



ASSOCIATION OF PENSION LAWYERS

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Dear Sirs

Investment Consultants Market Investigation (the “Investigation”)

Draft Order – Consultation

I am writing on behalf of the Investment Sub-Committee of the Association of Pension Lawyers of the United Kingdom (“APL”). The APL is a not-for-profit organisation whose members comprise over 1,100 UK lawyers, including most of the leading practitioners in the field, who specialise in providing legal advice on pensions to sponsors and trustees of pension funds and others, including the largest pension funds in the UK. Its purposes include promoting awareness of the role of law in the provision of pensions and to make representations to other organisations and governments on matters of interest to APL members.

I am writing in relation to your consultation on the draft Investment Consultancy and Fiduciary Management Market Investigation Order 2019 (the “**Draft Order**”). In particular, we would like to raise a point on the extent to which the Draft Order applies to the OPS Firms providing services to some occupational pension schemes.

1. Background

As you will be aware, a number of large occupational pension schemes have established their own “OPS Firms”¹ to whom the trustees of the scheme then delegate their investment management functions in accordance with section 34 and 36 of the *Pensions Act 1995*. These OPS Firms are in-house authorised firms which can carry on a number of regulated activities – including managing investments and providing advice – while benefitting from a lighter-touch FCA regime because they can only perform those activities in relation to the assets of an occupational pension scheme of which the OPS Firm (or certain related companies) is the trustee or employer.

For example, Railway Pension Investment Limited is the OPS Firm providing services in respect of the Railways Pension Scheme; USS Investment Management Ltd is the OPS Firm providing investment management and advisory services to the Universities Superannuation Scheme; and British Airways Pension Investment Management Limited is the OPS Firm for the two British Airways Schemes.

2. The potential issue

We understand that it is the intention of CMA that in-house managers for large occupational pension schemes and OPS Firms should fall outside of the remit of the remedies arising from the Investigation and the Draft Order.

Certainly, we note that although OPS Firms are not expressly included in the specific exception contained in paragraph 1.6, there has been an attempt to exclude from the definition of Fiduciary Management Services and Investment Consultancy Services (in paragraph 2.1) the provision of advice and services “... *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 of Controlling Employer*”². This would seem to be aimed at in-house fund managers and OPS Firms.

However, in our experience, there is little consistency in the ownership structure of firms of this type – which is why the definition of OPS Firm in the FCA Handbook is far broader than the above, capturing firms which are one or more of the following:

A. a trustee of the occupational pension scheme in question;

¹ As defined in the FCA Handbook, see <https://www.handbook.fca.org.uk/handbook/glossary/G806.html>

² In 2.1 of the Draft Order: paragraph (e) of the definition of Fiduciary Management Services and paragraph (a) of the proviso of the definition of Investment Consultancy Services.

- 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.

While the definition set out in the Draft Order will exclude many fiduciary managers who are managing their own occupational pension schemes or that of another member of their group, it will not capture all OPS Firms (who are usually within (B) of the definition above, as subsidiaries of the trustee, and who in turn are “interconnected” with the “principal” or “controlling” employer), and so there will be a significant minority who are not caught.

For example:

- We are aware of one, very large, scheme with an OPS Firm that does not have a traditional principal employer and also does not come within the master trust exemption contained in paragraph 1.6 of the Draft Order.
- Another scheme where the trustee and underlying OPS Firm has a complex ownership structure with no link to the principal/controlling employer.

As a result, there is a risk that some of these OPS Firms might inadvertently be caught by the Draft Order.

3. A potential solution

To the extent that it was your intention to exclude OPS Firms (which, as we say, is our understanding and seems to fit with your policy goals) we suggest that the definitions of Fiduciary Management Services and Investment Consultancy Services are amended to exclude services provided by all types of “OPS Firm” as defined in the FCA Rules (using the additional descriptions copied above) (or to have “OPS Firm” excluded from the definition of Provider).

Please direct any reply to the APL in this matter to Dominic Harris at dominic.harris@cms-cmno.com, or at the address set out above.

Yours faithfully

A handwritten signature in dark ink, appearing to be 'D. Harris', with a large, stylized initial 'D' and a cursive 'Harris'.

Dominic Harris

For and on behalf of the Association of Pension Lawyers