

## INVESTMENT CONSULTANTS MARKET INVESTIGATION

### UNDERTAKINGS GIVEN BY [NAME OF ADVISER] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE CONFIDENTIALITY RING FOLLOWING PUBLICATION OF THE WORKING PAPER ON ASSET MANAGER PRODUCT RECOMMENDATIONS

#### WHEREAS

- (1) On 14 September 2017, in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 ('the Act')<sup>1</sup>, the Financial Conduct Authority ('FCA') made a reference to the Competition and Markets Authority ('CMA') for a market investigation in relation to the supply and acquisition of investment consultancy services and fiduciary management services to and by institutional investors and employers in the UK ('the 'Investigation').
- (2) On 21 September 2017, the CMA published an issues statement setting out the framework for the Investigation including three candidate potential theories of harm.
- (3) The CMA has also published a working paper on Asset Manager Product Recommendations.
- (4) The Asset Manager Product Recommendations working paper is based on economic and financial analyses of the data received by the CMA during the Investigation from a number of parties and takes into account the parties' representations received either in writing and/or at oral hearings.
- (5) The CMA has decided to disclose the following by means of a confidentiality ring commencing on 29 March 2018 ('the Confidentiality Ring'):
  - a) the data underlying the analysis conducted to assess the performance of asset manager product recommendations, which is included in the working paper on Asset Manager Product Recommendations. This consists of:
    - i. data on asset management products, the performance of these and corresponding benchmarks, and the fees associated with these;
    - ii. data on the discounts (on asset manager fees) received by clients of investment consultants, and;
    - iii. data on ratings assigned to asset management products by investment consultants.

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<sup>1</sup> As provided for by s234I of the Financial Services and Markets Act 2000

(together the 'Disclosed Material'). A reference to the Disclosed Material in these undertakings includes a reference to any part of the Disclosed Material.

- (6) The CMA considers that the Disclosed Material includes specified information within the meaning of section 238 of the Act, to which the general restriction on disclosure in section 237 of the Act applies. The CMA may disclose specified information to any other person in circumstances permitted by the Act.
- (7) The CMA has decided to disclose the Disclosed Material by means of the Confidentiality Ring pursuant to section 241 of the Act. Access to the Confidentiality Ring is restricted to the external legal and/or economic advisers of the Relevant Parties and is provided for the sole purpose of allowing the advisers of a Relevant Party, on behalf of the Relevant Party, to review and understand the CMA's analyses, to prepare submissions and representations to the CMA regarding the Investigation, and (if relevant) to prepare and conduct an appeal against any decision of the CMA in connection with the Investigation, ('the Permitted Purpose').
- (8) Access to the Confidentiality Ring is restricted and will be granted to, and only to, an adviser:
  - a. who has been approved in writing by the CMA;
  - b. who has given written undertakings acceptable to the CMA ('the Individual Undertakings'); and
  - c. in respect of whom the adviser's firm/employer has provided written undertakings acceptable to the CMA ('the Firm Undertakings');in accordance with the arrangements in recital (10) (each such adviser being an 'Authorised Adviser');
- (9) The number of Authorised Advisers is limited to *[number – X]* for each Relevant Party.
- (10) The arrangements for obtaining CMA approval of an adviser and for giving undertakings in respect of an adviser are:
  - a. notice of not less than 2 CMA working days<sup>2</sup> must be given to the CMA of the date on which the adviser first wishes to be granted access to the Confidentiality Ring ('the Access Date');

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<sup>2</sup> A 'CMA working day' is any day of the week, Monday to Friday, on which the CMA's offices are open (and excludes public or English bank holidays).

