relevant FM services”—

- (a) where the trustees propose to appoint a person as an in-scope FM provider to manage any of the manageable assets of the relevant trust scheme, are fiduciary management services involving the management of those assets;
- (b) where—
 - (i) the trustees propose to increase the amount of assets managed by an in-scope FM provider (“F”), and
 - (ii) F was not appointed following a relevant tender process,are fiduciary management services involving the management of the total amount of assets that F would manage were the proposed increase to be made;
- (c) where—
 - (i) the trustees propose to increase the amount of assets managed by an in-scope FM provider (“F”), and
 - (ii) F was appointed following a relevant tender process,

are fiduciary management services involving the management of the additional amount of assets that F would manage were the proposed increase to be made;

- (d) where the duty in paragraph 7(1) or 9(3) applies, are fiduciary management services involving the management of the total amount of assets currently managed under the existing arrangements with the continuing in-scope FM providers or NRP FM providers (as the case may be).

PART 2

Duties of trustees of relevant trust schemes which met the asset management threshold before the commencement date

Application of Part 2

6.—(1) This Part of this Schedule applies in relation to a relevant trust scheme if the scheme has one or more continuing in-scope FM providers and—

- (a) immediately before the commencement date, the scheme meets the AMT, or
 - (b) the scheme meets the condition in sub-paragraph (2) or (3) (regardless of whether paragraph (a) also applies to the scheme).
- (2) A relevant trust scheme meets the condition in this sub-paragraph if—
- (a) the scheme is one to which Article 4.2 or 4.3 of the 2019 Order applied at any time before the commencement date,
 - (b) the scheme met the AMT immediately before the end of the period specified in Article 4.2 or, as the case may be, 4.3, of the 2019 Order, and
 - (c) one or more of the scheme's continuing in-scope FM providers were first appointed on or before 9th June 2019.
- (3) A relevant trust scheme meets the condition in this sub-paragraph if—
- (a) the scheme did not meet the AMT immediately before 11th June 2019, but met the AMT at any time during the period beginning with 11th June 2019 and ending immediately before 10th December 2019, and
 - (b) one or more of the scheme's continuing in-scope FM providers were first appointed on or before 9th December 2019.

Duty of trustees to carry out a qualifying tender process in connection with continued use of continuing in-scope FM providers

7.—(1) The trustees of a relevant trust scheme to which this Part applies must, by the end of the relevant day, have carried out, or have had carried out on their behalf, a qualifying tender process in respect of the fiduciary management services provided under the arrangements with each of their continuing in-scope FM providers.

- (2) But the duty in sub-paragraph (1) does not apply—
- (a) in respect of any of those arrangements if the scheme—
 - (i) does not meet the AMT immediately before the commencement date or falls below the AMT on or after that date, and
 - (ii) will not meet the AMT at the end of the relevant day;
 - (b) where paragraph (a) does not apply, in respect of—

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- (i) any arrangements in relation to which a competitive tender process was carried out before the commencement date;
 - (ii) where the trustees are a contracting authority for the purposes of the Public Contracts Regulations 2015, any arrangements made with an FM provider who was appointed as a result of a procurement carried out in accordance with those Regulations;
 - (iii) where the trustees are a contracting authority for the purposes of the Public Contracts (Scotland) Regulations 2015, any arrangements made with an FM provider who was appointed as a result of a procurement under those Regulations;
 - (iv) where a continuing in-scope FM provider will cease to provide fiduciary management services to the trustees on or before the relevant day, the arrangements made with that provider.
- (3) For the avoidance of doubt, where the trustees of the scheme—
- (a) have, before the commencement date, started but not completed a competitive tender process in relation to any arrangements with a continuing FM provider, and
 - (b) complete that competitive tender process before the end of the relevant day,
- they are to be treated as having complied with the duty in paragraph (1).
- (4) In this paragraph “the relevant day” means—
- (a) where the scheme meets the condition in sub-paragraph (2) of paragraph 6 (regardless of whether the scheme also meets the AMT immediately before the commencement date)—
 - (i) if the period specified in Article 4.2 or 4.3 of the CMA Order ended before the commencement date, the commencement date;
 - (ii) otherwise, the last day of the period of five years beginning with the day on which the earliest of the arrangements with any of the continuing in-scope FM providers to be reviewed under this paragraph was entered into;
 - (b) in any other case—
 - (i) the last day of the period of five years beginning with the day on which the earliest of the arrangements with any of the continuing in-scope FM providers to be reviewed under this paragraph was entered into, or
 - (ii) if that period ended before the commencement date or will expire on or before the last day of the period of two years beginning with the commencement date (“the transition period”), the last day of the transition period.

