

# Investment, Governance and Engagement Committee

## Agenda

1.00pm – 3.00pm on 30<sup>th</sup> May 2018

### Item

1. Introductions and apologies
2. Actions and agreements from meeting of 5<sup>th</sup> February 2018 **(Paper A)**
3. MIFID II – Update
4. Pooling investments – Cross Pool Forum proposal - Update
5. LA owned companies: QC's opinion on pension rights **(Paper B)**
6. Cost Transparency – Report from procurement group **(Paper C)**
7. Carillion liquidation – Update
8. Responsible investment – Update
9. AOB
10. Date of next meeting

The venue will be the Victoria Room at 18 Smith Square, Westminster, London SW1P 3HZ (see

<https://www.google.co.uk/maps/place/Westminster,+London+SW1P+3HZ/@51.4955666,-0.1289997,17z/data=!3m1!4b1!4m5!3m4!1s0x487604c2f22fcf31:0x4d27e283349ac875!8m2!3d51.4955757!4d-0.1267826>)

Please report to reception who will direct you to the right floor.

# Investment, Governance and Engagement Committee

# Investment, Governance and Engagement Sub Committee

## Item 2 – Paper A

### ACTIONS AND AGREEMENTS

**MEETING HELD ON 5<sup>th</sup> February 2018 – 1.00pm to 3.00pm**

**At 18 Smith Square, Westminster, London SW1P 3HZ**

### PRESENT

Cllr Denise Le Gal	Chair
Neil Sellstrom	CIPFA
Ian Greenwood	LAPFF
Rodney Barton	Practitioner
Peter Wallach	Practitioner
Colin Meech	Members (Unison)
George Georgiou	Members (GMB)
Annemarie Allen	Actuaries (Barnett Waddingham)
Steve Turner	Actuaries (Mercer)
William Marshall	Actuaries (Hymans)
Karen McWilliams	Actuaries (AonHewitt)
Jeff Houston	Board Secretary, LGA
Bob Holloway	Pensions Secretary, LGA

### APOLOGIES

There were apologies from Mark Wynn and Mike Ellesmore. All other members (or substitutes) were present.

#### 1. Welcome and introductions

The Chair welcomed all in attendance to the meeting.

#### 2. Tribute to Councillor Kieran Quinn

Ian Greenwood (IG) led a tribute to Councillor Kieran Quinn who died unexpectedly on Christmas day. A one minute silence followed and was fully respected.

#### 3. Actions and agreements from meeting of 16<sup>th</sup> October 2017

The minutes of the previous meeting were agreed.

#### 4. Changes at DCLG/MHCLG

Jeff Houston (JH) confirmed that he and Cllr Roger Phillips had met the new Minister, Rishi Sunak MP, earlier in the day. The Minister was keen to talk about investments and pooling but less so on

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matters like Carillion, academies and fair deal. He questioned the need for 88 funds and accepted that scheme governance was “complicated”. He gave the impression that he understood the risks behind affordability and sustainability and confirmed that he will be speaking at the PLSA LGPS conference in May. JH confirmed that his office is aware of the Board’s invitation for the Minister to attend the Board meeting in June.

## 5. MIFID II update

JH confirmed that every fund had been opted up with every service provider but the view was expressed that difficulties may be encountered in the future as providers go through the opting up process with authorities who are new clients.

Particular issues are being raised by providers in relation to the low level of training received by some committees and the subsequent reliance on consultants.

The Board together with the IA and BVCA are working to produce a Q&A document covering ongoing relationships and communications between MiFID service providers and local authorities as default clients.

**AGREED and ACTION – that the Secretariat together with CIPFA, FCA and other stakeholders should continue to monitor the MIFID II reporting process and report back to the committee when appropriate.**

## 6. Cross pool forum proposal

The committee discussed the three issues carried over from the Board meeting of the 16<sup>th</sup> November 2017, that is, membership, selection of Chair and frequency of meetings.

On membership, there was a clear consensus that to ensure effective representation in the eight asset pools, trade union representatives must form part of the cross pool forum and that each of the eight asset pools should be represented by three elected members and three trade union representatives selected by the three scheme employer representatives on the Board.

It was also agreed that the Chair should be selected from within the forum’s membership and that the forum must meet at least twice a year.

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On the subject of pooling, CM raised the issue of potential discrimination within the TUPE process and to the danger of two tier workforces being created within the new operators. JH accepted that the salary levels being reported will come under criticism in the local media and that defensive briefing will be needed.

## **Agreed :-**

- **that the Board is recommended to approve membership of the cross pool forum to comprise three representatives nominated by the administering authorities of each pool plus three members selected by the scheme member representatives on the Board. (a total of 27 members of the forum)**
- **that the Board is recommended to review its statement on representation to strengthen the position of scheme member representatives in the asset pools.**

## **Action :-**

- **that the Secretariat should undertake work to assess the rights and responsibilities relating to local authority owned arm's length companies in terms of evaluating terms and conditions of employment.**

## **7. Cost transparency**

JH updated the committee on the work of the FCA's Institutional Disclosure Working Party which is developing enhanced templates for all asset classes. At a meeting on 8<sup>th</sup> February the IDWG will present the results of their work so far and draft templates for both asset managers and trustees together with plans for next steps. It was confirmed that the LGPS Transparency Code will adopt the IDWG's templates when they become available later in the year but that there will be a transition period for managers who have already signed up to the Code.

Colin Meech (CM) expressed concern about the way in which data under the Code of Transparency was being collected. JH agreed that costs must be reported transparently and that work is underway with CIPFA to ensure that the necessary changes to annual reporting requirements and accompanying guidance are made.