- b. by 4pm on the CMA Working Day before the Access Date the Individual Undertakings signed by the adviser and, if relevant, the Firm Undertakings signed on behalf of the adviser's firm/employer, must be provided to (and received by) the CMA;
  - c. before the adviser attempts to access the Confidentiality Ring confirmation in writing must be obtained from the CMA that it has approved the adviser and has accepted the signed Individual Undertakings and, if relevant, the signed Firm Undertakings.
- (11) Subject to the Individual Undertakings and the Firm Undertakings, the CMA will make the Disclosed Material available to the Authorised Advisers through an external hard drive ('the Hard Drive'). The CMA will make available one Hard Drive per Relevant Party, which the Authorised Advisers will be permitted to collect from the CMA's offices between 9.30am and 5pm on any CMA working day during the Confidentiality Ring period.
- (12) Each Authorised Adviser will be permitted to download the Disclosed Material from the Hard Drive into a secure folder on computers with the specifications set out below at the Authorised Advisers' premises and accessible to the Authorised Advisers only (each a 'Secure Computer'). The Authorised Advisers of a Relevant Party will, between them, be permitted to download the Disclosed Material up to a maximum of 10 times, (each permitted download resulting in a 'Permitted Copy'). Each Secure Computer must have the following specifications:
- a. It must be password-protected
  - b. The storage media (except for the USB ports) must have been disabled; and
  - c. It may be networked to the other Secure Computers.
- (13) Disclosure of the Disclosed Material, or any part thereof, by the Authorised Advisers other than in accordance with the Individual Undertakings is not permitted without the express and prior written consent of the CMA. Breach of the Individual Undertakings by an Authorised Adviser may result in:
- a. the CMA:
    - i. terminating the Authorised Adviser's access to the Confidentiality Ring and refusing the Authorised Adviser access to any subsequent disclosure room or confidentiality ring run by the

CMA, whether relating to the Investigation or any other investigation;

- ii. referring the breach to the Authorised Adviser's regulatory body, if applicable, which may decide to take disciplinary action in relation to the breach.

- b. a breach by the Authorised Adviser of his or her obligations under Part 9 of the Act (as regards the disclosure and use of the Disclosed Material) which constitutes a criminal offence under section 245 of the Act;

(14) [Name of Firm] has been instructed by [Name of Party], which is a Relevant Party, for the purpose of providing [legal/economic] advice to [Name of Party] in relation to the Investigation. [Name of Adviser] is [employed by [Name of Firm] as a [legal/economic adviser]] [a partner in [Name of Firm]].

## **NOW THEREFORE**

I, [Name of Adviser], [Job title] at [Name of Firm], which has been engaged by [Name of Party] in connection with the Investigation, undertake to the CMA in my own name:

1. To use the Hard Drive only for the purpose of downloading the Permitted Copies and to access the Disclosed Material only using a Secure Computer of [Name of Firm];
2. To use the Disclosed Material for, and only for, the Permitted Purpose;
3. To hold the Disclosed Material in strict confidence and not to discuss, disclose, transmit, communicate or otherwise make the Disclosed Material available in any manner to any other person (including any other legal adviser, economic adviser, officer or employee of [Name of Firm] and [Name of Party]) except:
  - a. another Authorised Adviser of [Name of Party], or
  - b. a member of CMA staff or a CMA panel member working on the Investigation,
4. Not to make any electronic or non-electronic copy in any format of any of the Disclosed Material (including copying the Disclosed Material to another location either internal or external to the Authorised Adviser's premises), save as provided in paragraph 5 below.
5. While I may copy (either in electronic form on a Secure Computer or non-electronic form) the Disclosed Material only for the purposes of preparing, by

myself or together with one or more of the other Authorised Advisers, one or more submissions to the CMA in respect of the Disclosed Material within the scope of the Permitted Purpose (each a 'Confidential Submission'), in doing so I will ensure that, save as provided in paragraph 7 below, any document (including any summary, report or submission) I prepare, or analysis I undertake, which contains or refers to the Disclosed Material or which derives wholly or partially from the Disclosed Material is not used, disclosed or made available in any way to any other person at [Name of Party] or to any other person (including any other legal adviser, officer or employee of [Name of Firm] and [Name of Party] except:

- a. another Authorised Adviser of [Name of Party]; or
  - b. a member of CMA staff or a CMA panel member working on the Investigation.
6. For the avoidance of doubt while I may share a non-confidential version of any report or submission with [Name of Party] to facilitate the Permitted Purpose, I will ensure, including by making any necessary redactions, that (i) the restrictions in paragraph 7 are complied with in relation to any such non-confidential report or submission; and that (ii) the non-confidential report or submission is only shared with [Name of Party] after the CMA has confirmed in writing to an Authorised Adviser of [Name of Party] that the non-confidential summary, report or submission does not include any of the Disclosed Material and meets the requirements in paragraph 7.
7. While I may prepare a general summary of any Confidential Submission (each a 'Non-Confidential Summary') which can be disclosed to [Name of Party], I will ensure that;
- a) The Non-Confidential Summary is not used or made available in any way to disclose any part of the Disclosed Material;
  - b) The Non-Confidential Summary is only shared with [Name of Party] after the CMA has confirmed in writing to an Authorised Adviser of [Name of Party] that the Non-Confidential Summary does not include any of the Disclosed Material and meets the requirements in paragraphs 7(a) and 8 below.]
  - c) The Non-Confidential Summary must be no longer than is reasonably necessary for the Permitted Purpose.
8. For the avoidance of doubt, I will ensure that the Non-Confidential Summary does not enable or assist [Name of Party] to gain an understanding of its position or potential future position in any market relative to any other market operator (other than relative to a market wide benchmark) and in particular does not reveal any data that identifies the number of customers, measures of price calculated using

customer number data, results of quantitative analysis using customer number data, costs, data on the absolute or relative performance of other operators or data on the commercial arrangements of parties.

