PENSIONS AND LIFETIME SAVINGS ASSOCIATION

[redacted]

13th March 2019

Mr Peter Swan
Project Manager
Competition and Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD

Dear Mr Swan,

PLSA RESPONSE: CMA DRAFT REMEDIES ORDER

The PLSA welcomes the opportunity to respond to this consultation on the draft remedies order. We supported the CMA investigation into the investment consultancy and fiduciary management market; PLSA members have previously expressed concerns about the potential for misalignment of interests in the sector. We also believe that many of the CMA's findings and proposed remedies are sensible and, cumulatively, should have a positive impact on the sector.

We welcome the greater clarity and detail in the draft order. Our response here primarily addresses some of the high-level policy design which underlie the drafting of the Remedies. This includes areas where we believe that the way in which the order has been drafted inadvertently fails to capture the CMA's original policy intent.

Exemption for schemes with in-house investment arms

As we have highlighted in previous responses, schemes' in-house investment staff – despite providing asset allocation advice or investment management services – only do so for the pension scheme of which they are a part. This means they are not faced with the kinds of commercial incentives or have the same potential for conflicts of interest which the CMA has been exploring in its investigation.

We therefore welcome the CMA's efforts to exclude "the provision of advice by a Provider to the Pension Scheme Trustees of a pension scheme of which the Provider (or an Interconnected Body Corporate of the Provider) is the Principal Employer or Controlling Employer" from the definition of "Investment Consultancy Services". Similarly, we note the CMA's drafting in this respect on the definition of a "Fiduciary Management Service". We believe that such drafting

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will ensure most schemes with in-house investment or advice functions will be excluded from the CMA's remedies.

However, our understanding is that there are a small number of large schemes (providing for the retirement of many savers) with in-house investment advice or management arms, where trustees and their OPS[1] firms are in fact structurally independent of the sponsor/employer and which are therefore still included in the current definitions. We do not believe that this aligns with the CMA's policy intent in this area and think this should be changed. We understand that one way to solve this may be to draft the definitions so that an "OPS firm" is excluded. We believe the Association of Pension Lawyers have raised the same point and suggested specific drafting to address the issue

Clarity around CMA enforcement and compliance approach

In any regulatory regime it is important that those regulated have a clear understanding of every aspect of the framework within which they are operating: from their regulatory requirements and duties, through to the supervisory approach and then to enforcement and redress. Given the CMA's role in monitoring and enforcing compliance, and the lack of familiarity that schemes will have with the CMA's approach to regulation, we would appreciate greater clarity around the way in which the CMA will enforce the new regulations – even if for only a short period of time – and the kinds of penalties that could be imposed upon schemes for non-compliance.

We would also be grateful for clarity as early as possible around how the CMA's monitoring and enforcement approach will align with the approach taken by other regulators once regulatory responsibility on the different remedies is handed over. Clarity will be key, to ensure decision-making boards can allocate appropriate and proportionate resources and time to meeting new obligations.

Clarity would be particularly appreciated around the meaning of 'best endeavours' – if trustees are required to use such an approach to obtain bids for a competitive tender process, some guidance as early as possible around what best endeavours means in these circumstances would be most welcome. The terms 'best endeavours' has been, and remains, subject to a wealth of legal interpretation. There is uncertainty in its usage, with parties often arguing about its meaning in a particular context, but we understand that what is clear is that it sets a very high bar that risks requiring trustees incurring disproportionate costs.

[1] As defined in the FCA Handbook

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Cost transparency

We support the provision of clear, consistent information on fees and charges by investment and fiduciary managers to trustees. We welcome the reference in the Order to templates which could assist investors in understanding their costs. We believe it is important that investors understand the order in the context of wider initiatives aimed at supporting them in better understanding the costs of broader asset management as a result of the new Cost Transparency Initiative (CTI).

The CTI was launched in November 2018, taking forward the work of the previous Institutional Disclosure Working Group, one of the recommendations of the FCA's Asset Management Market Study. The PLSA is a founding member of this initiative and we believe that, in the future, the framework could be used to capture those costs borne "through funds provided by the Fiduciary Management Provider and those provided by third party asset manager."

We think that in many cases, the CTI would provide an appropriate framework for accommodating the kinds of disclosure intended by the Order. The CTI has run a pilot to test the new templates and is supporting the production of technical and instruction materials during early 2019, which will inform the work priorities for the CTI going forward. This could potentially increase the scope of the templates and it is possible that the CTI framework in future could include fiduciary management costs as anticipated in the Order. We hope that the CMA and other relevant regulators will maintain an ongoing dialogue with the CTI on the evolving scope of the initiative and its applicability to fiduciary management services.

We hope that the above is helpful and that you will get in touch should you have any queries or want any further information.

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Policy Lead: Investment and Stewardship

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