Cllr Le Gal (DLG) asked whether there had been any feedback on LGPS templates. JH said that the reaction has been mixed and that there were several issues that might need to be addressed. For

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example, CM reported that rather than inputting a nil return for a “don’t know” answer, some fund managers have inserted a zero giving the misleading impression of a saving being made.

CM enquired about progress of the procurement working group. Bob Holloway (BH) explained that the group had met for the first time in November and that a follow up meeting is to be held immediately after the Board meeting on the 26<sup>th</sup> February 2018.

**AGREED and ACTION – that the Secretariat should continue to monitor the Code reporting process and report back to the committee when appropriate.**

## 8. FCA Market Study - Update

BH confirmed that the FCA’s final policy rules following a series of consultations would be published in the Summer 2018.

## 9. Carillion liquidation - Update

JH explained that on the assets side, three funds had a small exposure to Carillion and that there was some evidence that certain LGPS funds may have had fund managers who had taken short positions on Carillion stock. There is a risk of reputational damage to the scheme and the Secretariat will continue to check the position to see if this was the case.

On the liabilities side, JH explained that 13 funds had a total of 28 admission agreements with Carillion employers. With one exception, all were in surplus.

IG noted that a better outcome would have been achieved under the “true and fair” accounting standard rather than the European standards currently in force.

**[ A note summarising the exposure to Carillion on both the assets and liabilities was circulated to committee members on the 6<sup>th</sup> February 2018]**

**AGREED and ACTION – that the Secretariat should continue to collect all relevant data relating to Carillion’s liquidation, including any evidence of LGPS fund managers taking short positions on Carillion stock, and report back to the committee.**

## 10. Responsible Investment - Update

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BH explained that no material comments had been made by committee members on the draft statement on non-financial factors circulated in December 2017 but that since then, CM had asked whether the paper should include reference to investments having to be made in the best interests of scheme members. BH explained that neither of the Law Commission's reports or their subsequent guidance had made any specific reference to this and reminded the committee that the statement was a factual statement of the law without any commentary or advice.

The government had published its interim response to the Law Commission's recommendations in December 2017 and has undertaken to consult on new legislation in the Summer of 2018. The committee agreed with IG's comment that any further regulatory work on responsible investment should wait until the government's consultation.

**AGREED and ACTION – that the Board should be asked to approve publication of the statement on non-financial factors when it meets on the 26<sup>th</sup> February 2018 and that the committee should prepare a response to the Government's consultation on new responsible investment regulations.**

## 11. IORP – Update

The committee was asked to note that there has been no further action since the last meeting with DWP and MHCLG officials.

## 12. AOB

There was no other business.

## 13. Date of next meeting

The date of the next meeting will be confirmed once the position of Chair has been resolved.

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## **Guidance on marketing financial products and services to UK Local Government Pension Scheme (LGPS) clients – May 2018**

The following guidance should be used as a guide only. The content is intended to be high level. Being general in nature, it may not give the answers to all of your questions or to the issues specific to your business models. This guide is not legal advice and, where firms have any doubt as to its interpretation, separate legal advice should be sought.

The guidance has been prepared on the assumption that the firms in question are UK authorised firms, with permissions limited to servicing professional clients only.

The guidance assumes firms will be promoting to UK LGPS only. If EU local authorities are targeted, different rules will apply.

While the guidance considers, at a high level, the impact of pooling, it does not provide details on how prospecting with LGPS may be affected by the introduction of pools.



## A - Communicating with LGPS prior to opting-up to professional client status

### Question 1 Can we communicate with LGPS prior to opting them up to professional client status?

Yes.

Please note however that the (i) content of the communication; and (ii) the range of the underlying products and services being communicated must be considered in more detail.

### Question 2 How should we approach the nature of the communication when an LGPS has not been opted-up?

Firms should -

- (i) determine if the communication is a “**financial promotion**”; and
- (ii) if so, ensure that the content of the communication is retail-compliant and underlying products and services are limited to those suitable for retail clients; but
- (iii) if not, still ensure that the content of the communication is retail-compliant.

### Question 3 What is a financial promotion?

A financial promotion is “*an invitation or inducement to engage in investment activity that is communicated in the course of business*” (note that the FCA has extensive guidance at PERG 8 of the FCA Handbook as to what a “financial promotion” comprises and firms should use such guidance to judge the status of their communications accordingly).

The UK rules do not contain a definition of an “invitation” or “inducement” and therefore these terms are left to their natural meanings.

An “**invitation**” is capable of meanings ranging from merely “asking graciously or making a request to encourage or solicit” and “**inducement**” is given meanings ranging from “merely bringing about to prevailing upon or persuading”. Context, however, will be appropriate in determining whether these elements are satisfied.

A communication is likely to be an invitation or inducement if it (1) has the purpose or intent of leading a person to engage in investment activity and (2) is promotional in nature (it must seek, on its face, to persuade or incite the recipient to engage in investment activity).

This is an objective test and it must be determined as to whether a reasonable observer, taking account of all the

circumstances at the time the communication was made, would consider that the communicator intended the communication to persuade or incite the recipient to engage in investment activity or that that was its purpose and regard the communication as seeking to persuade or incite the recipient to engage in investment activity.

For example:

- Informal and social conversations between investment managers and representatives of local authorities over coffee in the margins of a conference are unlikely to be financial promotions.
- Educational presentations (if purely educational) are also unlikely to be financial promotions where there is no inducement angle to the presentation being delivered. A conversation between an investment manager and the representative of a local authority to walk through marketing material about the specific services that the investment manager can offer them, however, would more likely be a financial promotion.

There are specific requirements which govern communications (including financial promotions) in the FCA Conduct of Business Rules (see COBS 4) that firms will be required to comply with. Where communications are being directed at retail clients, which includes potential clients, specific content requirements are triggered.