9. To ensure that any submission I prepare containing or referring to the Disclosed Material is submitted to the CMA separately from any other submission on behalf of [Name of Party] and highlights any Disclosed Material.
10. To keep secure at all times the Disclosed Material, the Permitted Copies and any Confidential Submission, report or other document prepared (in or on the Secure Computers) by, or provided to, me, which contains or refers to the Disclosed Material (together the 'Relevant Material and Documents'). Relevant Material and Documents in electronic form must be kept only in or on the Secure Computers.
11. To save the Confidential Submission (and relevant working files/analyses) in the relevant Hard-drive folders and return the Hard-drive to the CMA's offices by 5pm on 19 April 2018
12. By 5pm on 19 April 2018:
  - a. To delete the Permitted Copies from the Secure Computer(s) so that the Disclosed Material is not readily available to any person (measures must be taken to ensure no copies remain in either the recycle bin or in a backup system);
  - b. In so far as not covered by (a) above, and subject to paragraph 13 below, to destroy or return to the CMA the Relevant Material and Documents or, where the Relevant Material and Documents are in electronic form, to delete them from the Secure Computers so that they are not readily available to any person (measures must be taken to ensure no copies remain in either the recycle bin or in a backup system); and
  - c. To notify the CMA of the manner of, and date of, the destruction and/or deletion of the Relevant Material and Documents.
13. To ensure that no more than one copy of any Confidential Submission is retained in or on one Secure Computer and to return, save as provided in paragraph 14 below, the copy of any Confidential Submission at the conclusion of the period within which any appeal may be brought concerning the Investigation.
14. If it is required to comply with [Name of Firm]'s professional indemnity insurance policy or any applicable law, legislation, regulation or court order, the

Authorised Advisers of [Name of Firm] may retain one copy of the Confidential Submission, provided that:

- a. the copy is stored securely in accordance with the undertaking in paragraph 10;
- b. the CMA is notified of the retention at the conclusion of the period within which any appeal may be brought concerning the Investigation; and
- c. the CMA is consulted as far as practicable prior to any disclosure of the copy under [Name of Firm]'s professional indemnity insurance policy or any applicable law, legislation or court order.

15. To notify the CMA immediately if I become aware of or suspect that any of [Name of Party]'s Authorised Advisers have failed to comply with the Individual Undertakings, or any of the firms that such Authorised Advisers represent have failed to comply with the Firm Undertakings.

#### **PROVIDED THAT**

These undertakings shall not apply to any part of the Disclosed Material that:

- i) belongs or relates solely to [Name of Party] or to [Name of Party]'s business and which does not include any confidential information belonging to, relating to or deriving solely or partially from any other party;
- ii) is information that has previously been disclosed by the CMA to [Name of Party in the Investigation;]
- iii) at the time of disclosure is in the public domain or subsequently comes into the public domain, except through breach of the Individual Undertakings or of any of the other Undertakings given by external legal and/or economic advisers for any other Relevant Party in relation to the Confidentiality Ring;
- iv) is required to be disclosed by law, legislation, regulation or court order, as long as (except where prohibited by law, legislation, regulation or court order), I consult the CMA as far as practicable prior to the proposed disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure; or

#### **AND IN AGREEMENT THAT**

These Undertakings shall be governed by and construed in accordance with English law and I submit to the exclusive jurisdiction of the courts of England and Wales to hear and decide any action or proceedings which may arise out of, or in connection with these Undertakings.

[Name of Party] has given full and informed consent to the terms of these undertakings, including the restrictions placed upon [Name of Adviser] on the further disclosure of information, subject to the undertakings above.

