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Dear Vicky,

RE: Investment Association response to the DWP consultation on delivering the CMA recommendation for trustee oversight of investment consultants and fiduciary managers

Thank you for the opportunity to respond to the above consultation and comment on the draft Occupational Pension Schemes (Governance and Registration)(Amendment) Regulations 2019 (the "**Draft Regulations**").

We restrict our comments to the proposed definitions of investment consultancy ("**IC**") and fiduciary management ("**FM**") services set out in the Draft Regulations. This is of paramount importance to the Investment Association and its members, since the definition of IC and FM services will have a direct and material impact on the scope of the obligations set out in the Draft Regulations.

Defining IC and FM services in the Draft Regulations

We agree that for the purpose of these regulations, trustees and the wider pensions industry should have a common understanding of what is meant by IC and FM services. Furthermore, given that these terms will be defined in three separate places – the Investment Consultancy and Fiduciary Management Market Investigation Order 2019 (the "**CMA Order**"), pensions law and, in future, FCA rules – it is important that there be consistent definitions across all these instruments. We therefore welcome the DWP's decision to closely follow the definitions of IC and FM services in the CMA Order.

However, we do have three serious concerns over the IC and FM definitions in the Draft Regulations.

1. The definition of 'advice' is too broad

'Advice' is defined in s36(3)(a)(i)(aa) of the Draft Regulations as follows:

36. (3) P provides investment consultancy services to the trustees of a relevant trust scheme if—

(a) P gives advice to the trustees of the scheme on, or in connection with, any of the following—

(i) the merits of—

(aa) the exercise of any of the trustee's powers of investment (including the making or retaining of any investment);

Our concern is that this element of the definition of investment advice is very broad – much broader than both the definition of investment advice in the FCA Handbook¹ and the CMA Order – as a result of which there is considerable ambiguity over what may or may not constitute advice.

For example, the wording suggests that, as well as advising on a specific investment, more general advice on the merits of investing in a particular asset class, while not naming a specific security, would be captured in the definition of 'advice'. It is therefore unclear as to whether information given to trustees comparing and contrasting different investments would constitute advice under this definition. Further clarity would be helpful here in order for firms to understand whether providing such comparative information would constitute advice.

Furthermore, it is possible that by answering the following questions – typical examples from RfPs issued by investment consultants on behalf of trustees – managers could be deemed to be providing 'advice' on the exercise of the trustee's powers of investment:

- What structure (segregated, pooled, other) would you suggest for the mandate?
- What legal/regulatory protections does the proposed structure provide compared to the alternatives?
- Would you suggest managing the mandate physically or synthetically?
- What are your suggested investment restrictions for the mandate?

Answering such questions – which relate to asset management services, rather than fiduciary management – would not be advice under the definition in FCA rules. Were they treated as advice for the purposes of the Draft Regulations, this would cause both firms and clients material complications that we outline below.

2. 'Advice' is no longer characterised by a specific recommendation or guidance – further broadening its' scope

The CMA Order contains a reference² to advice being on the merits of *"taking or not taking a specific course of action and includes a recommendation or guidance to that effect."* We note this language has been removed from the Draft Regulations, the effect of which is to make the definition of advice significantly broader than the definition in the CMA Order. This not only creates inconsistencies in the interpretation of advice and FM and IC services, but most importantly has the effect of materially widening the scope of FM and IC services, thereby resulting in overly complex, burdensome and unwarranted obligations falling on both firms and trustees.

3. The scope of 'investment decisions' in FM services is too wide

Important clarificatory provisions in the definition of FM services in the CMA Order have not been replicated in the Draft Regulations. In particular, the definition contained in the CMA Order expressly states at paragraph (d) that *"investment decisions' means decisions in relation to investments that may be made and includes but is not limited to decisions in*

¹ See the annex attached to this letter for more detail on the definition used by the FCA. We include this here purely for reference purposes as it is mentioned a number of times in this letter.

² CMA Order, section 2.1, "FM services" and "IC services" definitions.

respect of asset allocation and fund/manager selection".³ Similar to concerns with the definition of advice above, this also creates inconsistencies in the interpretation of FM services and has the effect of materially widening the scope of FM services, thereby resulting in overly complex, burdensome and unwarranted obligations falling on both firms and trustees.



What is the impact of such broad definitions of 'advice' and FM services?

An overly wide definition of 'advice' and the widening of the scope of FM services by omitting the clarificatory language in paragraph (d) of the definition of FM services in the CMA Order are concerns of material importance to the Investment Association and its members as:

- Departing from the wording of the CMA Order may risk the Draft Regulations, when adopted and implemented, having an 'effect' materially different from what the CMA Order sought to achieve, and therefore cause confusion amongst the industry and result in the CMA not confirming that the Regulations have an 'equivalent effect' to that of the Order; and
- Wider definitions of 'advice' and FM services than originally envisaged by the CMA Order would result, should this point not be corrected in the final Regulations, in overly complex, burdensome and unwarranted obligations falling on both firms and trustees.