#### **Question 4** ***What are the implications if we determine that the communication is not a financial promotion?***

If a firm determines that its communication is not a financial promotion, then the communication may be made to a prospective LGPS without requiring the LGPS to opt-up.

Note however that the LGPS remains a retail client and, as such, the content of any communication with a retail client, even where the communication does not go as far as being a financial promotion, should comply with the requirements of the FCA Conduct of Business Rules (particularly COBS 4) which set out requirements for firms when communicating with retail clients. In other words, discussions with LGPS before they are opted-up must be “**retail-compliant**”.

#### **Question 5** ***What are the implications if we determine that the communication is a financial promotion?***

If a firm determines that its communication is a financial promotion, further analysis is required (see the flowcharts in the Annex for guidance on the impact of issuing financial promotions to LGPS).

- Where (i) the content of the financial promotion is retail-compliant and (ii) it references an underlying retail-compliant service and/or product (i.e., for example, promoting a UCITS), this can be communicated to an LGPS client. There is no need for an LGPS to be opted-up to elective professional client status in order for that client to receive that communication and make an investment in the UCITS.

- Where (i) the content of the financial promotion is retail-compliant and (ii) it references a “**non-mainstream pooled investment**”<sup>1</sup>, this can be communicated to an LGPS. There is no need for an LGPS to be opted-up to elective professional client status in order for that client to receive that communication. However, the LGPS is still likely to be required to be opted-up to elective professional client status in order for it to make an investment in the non-mainstream pooled investment if the non-mainstream pooled investment has professional investor eligibility criteria.

Note that the premise under which this communication can be issued is the relevant exemption available under COBS 4.12.4 R (restrictions on promotion of non-mainstream pooled investments). Firms can rely on the “**excluded communications**” exemption in COBS 4.12.4 R. This exemption provides that where a financial promotion would benefit from an exemption under the Promotion of Collective Investment Schemes Order 2001 (“**PCISO**”), that financial communication can be made. The PCISO has an exemption available when communicating to “**investment professionals**”. Unlike the definition of “professional clients” under the FCA Handbook rules, the definition of “investment professionals” includes “local authorities” (Art 14(5)(d) PCISO). We are of the view that it is possible that firms, where they can rely on the PCISO (or “**safe harbour**”), will not be in breach of the restrictions on promoting non-mainstream pooled investments to local authority clients provided they remain within this “safe harbour”.<sup>2</sup>

- Where (i) the content of the financial promotion is not retail-compliant; or (ii) it references products which are neither retail-compliant nor non-mainstreamed pooled investments, then this cannot be communicated to an LGPS.

## Question 6 Do different restrictions apply depending on whether a firm wants to promote a segregated mandate or a commitment to a fund?

No.

However, in practice where a manager’s regulatory permissions are limited to servicing professional clients only, there will be a natural restriction on them taking on an LGPS mandate unless and until the LGPS has been opted-up. In contrast, where a

<sup>1</sup>A “**non-mainstream pooled investment**” includes any of the following investments: (a) a unit in an unregulated collective investment scheme; (b) a unit in a qualified investor scheme; (c) a security issued by a special purpose vehicle, other than an excluded security; (d) a traded life policy investment; (e) rights to or interests in investments that are any of (a) to (d). Note that we have not considered in detail any restrictions on the distribution of certain regulatory capital instruments (including contingent convertible instruments and CoCo funds). These should be considered in more detail if intended to be offered to LGPS.

<sup>2</sup> This point only considers the issue of communicating with non-opted-up LGPS clients. Therefore, before the actual provision of a service or an investment is made, further analysis must be undertaken as to whether the LGPS client should be opted-up.

manager is promoting a retail-compliant fund (such as a UCITS), provided the financial promotion is retail-compliant, an LGPS may buy units in such funds without having to be opted-up.

**Question 7** *Can managers send factual information to un-opted-up LGPS clients or prospects on demand (e.g. leaver records)?*

Yes, but only if the content is purely informational and is not considered as a financial promotion. Firms should ensure that the materials are appropriate for a retail client.

**Question 8** *When providing financial services to LGPS clients, firms will be required to provide the LGPS with certain information prior to the provision of the service<sup>3</sup>. Can this information be provided after an LGPS has been opted-up to professional client status?*

There are no hard and fast rules as to when exactly prior to the provision of the financial service that the information should be provided. Equally, there are no hard and fast rules as to when an LGPS may request to be opted-up from retail client to elective professional status.

Opting-up the LGPS client (and the provision of the information per COBS 3.3.1B) may occur at any time between the initial prospecting up until the point before executing the IMA, IAA or any other agreement.

Opting-up at the early stages of prospecting would reduce regulatory risk of a firm being deemed to be dealing with a retail client and would allow firms to provide information which is appropriate for professional clients.

It is appreciated that this may be impractical at the early stages of prospecting but generally, the earlier a firm opts-up a client, the lower the regulatory risk.

**Question 9** *Can firms complete RFPs for anonymous LGPS investors via a consultant where they do not know who the underlying client is?*

A completed RFP would be deemed a financial promotion. Where the underlying client of the RFP is a retail client, the content of the RFP should be retail-compliant.

This becomes challenging for a firm when they have no visibility as to who the client is. As a potential solution and in order to lower risks, managers might wish to consider asking consultants to include LGPS funds' opt-up documentation in a RFP. By

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<sup>3</sup> Per COBS 3.3.1B

doing this, by the time the RFP has been responded to, the manager is able to opt-up the potential client (and would know the identity of the underlying client) in preparation of its pitch. They should then be able to market on a professional basis once the client has been opted-up.

**Question 10** *Can firms request LGPS to opt-up for marketing purposes only?*

Firms should not induce or entice an LGPS to opt-up to professional client status. Any request to be opted-up should come from the LGPS. Where an LGPS does seek to be opted-up to professional client status, this can be done with prospecting in mind and not only in respect to a concluded mandate/investment.