PART 3

Duties of trustees of relevant trust schemes which meet the asset management threshold on or after the commencement date

Duty of trustees of a relevant scheme to carry out a qualifying tender process in connection with appointment, or change to the mandate, of an in-scope FM provider

8.—(1) The trustees of a relevant trust scheme must carry out, or have had carried out on their behalf, a qualifying tender process before—

- (a) appointing a person as an in-scope FM provider, or
 - (b) increasing the amount of manageable assets managed by an in-scope FM provider.
- (2) But the duty in sub-paragraph (1) applies only if sub-paragraph (3) or (4) applies.

- (3) This sub-paragraph applies where—
- (a) the scheme does not already meet the AMT but would meet the AMT if the appointment or increase were made, and
 - (b) the trustees are not a contracting authority for the purposes of the Public Contracts Regulations 2015 (“the PC Regulations”) or the Public Contracts (Scotland) Regulations 2015 (“the PCS Regulations”).
- (4) This sub-paragraph applies where—
- (a) the trustees are a contracting authority for the purposes of the PC Regulations or the PCS Regulations,
 - (b) the relevant FM provider will not be, or was not, appointed following a procurement carried out in accordance with the PC Regulations or, as the case may be, under the PCS Regulations, and
 - (c) either—
 - (i) the scheme does not already meet the AMT but would meet the AMT if the appointment or increase were made, or
 - (ii) if the scheme already meets the AMT, the appointment or increase would be the first to be made since the AMT was last met following the appointment of an FM provider, or an increase in the amount of assets managed by an FM provider, who was appointed as a result of a procurement carried out in accordance with the PC Regulations or, as the case may be, under the PCS Regulations.
- (5) For the purposes of sub-paragraph (4)(c)(ii), where any other appointment or increase is proposed to be made at the same time as the relevant appointment or increase, those appointments or increases (or both) are to be treated as a single appointment for the purposes of determining whether the requirement that the appointment or increase (as the case may be) would be the first to be made since the AMT was last met.

Duty of the trustees to carry out a qualifying tender process in respect of arrangements with existing FM providers not appointed following a relevant tender process

- 9.—(1) This paragraph applies where—
- (a) a relevant trust scheme has one or more NRP FM providers, and
 - (b) the duty in paragraph 8(1) is triggered by the proposed appointment of another in-scope FM provider or increase in the amount of assets managed by another in-scope FM provider.
- (2) In this Schedule “NRP FM provider” means an in-scope FM provider who was not appointed following a relevant tender process.
- (3) The trustees must carry out a qualifying tender process, or arrange for such a process to be carried out on their behalf, in respect of the relevant services provided under the existing arrangements with each of their NRP FM providers at the same time as the tender under paragraph 8(1) is carried out by them or on their behalf.
- (4) But the duty in sub-paragraph (3) does not apply in respect of any arrangements in relation to which the duty in paragraph 7(1) applies.

Notification to FM providers

- 10.—(1) The trustees of a relevant trust scheme must give a tender completion notice to any in-scope FM provider who is—
- (a) appointed on or after the commencement date, or
 - (b) given authority to manage additional manageable assets on or after that date.

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(2) The trustees of a relevant trust scheme must also give a tender completion notice to any NRP FM provider who is to continue to provide fiduciary management services under their existing arrangements with the trustees following a qualifying tender process under paragraph 9(3) in respect of those services.

(3) A “tender completion notice” is a notice in writing which states that—

(a) where sub-paragraph (1) applies, either—

(i) the appointment or increase is made following the carrying out of a qualifying tender process under paragraph 8, or

(ii) no such tender was required before the appointment or increase was made;

(b) where sub-paragraph (2) applies, a qualifying tender process has been carried out under paragraph 9 in respect of the fiduciary management services provided under the existing arrangements with the relevant FM provider.]

Changes to legislation:

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