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**Date: 12 March 2019**

Dear Praful,

**RE: Investment Association response to the CMA consultation on 'The Investment Consultancy and Fiduciary Management Market Investigation Order 2019' draft**

Thank you for the opportunity to comment on the draft 'Investment Consultancy and Fiduciary Management Market Investigation Order 2019'. We restrict our comments to two areas:

**1. Definition of investment consultancy and fiduciary management services**

The definition set out in the draft Order better reflects the nature of IC and FM services in comparison to the previous high level definitions in the Issues Statement and Provisional Decision Report. In particular, the broad definition of FM as advice together with the implementation of that advice captures the essence of the service.

However, further refinements are needed, both to clarify these terms, and to narrow their scope sufficiently.

**(a) Narrowing the scope of 'advice' – linking to the 1995 Pensions Act**

Advice as defined in part (c) of the FM Services definition in article 2.1 is very broad and could cover wider areas of asset management activity that are not fiduciary management. The following is a non-exhaustive list of examples, none of which we would describe as fiduciary management:

- The manufacture and distribution of any multi-asset or multi-manager product where the asset manager is making a decision on asset allocation or manager selection within the product.
- Discussions with pension scheme trustees around investment strategy, such as changing the risk and reward profile of a portfolio.
- Instances where an asset manager has presented a potential product or solution as part of a sales process and provided information about the product and its key features to trustees.

As set out in paragraphs 76–77 and 80–85 of our response<sup>1</sup> to the Provisional Decision Report, as well as in our letter to the CMA of 8 November 2018<sup>2</sup>, the definitions of IC and FM services would benefit from an explicit link to s36 of the 1995 Pensions Act to ensure that no unintended activities are caught by the Order.



Such a link would achieve this by making it clear that only services provided to trustees in the context of their obligations to seek advice under the 1995 Pensions Act would constitute IC or FM for the purposes of applying the CMA’s remedies. As we discussed in our response to the Provisional Decision Report, it is this requirement on trustees to take advice that has driven the particular development of the IC and FM markets in the UK and so linking the definition back to it would provide a logical means of ensuring appropriate targeting of the remedies.

#### (b) Aligning advice in the IC and FM services definitions

We view the advice component of FM as being the same as the advice provided by a traditional investment consultant. The distinguishing characteristic of FM is that the provider of the advice then goes on to implement that advice through discretionary portfolio management. In a traditional investment consulting model, the trustees will act on the advice of the consultant and appoint one or more investment managers to implement the different elements of the recommended investment strategy.

Conceptually, the nature of the advice provided under the two services is the same, covering matters such as the scheme’s investment strategy, asset allocation and manager selection.

Accordingly, the advice element of fiduciary management (part a of the definition) should be aligned with the description of the advisory services offered under a pure IC model (parts a-d of the IC services definition in article 2.1). This would achieve consistency between the advice elements of the two services. The current wording of the IC and FM advice definitions cover similar activities, but the differences in the wording could lead to some confusion.

Having consistency of advice across the IC and FM definitions would ensure that it is clear that an IC firm stops at providing advice on these matters, while an FM firm both advises on these matters and implements them as part of the same service.

#### (c) Proposal for amending the definitions

Taking these two issues together we suggest some alternative definitions of investment consultancy services and fiduciary management services. We have set out in the annex what such definitions could look like.

- As regards advice about investments, it should reflect the generally applicable understanding of it in the Regulated Activities Order and elsewhere – the annex sets this out.
- As regards advice about “any matters in respect of.....advice in relation to the preparation or revision of the Statement of Principles” this will need to be limited so as not to capture accountancy, actuarial and legal advice as such – reference to investments will address this.

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<sup>1</sup> [IA response to the Provisional Decision Report](#), August 2018.

<sup>2</sup> [IA response](#) to the consultation paper ‘Draft definitions of Investment Consultancy services and Fiduciary Management services for the purposes of potential remedies’, November 2018.

- Strategic asset allocation - for legal certainty this is caught by a wide definition of advice about investments, but we continue to believe that the definitions would benefit from an explicit link to the 1995 Pensions Act by requiring pension trustees to take advice from persons regulated as investment advisers and/or investment consultancy advisers. This also would dispense with the need to refer here to strategic asset allocation and allow it to be referred to in guidance about the meaning of advice on investments.
- Manager selection should refer to managers providing regulated discretionary investment management.



We suggest that the definition of Fiduciary Management could also be much more straightforward. Part (a) will in the new regime either be a regulated investment adviser, or much more likely, the new regulated investment consultancy service provider. Together with part (b) they form an entire set, a fiduciary management service. The annex sets out a suggestion for a simpler definition of fiduciary management along these lines.