**Question 11** *If firms have separately opted-up the local authority in respect of its treasury assets, can the LGPS be treated as a professional client?*

No, the LGPS will need to be opted-up separately.

**Question 12** *Do placement agents marketing their clients' funds to professional clients in the UK need to obtain written confirmation from a local authority that they have opted-up? Or can publicly available information from the LGA website on [local authorities' opt-up status](#) be relied upon?*

If a placement agent is an authorised firm and communicates with a LGPS, it will be required to categorise the LGPS in its own right in order for it to determine the nature of the communications it is entitled to issue. They cannot rely on an opt-up being carried out by another authorised firm.



## **B - Practical Application - Conferences**

### **Question 1    *If a firm hosts an event, can they allow LGPS to attend the event where they are not opted-up to professional status?***

This will depend on the nature of the event itself and the scope of what the event is seeking to cover.

If the event is purely educational in nature or the content of the event is informal and only generic discussions are carried out, this may fall outside the scope of “financial promotion”. As long as the material/discussion is retail-compliant, LGPS clients who have not been opted-up can attend.

Care should be taken if these events include promotional elements and if the products and/or services are only suitable for professional investors.

The approach that a firm adopts in relation to LGPS clients should not differ from the approach the firm would otherwise adopt when dealing with any other retail client.

### **Question 2    *Where such an event will contain financial promotions which are either non-retail-compliant and/or reference products which LGPS cannot acquire, can firms allow LGPS to attend the event where they are not opted-up?***

Firms should not actively permit LGPS to attend such an event if they have not been opted-up to professional client status.

In practice, firms should limit invitations to LGPS attendees who have been opted-up to professional status for the services and funds which are the subject of the event.

Firms could look to hold LGPS specific events, which is a safe, albeit costly, option.

Where firms cannot limit invitations or are actively aware that retail LGPS are attending the event, firms should ensure that all financial promotions are retail-compliant and only reference appropriate products and services.

### **Question 3    *How should firms approach third party conferences where both professional and retail LGPS are attending?***

When promoting products and/or services to prospective LGPS at third party conferences, firms must treat LGPS as retail clients, unless and until they are opted-up to elective professional client status for the services and/or products in question.

The conference content would need to be suitable for the LGPS clients or potential clients as retail clients (note however in a non-mainstream pooled investments context, the local authorities “safe harbour” exemption explored above should be

available even if they are non-retail products).

The approach that a firm adopts in relation to LGPS clients should not differ materially from the approach that they adopt when dealing with retail clients generally.

**Question 4** *When firms attend conferences, can they talk about products aimed solely at professional investors (infrastructure and real estate) or can they only talk about retail products?*

If the discussion is very generic and/or purely educational, with no financial promotion, then it is possible to discuss such products.

If the discussion is a financial promotion, firms must be satisfied that the infrastructure or real estate products are either (i) retail products; or (ii) are exempt from the restrictions on the promotion of non-mainstream pooled investments. If so, firms can discuss these products with LGPS but must still ensure that the nature of discussion is retail-compliant.

**Question 5** *Is there a rule of thumb to distinguish between activities that amount to “educating” and those that amount to “promoting”?*

There are no clear regulatory lines distinguishing between activities which are “educating” and those which are “promoting”.

Firms will be required to take a view on a case-by-case basis. Where an activity is intended to procure business for a firm, it is likely to be an inducement. Where it is simply educational and does no more than enable a person, for example, to identify investment options, or educate about mechanics or risks of investments, then this is not likely to be considered as a financial promotion.

**Question 6** *How would training, with or without CPD accreditation be viewed? Can firms provide product, strategy and asset class training to LGPS without an opt-up?*

Yes, if the training is purely educational and there is no promotional element. This will need to be considered on a case-by-case basis.

### C - Communicating with LGPS funds as part of a pool

**Question 1**     *What conversations are permitted when a firm is promoting itself to a professional client (the pool) but there are others in a room/committee that may not be opted-up to professional client status by the firm (i.e. the underlying LGPS fund)?*

Given the firm will contract with the pool and not the LGPS, it could be argued that there is no need to opt-up the LGPS as (1) any financial promotion made in the presence of those investors would be to the pool as a whole (and not to the individual investors, as they would not be able to act upon such financial promotions individually); and (2) there is no direct client relationship between the investor under the pool and the firm.

However, each pool structure is different and this may be dependent on how much discretion each LGPS has within the pool structure, which is likely to vary from pool to pool. This will also be dependent on whether the firm follows up directly with one of the LGPS. The risk would be higher if any of the LGPS funds have retained any or most of their decision-making capacity in relation to their assets in the pool or if a firm subsequently discusses the mandate/investment directly with the LGPS.

**Question 2**     *When a LGPS fund joins a pool, can firms talk to those LGPS funds as professional investors under the umbrella of the pool?*

Yes, but only in the context of the investor receiving communications as an investor via the pool vehicles rather than under any separate client relationship.