[Name of Adviser] of [Name of Firm]

[*signature*]

[Date]



## INVESTMENT CONSULTANTS MARKET INVESTIGATION

### UNDERTAKINGS GIVEN BY [NAME OF FIRM] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE CONFIDENTIALITY RING FOLLOWING PUBLICATION OF THE WORKING PAPER ON ASSET MANAGER PRODUCT RECOMMENDATIONS

#### WHEREAS

- (1) On 14 September 2017, in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 ('the Act')<sup>3</sup>, the Financial Conduct Authority ('FCA') made a reference to the Competition and Markets Authority ('CMA') for a market investigation in relation to the supply and acquisition of investment consultancy services and fiduciary management services to and by institutional investors and employers in the UK ('the 'Investigation').
- (2) On 21 September 2017, the CMA published an issues statement setting out the framework for the Investigation including three candidate potential theories of harm.
- (3) The CMA has also published a working paper on Asset Manager Product Recommendations.
- (4) The Asset Manager Product Recommendations working paper is based on economic and financial analyses of the data received by the CMA during the Investigation from a number of parties and takes into account the parties' representations received either in writing and/or at oral hearings.
- (5) The CMA has decided to disclose the following by means of a confidentiality ring commencing on 29 March 2018 ('the Confidentiality Ring'):
  - a) the data underlying the analysis conducted to assess the performance of asset manager product recommendations, which is included in the working paper on Asset Manager Product Recommendations. This consists of:
    - i. data on asset management products, the performance of these and corresponding benchmarks, and the fees associated with these;

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<sup>3</sup> As provided for by s234I of the Financial Services and Markets Act 2000

- ii. data on the discounts (on asset manager fees) received by clients of investment consultants, and;
- iii. data on ratings assigned to asset management products by investment consultants.

(the 'Disclosed Material'). A reference to the Disclosed Material in these undertakings includes a reference to any part of the Disclosed Material.

(6) The CMA considers that the Disclosed Material includes specified information within the meaning of section 238 of the Act to which the general restriction on disclosure in section 237 of the Act applies. However, the CMA may disclose specified information to any other person in circumstances permitted by the Act.

(7) The CMA has decided to disclose the Disclosed Material by means of the Confidentiality Ring pursuant to section 241 of the Act. Access to the Confidentiality Ring is restricted to the external legal and/or economic advisers of the Relevant Parties<sup>4</sup> and is provided for the sole purpose of allowing the advisers of a Relevant Party, on behalf of the Relevant Party, to review and understand the CMA's analyses, to prepare submissions and representations to the CMA regarding the Investigation, and (if relevant) to prepare and conduct an appeal against any decision of the CMA in connection with the Investigation.

(8) Access to the Confidentiality Ring is restricted and will be granted to, and only to, an adviser:

- a. who has been approved in writing by the CMA;
- b. who has given written undertakings acceptable to the CMA ('the Individual Undertakings'); and
- c. in respect of whom the adviser's firm/employer has provided written undertakings acceptable to the CMA ('the Firm Undertakings');

in accordance with the arrangements in recital (10) (each such adviser being an 'Authorised Adviser');

(9) The number of Authorised Advisers is limited to [number – X] [for each Relevant Party.

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<sup>4</sup> A Relevant Party is a party whose legal/economic advisers are granted access to the Confidentiality Ring.

(10) The arrangements for obtaining CMA approval of an adviser and for giving undertakings in respect of an adviser are:

- a. notice of not less than 2 CMA working days<sup>5</sup> must be given to the CMA of the date on which the adviser first wishes be granted access the Confidentiality Ring ('the Access Date');
- b. by 4pm on the CMA Working Day before the Access Date the Individual Undertakings signed by the adviser and, if relevant, the Firm Undertakings signed on behalf of the adviser's firm/employer, must be provided to (and received by) the CMA; and
- c. before the adviser attempts to access the Confidentiality Ring, confirmation in writing must be obtained from the CMA that it has approved the adviser and has accepted the signed Individual Undertakings and, if relevant, the signed Firm Undertakings.

(12) Subject to the Individual Undertakings and the Firm Undertakings, the CMA will make the Disclosed Material available to the Authorised Advisers through an external hard drive ('the Hard Drive'). The CMA will make available one Hard Drive per Relevant Party, which the Authorised Advisers will be permitted to collect from the CMA's offices between 9.30am and 5pm on any CMA working day during the Confidentiality Ring period.

