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Financial Stability And Regulatory Policy Team
HM Treasury
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Dear Sirs

FSMA TWO YEAR REVIEW - CHAPTER 4 - IMPACT OF FSMA ON EMPLOYERS OFFERING PENSION PRODUCTS

I am writing with the comments of the Investment Committee of the Association of Pension Lawyers on the above Chapter of the Consultation Paper.

References below to the consultation questions are to those numbered questions which appear in Section 4 of volume 1 of the above consultation paper (February 2004). One of my colleagues on the Committee will be responding separately on Chapter 7.

Q10: Do you agree that there should be an exemption for both real time and non real time promotions made by employers option 1(c)? If not, which of options 1(a) and (b) do you prefer?

If it is proposed to permit financial promotion of Group personal pension schemes or stakeholder pension schemes under the conditions set out in draft Article 77 of the amended FPO, with the modifications which we suggest below, we can see no real purpose in seeking to distinguish between "real time" and "non real time" communications. In practice, promotions made subject to those conditions which the employer would be undertaking within the exemption would very likely be a mixture of the two. In our view, the distinction would be artificial in this context.

Q11: Do you agree that any exemption should be subject to conditions and not be unrestricted?

Yes

Q12: Do you agree with the conditions outlined [at paragraph 4.31 of the paper]?

Yes - with two areas in which we would propose modifications below.

First, there should be a closer definition of what constitutes a "direct commercial benefit" to the employer from the scheme to which the promotion relates. We take the opportunity to comment on the wording of draft article 77 to the FPO in this respect. We suggest that the term "direct commercial

benefit" in draft article 77 (2)(b) be redefined as a "direct or indirect financial benefit" which would itself be defined (non exhaustively) so as to include any commission or payment made by the provider of the Group PPP or SPS in question (or by any associated company of that provider) or the conclusion of beneficial terms in relation to any other financial product or service made available by that provider (or by an associated person) to the employer (or to any employer in the same group as the employer undertaking the promotion). We see this as an important control designed to ensure that the employer is not unduly influenced by its overall relationship with the pension provider.

Second, although we agree with the condition that the Employer should be making a contribution to the GPP, if the FPO exemption in draft Article 77 is to apply, we cannot see the logic for imposing the same condition in relation to an SPS. There is no obligation on an employer under Section 3 of the Welfare Reform and Pensions Act 1999 or under the Stakeholder Pension Schemes Regulations to go beyond consulting the relevant employees and Trade Unions, designating a SPS and allowing reasonable access by the SPS provider to the employer's relevant employees.

So Article 77(2)(a) would need to be amended accordingly.

A suitable definition of "Group Personal Pension Plan" should be included we suggest by reference to that contained in Section 1 of the Pension Schemes Act 1993, with an express exclusion where the arrangements constitute an "occupational pension scheme" (a term also defined in the same Section).

Q13: Do you think there should be other conditions?

No.

Q14-16: Do you think that the exemption should contain an additional condition restricting the ability of employers to provide individual advice to employees [and related questions on employer advice to employees by reference to their individual circumstances]

Of relevance to these questions is what is permitted under the FSMA 2000 (Carrying on Regulated Activities by way of Business) Order 2001 at present. Article 3 of that Order makes it clear that a person is not to be regarded as carrying on by way of business an activity to which that Article applies unless he carries on the business of engaging in one or more such activities. Among those Articles to which that investment business condition applies is Article 53 of the RAO (advising on investments). A group personal pension scheme and a stakeholder pension scheme are plainly "investments" for this purpose. However, if one takes the position of an employer which in relation to its commercial activities is not carrying on any regulated activity at all or indeed of an employer which is carrying on a range of regulated activities, it is likely to be the case that even if the employer on a single occasion or series of occasions gave specific advice about the merits of particular employees joining the Group PPP or SPS in question, that employer would not in so doing be advising on investments under Article 53 RAO "by way of business"

as Article 3 above would require if the Employer is to require authorisation. We believe that in practice, the distinction between financial promotion of the Group PPP which is to be permitted and advice as to the merits of participation, where restrictions are intended, may be a fine one. In view of the importance and potential financial consequences of participation by individual employees and the potential for individuals employed by the employer to provide advice which, whilst generically sound, may not take proper account of individual circumstances of employee, it would in our view on balance be appropriate to limit the ability of an employer to advise on the merits of a particular Group PPP to advice given in relation to the circumstances of the individual employee.

We are concerned, however, that activity intended to be exempted under the amended Article 77 of the FPO should not indirectly then be prohibited if uncertainty is created by a further condition which prohibits individual advice in this area. Perhaps an additional sub paragraph could be included in Article 77 to the effect that where promotion of a Group PPP or SPS has been made to a group of employees, within the Article 77 exemption, the employer shall not be taken to have given advice as to the merits of any individual employee joining the relevant scheme (and accordingly entering into the relevant Group PPP or SPS pension contract) unless the employer has taken any additional step of advising that employee on the merits of his participation in the particular scheme by reference to his or her individual circumstances. In that event, in our view, the exemption for which amended Article 77 of the FPO provides should be available up to but not including that point. To go beyond it the employer would then have to be FSA authorised to carry on the relevant regulated activity or ensure that further individual advice was only given by another FSA authorised person (normally a firm of independent financial advisers). This also in our experience probably reflects the line beyond which Employers would not wish to go, unless they are in a relevant financial services business in which case they will no doubt be authorised to give the advice in any event.

Consideration may also need to be given to an amendment to Article 3 of the FSMA 2000 (Carrying on Regulated Activities etc) Order 2001 to the effect that the provision of "one to one" advice by an employer by reference to an individual employee's circumstances as to the merits of taking up a Group PPP or SPS shall be regarded as the carrying on of a business for this purpose where it would not otherwise be so regarded under the general test in Article 3(1).

Q17: Promotion by reference to unfavourable comparisons with other persons:

We do not support this approach. The general law of negligent mis-statement and the strengthening of draft Article 77 to the FPO which we suggest in response to Q18 below should address the perceived mischief.

Q18: Do you agree that there should be no restriction on which employer's representatives can promote the employer's pension schemes.

There may be some merit in requiring any employer's representative to be sufficiently familiar with the main features of the Group PPP or SPS in question to provide an accurate description of its key terms. We might for example suggest an additional sub paragraph (d) to article 77 (2): "(d) the employer has taken reasonable steps to ensure that any employee, director or other representative of the employer making that promotion on the employer's behalf has a sufficient degree of knowledge and understanding of the Group personal pension scheme or stakeholder pension scheme in question to enable a fair and accurate account of the principal features of the scheme to be given to those who are to receive the financial promotion in question".

Yours faithfully

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for APL Investment Committee

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