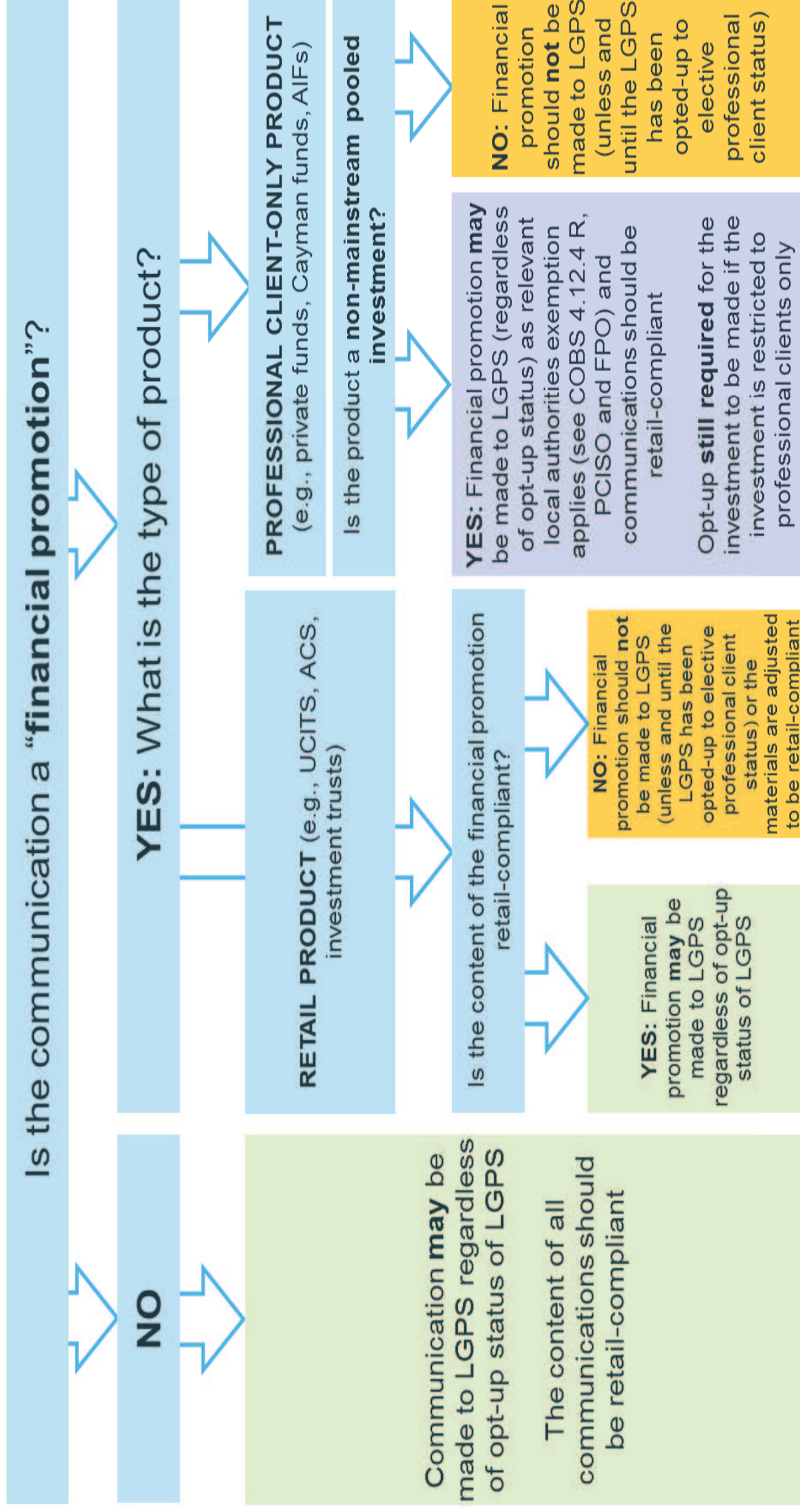
This is subject to a risk assessment made by a firm if there is any likelihood that the LGPS fund could act independently of the pool as a result of the communications.

**Question 3**     *Once pooled, can firms discuss asset classes, economic outlook, market commentary etc. with underlying LGPS funds without opting-up?*

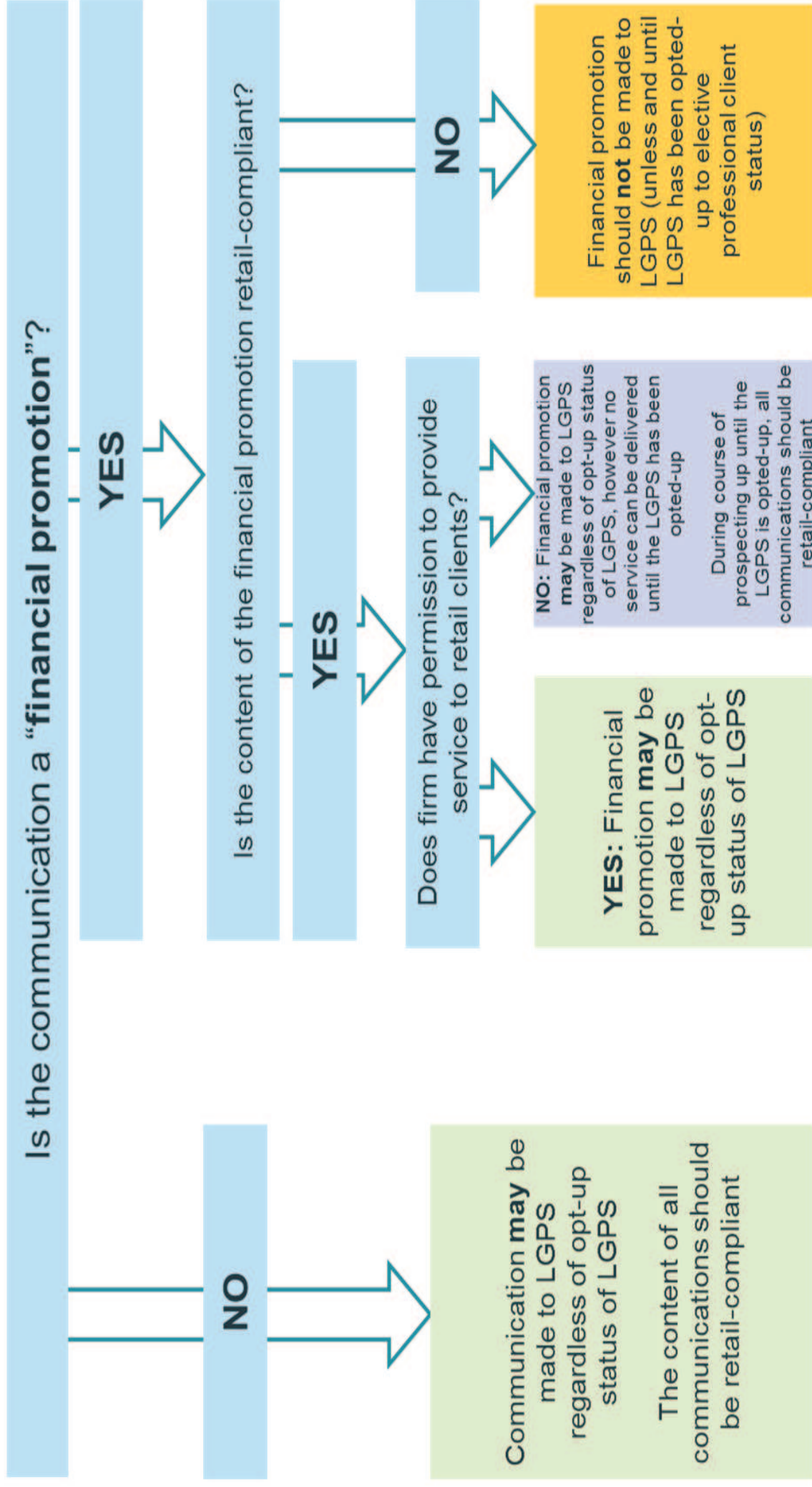
This is subject to the analysis explored above relating to communications to LGPS. In practice it is likely that a firm's level of interaction with investment consultants or investment teams within the pools will increase over time. However, assuming that each LGPS maintains a level of discretion in decision-making over their own assets, any financial promotions suitable for professional clients would require the relevant LGPS fund to be opted-up before it can receive such communications. In the absence of opting-up an LGPS client, communications would have to be retail-compliant.