In concrete terms, an overly broad definition of 'advice' would likely result in wider conversations that investment managers have with existing and prospective clients about fund and asset management services being treated as advice under these regulations, even though they would not constitute advice under the FCA definition. This in turn may lead to IC and FM services being inadvertently provided – in the sense that they are neither intended by the firm nor desired by the client – under the DWP regulations and trigger obligations on trustees.

To illustrate this point, an investment manager answering the questions listed on page 2 above, for example, could be deemed to be providing advice and therefore be providing IC services. The trustees would then be obliged to set objectives and monitor performance against those objectives, which would be meaningless in this example and impose unnecessary time and resource costs on trustees.

Meanwhile, an investment manager that answers these questions and is subsequently appointed to provide asset management services within 12 months could be treated as the scheme's fiduciary manager (if the wider scope of FM services currently in the regulations is left unaltered) – despite the fact that the service being sought by trustees and provided by the manager is clearly not an FM service. This would trigger the specific mandatory tendering requirements in the regulations, again, imposing undesired and unnecessary costs on trustees.

Furthermore, from an investment manager's perspective, differing definitions of advice and FM services between the CMA Order, DWP regulations and FCA rules would create significant complexity and uncertainty over what constituted advice under different regulations, making it overly complex and burdensome for firms when having conversations with clients.

³ CMA Order, section 2.1, "FM services" definition.

Proposed way forward

We appreciate that a key driver of the CMA work has been to ensure that wider areas of investment advice provided by investment consultants – notably asset allocation and manager selection – are caught by regulation and we have consistently supported this approach⁴ in our representations to the CMA during the course of its investigation.

We think it is crucial that the Draft Regulations mirror the definitions of advice and FM services contained in the CMA Order for the reasons set out above, such that conversations about wider asset management services are not captured. Specifically, it is paramount that the DWP re-incorporates 1) the reference⁵ in the CMA Order to advice being on the merits of *"taking or not taking a specific course of action and includes a recommendation or guidance to that effect."* and 2) paragraph d of the definition of FM services in the CMA Order.

Issues of timing

We note that as well as the Draft Regulations, HMT and the FCA have committed to legislating for incorporation of the relevant parts of the CMA Order into the Financial Services and Markets Act (Regulated Activities) Order 2001 and FCA rules respectively. According to paragraphs 10-11 of the DWP consultation document accompanying the Draft Regulations, these consultations are anticipated to be later this year (HMT) and by April 2020 (FCA).

Given the need for consistency of definitions across all these instruments, we would recommend that the DWP delays laying final regulations until the HMT and FCA consultations have been completed. This would ensure that DWP, HMT and the FCA can work to achieve alignment of definitions across all the relevant legal instruments.

We do not anticipate any problems with such a delay because the CMA Order has already been laid and will be in force from 10 December 2019 for a lifetime of up to ten years⁶: all relevant parties will be obliged to abide by the requirements of the CMA Order from this date, and any delay to incorporation of the Order into sectoral rules will have no effect on the application of the CMA remedies.

I hope this response is clear in an area that we believe is important to clarify. We would be keen to discuss further with you directly.

Yours sincerely,

Imran Razvi

Senior Policy Adviser – Pensions & Institutional Market

⁴ See the [IA response](#) to the CMA IC-FM Market Investigation Provisional Decision Report, 2018.

⁵ CMA Order, section 2.1, "FM services" and "IC services" definitions.

⁶ CMA Order, section 1.4(b).

ANNEX: THE DEFINITION OF INVESTMENT ADVICE IN FCA RULES



Following the transposition into UK law of the EU's revised Markets in Financial Instruments Directive⁷ (MiFID II) the [FCA Handbook](#) uses the following definition of investment advice for MiFID business:

Investment advice:

The provision of personal recommendations to a client, either upon the client's request or at the initiative of the firm, in respect of one or more transactions relating to designated investments.

[Note: article 4(1)(4) of MiFID]

Personal recommendation:

- a) made to a person in their capacity as an investor or potential investor, or in their capacity as agent for an investor or a potential investor;
- b) which constitutes a recommendation to them to do any of the following (whether as principal or agent):
 - i. buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular investment which is a security, a structured deposit or a relevant investment (that is, any designated investment (other than a P2P agreement), funeral plan contract, pure protection contract, general insurance contract, right to or interests in a funeral plan contract or structured deposit); or
 - ii. exercise or not exercise any right conferred by such a relevant investment to buy, sell, subscribe for, exchange or redeem such an investment;
- c) that is:
 - i. presented as suitable for the person to whom it is made; or
 - ii. based on a consideration of the circumstances of that person; and
- d) that is not issued exclusively to the public.

[Note: article 2(1)(15) of the IDD, article 9 of the MiFID Org Regulation and article 53(1C) and 53(1D) of the Regulated Activities Order]

Considering the questions listed on page 2 above alongside this definition, it is clear that the answers to those questions could not be regulated advice as defined here.

⁷ [Directive 2014/65/EU](#)