## **2. The status of Occupational Pension Scheme (OPS) Firms in the draft Order**

In our response to the CMA's Provisional Decision Report, we raised the issue of OPS firms, the in-house investment management arms of occupational pension schemes. Our view at the time of the Provisional Decision Report was that the working definitions of investment consultancy and fiduciary management would cover OPS firms because of the activity they carry out on behalf of their parent pension schemes. These can be broadly characterised as advising on and managing investments. A more precise regulatory definition of 'OPS activity' can be found in the FCA handbook<sup>3</sup>. It remains our view that the revised definitions of IC and FM services, though narrower than before, could still capture some OPS firms.

We are confident that OPS firms are not intended to be in scope of the CMA's investigation and remedies: they have not been discussed in the CMA's investigation and as non-commercial entities, they operate on a cost-recovery basis only and do not provide services to any client other than the pension scheme of the group by which they are owned. They do not face the conflicts of interest faced by commercial IC-FM firms that the CMA identified in its market investigation. Applying the remedies to these firms would lead to significant burdens on both OPS firms and the scheme trustees, with no benefit to the scheme trustees.

We note that under the definitions of fiduciary management services and investment consultancy services in article 2.1 of the draft Order, that part (e) of the former and part (a) of the non-included services under the latter, exclude from the Order the staff schemes of

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<sup>3</sup> 'OPS activity' defined in the [FCA Handbook](#) as:

(a) managing investments in a case where the assets managed are:

- (i) held for the purposes of an occupational pension scheme; or
- (ii) held for the purposes of a welfare trust established by a person who is, or has been at any time during the last 12 months, an associate of the OPS firm; or
- (iii) assets of an OPS collective investment scheme;

(b) any one or more of the following activities undertaken in the course of, or incidental to, the operation of an occupational pension scheme, welfare trust or OPS collective investment scheme:

- (i) dealing in investments as principal;
- (ii) dealing in investments as agent;
- (iii) arranging (bringing about) deals in investments;
- (iv) making arrangements with a view to transactions in investments;
- (v) safeguarding and administering investments;
- (vi) advising on investments;
- (vii) receiving or holding client money

IC and FM providers. The same exclusion will cover some, though not all OPS firms. This difference is due to ownership structure: some OPS firms are an Interconnected Body Corporate of the Controlling Employer and therefore exempt. Other OPS firms have a different ownership structure and cannot rely on this exemption.



We would strongly recommend that the CMA make it explicitly clear in its final Order that OPS firms are out of scope. This could be best achieved by adding OPS firms as defined in the FCA Handbook Glossary<sup>4</sup> to the list of exclusions in article 1.6 of the draft Order.

We hope this response is helpful and would be delighted to discuss it with you further.

Yours sincerely,

**Guy Sears**

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**Imran Razvi**

**Senior Policy Adviser, Pensions & Institutional Market**

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<sup>4</sup> OPS firm defined in the [FCA Handbook](#) as:

a) (except in IPRU(INV)) a firm which:

(i) carries on OPS activity; and

(ii) is one or more of the following:

(A) a trustee of the occupational pension scheme in question;

(B) a company owned by the trustees of the occupational pension scheme in question;

(C) a company which is:

(I) an employer in relation to the occupational pension scheme in question in respect of its employees or former employees or their dependants; or

(II) a company within the group which includes an employer within (I); or

(III) an administering authority subject to the Local Government Pension Scheme Regulations 2013 as in force on 1 April 2018; or

(b) a firm which:

(i) has satisfied the requirements set out in (a) at any time during the past 12 months; but

(ii) is no longer able to comply with those requirements because of a change in the control or ownership of the employer referred to in (a)(ii) during that period.

# ANNEX – SUGGESTED DEFINITIONS OF INVESTMENT CONSULTANCY AND FIDUCIARY MANAGEMENT FOR CMA ORDER



## Investment Consultancy service

1. 'Investment consultancy service' means the provision of advice, that is not a personal recommendation, given to a person under s36(1) of the 1995 Pensions Act in their capacity as a pension scheme trustee
  - a. on the merits of the pension scheme buying, selling, subscribing for, exchanging, redeeming, holding or underwriting any designated investment or exercising or not exercising any right conferred by such an investment to buy, sell, subscribe for, exchange or redeem such an investment;
  - b. on any matters relating to designated investments in respect of which trustees are required by law to seek advice in relation to the preparation or revision of the written statement of principles required by s.35(1) of the Pensions Act 1995; or,
  - c. in relation to the selection and appointment of any person authorised to provide discretionary investment management services to the pension scheme.

Note for guidance that strategic asset allocation is within 1a. and can fall within 1b.

## Fiduciary Management service

2. A fiduciary management service arises when a person provides discretionary investment management services to a person in their capacity as a pension scheme trustee and it (or a connected person) has, within 12 months before the date on which such services commenced, acted as an investment consultant service provider to that person or any other in their capacity of a trustee of that pension scheme.

## Complementary Pensions Act 1995 change

The Pensions Act s36(6) could be amended as well to reflect the new definition of investment consultancy:

6) For the purposes of this section "proper advice" means—

....

(b) in any other case, the advice of a person **who is a regulated investment consultancy provider.**