## Communicating a PRODUCT to a retail LGPS scheme



## Communicating a SERVICE to a retail LGPS scheme



# Investment, Governance and Engagement Committee

**30<sup>th</sup> May 2018**

**Item 5 – Paper B**

## **Report of Transparency Procurement Working Group**

1. At its meeting on the 16<sup>th</sup> May, the group considered the paper attached as ANNEX 1.
2. Concern was expressed by the group that insufficient progress had been made since the last meeting and significant acceleration of the process was needed. In particular it was noted that to meet the 12 month compliance checking timescale for the first managers signed up the system should have been in place this month.
3. The group agreed that a specification for the system should be drawn up as soon as possible. This should include both a Lockbox offline option and a Portal online option.
4. It was also agreed that as the first stage the system should be at least capable of accepting and storing template data while performing a number of checks to ensure managers are complying with the Code of Transparency
5. It was further agreed that the secretariat should seek feedback from interested parties in order to scope the costs and resources required for obtaining the system both on the basis of external procurement and an 'in-house' model solutions.
6. Finally it was agreed that in obtaining such feedback and scoping the cost and resource requirements the secretariat should ensure the system would have the capability to add a second stage with enhanced analytical and reporting functionality.

## **Next steps**

7. A specification (including stage 2 enhanced reporting) has been drafted and is attached at ANNEX 2.
8. The secretariat is currently engaging with a number of existing service providers to scope out the interest, range of services and indicative costings of the system.
9. In doing so they are especially mindful of the security requirements of the system.

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10. The 'in house' option would include the hosting and management of the data within the LGPS 'family' (Fund or Pool or SAB) with the system elements either licensed or built to order. The secretariat will investigate the level of interest and potential costs for each of these potential hosts.
11. A verbal update on feedback will be given at the meeting however early indications are that the Lockbox version although attractive in its levels of security will receive much less interest from providers and would be significantly more resource heavy as it will require manual intervention for both input and reporting.
12. A full report with a recommendation of a preferred model for the solution will go to the Board on 27<sup>th</sup> June.

## **13. Committee are asked to note the progress made**

### **Funding**

14. The two stage approach outlined above has the objective of securing an effective compliance system at minimal cost while having the potential for further developing enhanced analytical and reporting tools which could be made available to LGPS Funds and Pools either on a pay for use or subscription basis.
15. At present the specification and functionality envisages a 'closed universe' system which neither shares its data with other systems or other users for benchmarking purposes. There is some commercial potential in opening the system at some future date with the potential for self-funding.
16. Another option for funding could be to open up the analytical and reporting tools to Code signatories (with robust privacy walls) either on a pay for use or subscription basis.
17. **Committee are asked to agree that the secretariat investigate the potential cost benefits and risks of an open universe option or the use by Code signatories and include their findings in a report to the next meeting.**



# Scheme Advisory Board

## **Update briefing paper to the Procurement working group in relation to investment cost transparency**

**9 May 2018**

### **1. Background**

- 1.1. The Procurement working group assisted by the secretariat were asked by the Scheme Advisory Board to develop proposals for ensuring compliance with the Board's Code of Transparency by fund managers signed up to the Code. Further work may follow, depending on the outcome of and proposals by the FCA's Institutional Disclosure Working Group (IDWG), regarding the analysis of investment costs provided under the Code to enable greater understanding by the individual pension funds.
- 1.2. Investment cost transparency was an essential part of the government's investment reforms in 2016 and is a key element of the criteria for LGPS asset pooling.
- 1.3. This paper is intended to inform the thinking of the working group and to plan for the next two months leading to a request for a decision at the June Board meeting

### **2. Investment Cost Transparency**

- 2.1. The Board views the move toward investment cost transparency and consistency as an important factor in the LGPS being perceived as a value-led and innovative pension scheme. Transparency is also a target for the revised CIPFA accounting and reporting guidance to be issued in respect of the statutory annual report and accounts.
- 2.2. To assist LGPS administering authorities in obtaining the more detailed investment fee data they require, the secretariat worked with a number of key stakeholders including investment managers, CIPFA and LGPS administering authorities to develop the Code of Transparency.