(13) Each Authorised Adviser will be permitted to download the Disclosed Material from the Hard Drive into a secure folder on computers with the specifications set out below at the Authorised Advisers' premises and accessible to the Authorised Advisers only (each a 'Secure Computer'). The Authorised Advisers of a Relevant Party will, between them, be permitted to download the Disclosed Material up to a maximum of 10 times, (each permitted download resulting in a 'Permitted Copy'). The Secure Computers must each have the following specifications:

- (a) It must be password-protected;
- (b) The storage media (except for the USB ports) must have been disabled; and
- (c) They may be networked to each other.

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<sup>5</sup> A 'CMA working day' is any day of the week, Monday to Friday, on which the CMA's offices are open (and excludes public or English bank holidays).

(14) Disclosure of the Disclosed Material, or any part thereof, by the Authorised Advisers other than in accordance with the Individual Undertakings, is not permitted without the express and prior written consent of the CMA. Breach of the Individual Undertakings by an Authorised Adviser or of the Firm Undertakings by an Authorised Adviser's firm/employer may result in:

a. the CMA:

- i. in the case of a breach by an Authorised Adviser, terminating the Authorised Adviser's access to the Confidentiality Ring and refusing the Authorised Advisor access to any subsequent disclosure room or confidentiality ring run by the CMA, whether relating to the Investigation or any other investigation;
- ii. in the case of a breach by a firm/employer, terminating the firm/employer's participation in the Confidentiality Ring and refusing a request to participate in any subsequent disclosure room or confidentiality ring run by the CMA, whether relating to the Investigation or any other investigation; and
- iii. referring the breach to the regulatory body of the Authorised Adviser or firm/employer, if applicable, which may decide to take disciplinary action in relation to the breach;

b. a breach by the Authorised Adviser of his or her obligations under Part 9 of the Act (as regards the disclosure and use of the Disclosed Material) which constitutes a criminal offence under section 245 of the Act.

(15) [Name of Firm] has been instructed by [Name of Party], which is a Relevant Party, for the purpose of providing [legal/economic] advice to [Name of Party] in relation to the Investigation. [Name of Adviser[s]] is employed by [Name of Firm] as a [legal/economic adviser] [a] partner[s] in [Name of Firm].

## **NOW THEREFORE**

[Name of Firm] which has been engaged by [Name of Party] in connection with the Investigation undertakes to the CMA that:

1. It will give only the Authorised Advisers of [Name of Firm] access to the Disclosed Material and only in accordance with the terms of the Individual Undertakings given by the Authorised Advisers of [Name of Firm];
2. It will notify the CMA immediately if it becomes aware of or suspects that there has been any breach of:

- a. these undertakings;
  - b. the Individual Undertakings given by an Authorised Adviser of [Name of Party]; or
  - c. the other Firm Undertakings given in respect of any of the Authorised Advisers of [Name of Party]'; and
3. It will notify the CMA immediately if any Authorised Adviser ceases to be at [Name of Firm] during the period ending five CMA working days after the expiry of the period for appealing against the CMA's final report in the Investigation.

Further, [Name of Firm] undertakes to the CMA to use all reasonable endeavours to ensure that the Authorised Advisers at [Name of Firm] comply with the Individual Undertakings which they have given. [Name of Firm] acknowledges that it is fully aware of the Individual Undertakings that its Authorised Advisers have given.

#### **PROVIDED THAT**

These undertakings shall not apply to any part of the Disclosed Material that:

- i. belongs or relates solely to [Name of Party] or to [Name of Party]'s business and which does not include any confidential information belonging to, relating to or deriving solely or partially from any other party;
- ii. is information that has previously been disclosed by the CMA to [Name of Party] in the Investigation;
- iii. at the time of disclosure is in the public domain or subsequently comes into the public domain, except through breach of the Individual Undertakings or of any of the other Undertakings given by external legal and/or economic advisers for any other Relevant Party in relation to the Confidentiality Ring;
- iv. is required to be disclosed by law, legislation, regulation or court order, as long as, and (except where prohibited by law, legislation or court order), [Name of Firm] consults the CMA prior to the proposed disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure; or

#### **AND IN AGREEMENT THAT**

These undertakings shall be governed by and construed in accordance with English law and [Name of Firm] submits to the exclusive jurisdiction of the courts of England

and Wales to hear and decide any action or proceedings which may arise out of, or in connection with these undertakings.

[Name of Party] has given full and informed consent to the terms of these undertakings and the Individual Undertakings given by the Authorised Advisers of [Name of Firm], including the restrictions placed upon those Authorised Advisers on the disclosure of information by these Undertakings.

[Name of Firm]

[*signature*]

[Date]