- 2.3. This Code, attached as Appendix A to this paper, was approved by the Board on the 6<sup>th</sup> March 2017 and launched on the 17<sup>th</sup> May 2017. To date, over 60 fund managers have signed up to the code covering in the region of £170 billion worth of the scheme's assets.
- 2.4. At present, compliance with the Code requires fund managers to complete and submit the Code template either quarterly or annually, without request, to their LGPS clients whether that be individual funds or pooled entities.
- 2.5. At present the Code template only covers listed assets. At its meeting on 26<sup>th</sup> February the Board agreed to adopt the template(s) to be agreed by the IDWG which will include unlisted asset classes either within a single template or via multiple templates .
- 2.6. For the purpose of this note, the secretariat is not aware of there being a material difference between the Board's template and that being established by the IDWG for listed assets. A copy of the Board's template is included here as Appendix B and can also be found at [http://lgpsboard.org/images/CoT/LGPS\\_TemplateFINAL\\_March2017.pdf](http://lgpsboard.org/images/CoT/LGPS_TemplateFINAL_March2017.pdf)

### **3. Data collection exercise**

- 3.1. At present, the template is in spreadsheet form and is submitted by managers directly to their LGPS clients, this requires:
- manual reminders of a requirement to complete for a particular pension fund client (pension funds may have different requirements on how often it is completed)
  - manual completion, checking and validation by the asset manager
  - manual checking of completion by LGPS fund officers of the submitted forms
  - manual submission the client LGPS pension funds and pools within the agreed timescale
- 3.2. While the template may be relevant and fit for purpose based on current reporting and regulatory requirements, both these underlying regulations and the methods of cost recovery and charging may change over time. Therefore the template(s) will need to be updated both to remain relevant with changes in regulation as well as the cost data to be checked. The

IDWG will be considering as part of its remit how the template(s) will be owned and evolved over time.

- 3.3. The Board asked the working group assisted by the Secretariat to develop proposals for a compliance and checking function with regard to completion and submission of the template – how this might be carried out, process managed and possible costs.
- 3.4. The IDWG is also considering how template data may be further analysed and used and in particular whether this could be achieved centrally. The outcome of this part of their remit will inform the Board with regard to the need to develop such functionality within the LGPS.
- 3.5. At this time therefore the scope of this work is focused on the ability to confirm compliance with the Code's requirement to complete and submit template data in line with agreed timescales and overriding regulatory requirements (in particular MiFID II).
- 3.6. The secretariat has spoken informally to third party companies who provide investment data collection and checking services and to LGPS fund managers about the current process. As a result of these discussions, it is considered that a slightly wider scope of work could be considered such that the template(s) can :
  - Be made more web-based enabling more efficient (and possibly automated) completion by fund managers
  - Be automatically checked for completion before submission (like many other on-line forms that flag where answers are not valid or not completed)
  - Be validated for compliance with regulation in force at the time of submission
  - Include automatic reminders to the fund manager for completion and automatic distribution to the relevant pension funds on the required timetable
- 3.7. There are some key requirements that various fund managers state are critical to also providing the template(s) to the Board or a third party for compliance and checking purposes – in particular that the data collected shall only be for the information of the underlying pension fund clients and

the Board. The fund managers signed up to the Code would not wish their data to be pooled by any third party for the purpose of the publication of manager level comparative data and 'league tables'

- 3.8. In this regard the independence of any third party would be crucial to the trust placed in the process.

#### **4. Market sounding**

- There are a number of ways for the compliance and checking function to be developed and implemented – whether in line with the original request from the Board or the slightly wider function as suggested above. The possible options are for the Board to purchase an 'off the shelf' solution to enable fund managers to submit their completed templates to the Board. The necessary resource would then need to be made available for a manual, in-house notification, checking and compliance function
  - to hire a consultant on a short term contract to develop a tailored on-line system. This system would have notification, checking and compliance functions built in and would provide reporting to the Board on an exception basis. The Board would own the IP but would need to ensure the hosting of the platform, security around the data and relevance of the template for changing standards was managed timely and appropriately.
  - to procure the services of a third-party data analytics firm to design, host and code a tailored compliance and checking system. That firm would then be responsible for all the security issues around a web-based platform, the Board would be the client but the third-party firm would have no rights to use the data other than for what is set out in the agreed contract.
- 4.1. The Secretariat has had very informal and early discussions with possible third-party providers and believe there is both capability and appetite for such a contract. However, this needs further investigation.
- 4.2. In order for the Board to have all the relevant information it needs for the meeting on the 27th June, the secretariat intends to use the intervening period for an informal market sounding on each of the possible options above and will report back to the procurement working group. If the working group agrees, the secretariat will, over the next month:



- investigate the capability and capacity necessary for an in-house solution,
  - research possible external consultants that could provide the necessary development service for a tailored solution, and
  - speak to some third-party providers who we believe can meet the requirements, in particular their independence from the asset management and benchmarking industries and their ability to hold the data securely
- 4.3. To facilitate this research, it is proposed to use the briefing note at Appendix C [to be written] to ensure that any discussions with third parties can be focused on the necessary requirements and that meaningful answers are given to specific questions. This will include indicative costs which would then give an indication of a procurement route – I.e. whether a full EU tender process is required.
- 4.4. Following this information gathering, the secretariat will present the results and analysis to the procurement working group and subsequently to the Investment, Governance and Engagement committee in May and the Board in June. The Board will be able to make an informed decision on the scope of the envisaged role, solution to fulfilling that scope, relevant procurement route and indicative timetable.

**Recommendation – that the procurement working group notes the proposals set out above and agrees to present this to the Investment, Governance and Engagement committee for consideration on the 30<sup>th</sup> May 2018.**

## Appendix A – Transparency Code

### LGPS Investment Code of Transparency (“the Code”)

**Date of Publication: 18<sup>th</sup> May 2017**

#### Definitions

For the purpose of this Code the following definitions shall apply:

<b>Administering Authority</b>	means the administering authority of a pension fund within the LGPS. For the purposes of the Code only this term shall also apply to the operator of any LGPS investment pool
<b>Board</b>	means the Local Government Pension Scheme Advisory Board
<b>Investment Manager</b>	means an investment manager, who has been or wishes to be, appointed by an Administering Authority in accordance with the Investment Regulations
<b>Investment Regulations</b>	means The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (as from time to time amended or replaced)
<b>LGPS</b>	means the Local Government Pension Scheme for England and Wales
<b>Template</b>	means the template information form for the relevant investment types provided by the Board as updated from time to time and made available on the Board’s website

#### A Introduction

1. The Board is a body established under the Local Government Pension Scheme Regulations 2013. The function of the Board is to provide advice to the Secretary of State on the desirability of making changes to the LGPS. The Board also has the function of providing advice to Administering Authorities and local pension boards in relation to the effective and efficient administration and management of the LGPS and their pension funds. The Board has the power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions.
2. The Board views the move toward investment cost transparency and consistency as an important factor in the LGPS being perceived as a value-led and innovative pension scheme. Transparency is also a target for the revised CIPFA accounting standard issued for inclusion in the statutory annual report and accounts and is included in the government’s investment reform guidance and criteria for LGPS pooling.
3. To assist LGPS administering authorities in obtaining the more detailed investment fee data they require, the Board has worked with key stakeholders including investment managers, CIPFA and LGPS administering authorities to develop the Code.
4. The Administering Authority and the Board recognise their obligations pursuant to the Freedom of Information Act and the Section 45 FoIA Code of Practice and will engage with Investment Managers appropriately in that respect.

#### Scheme Advisory Board Secretariat

18 Smith Square, London SW1P 3HZ T 020 7187 7344 E [liam.robson@local.gov.uk](mailto:liam.robson@local.gov.uk) or [elaine.english@local.gov.uk](mailto:elaine.english@local.gov.uk) W [www.lgpsboard.org](http://www.lgpsboard.org)

## B Application of the Code

5. The Code is a voluntary code and covers the provision of transparent and consistent investment cost and fee information between Investment Managers and Administering Authorities.
6. An Investment Manager may sign up to the Code in writing in the form agreed by the Board. By doing so the Investment Manager is demonstrating its commitment to the transparent reporting of LGPS investment costs and fees to administering authorities.
7. An Investment Manager who signs up to the Code in respect of the investment types covered by the Code agrees that within a period of twelve months of signing up to the Code (or such longer period as the Board may in its discretion agree) it will put in place the systems necessary to allow the completion and automatic (i.e. without the client having to make a request) submission of the Template(s) to each Administering Authority that the Investment Manager is appointed by (whether at the time of signing up to the Code or in the future).
8. 7A. Where an asset class is not covered by the template(s) available under the Code, an investment manager may sign up on the understanding that within a period of 12 months (or such longer period as the Board may in its discretion agree) it will put in place the systems necessary to allow the completion and automatic (i.e. without the client having to make a request) submission of cost data substantially similar in scope and detail to that covered by existing templates. The exact format of that cost data is to be agreed with each Administering Authority that the Investment Manager is appointed by (whether at the time of signing up to the Code or in the future). Managers who sign up to the Code under this provision must adopt and make use of relevant Code templates as they become available.
9. Where an asset class is not covered by the template(s) available under the Code, an investment manager may sign up on the understanding that within a period of 12 months (or such longer period as the Board may in its discretion agree) it will put in place the systems necessary to allow the completion and automatic (i.e. without the client having to make a request) submission of cost data substantially similar in scope and detail to that covered by existing templates. The exact format of that cost data is to be agreed with each Administering Authority that the Investment Manager is appointed by (whether at the time of signing up to the Code or in the future). Managers who sign up to the Code under this provision must adopt and make use of relevant Code templates as they become available.
10. The Template(s) must be submitted automatically (i.e. without the client having to make a request) each year to each Administering Authority (if required by the Administering Authority) and to any independent third party appointed by the Board in accordance with paragraph 12. Administering Authorities may also request such submissions on a quarterly basis.
11. There are separate Templates for segregated portfolio management and for pooled funds. Where an Investment Manager operating a segregated mandate invests in a pooled fund as part of that mandate, the reporting will be done via the Investment Manager's own Template.
12. The Investment Manager will not vary the Templates except with the written agreement of the Board and the relevant Administering Authority.
13. The current Templates only apply in relation to listed asset classes. Templates for unlisted asset classes such as private equity will be developed in due course. It is envisaged that the Templates will develop over time to encompass other more challenging areas of cost transparency and will remain flexible to enable changes to meet the rapidly developing market for investment products. The listed asset Template may be amended from time to

### Scheme Advisory Board Secretariat

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time to keep in line with the Investment Association's Disclosure Code and/or the outcome of the FCA's Institutional Disclosure Working Group, IDWG.

14. The Board may appoint an independent third party to audit Templates provided in accordance with the Code and general compliance of the Code by Investment Managers. The third party may also be asked by the Board to collate, analyse and publish generic, non-attributable information obtained from the Templates at a national level. The Investment Manager shall co-operate with the Board and/or appointed third party and provide such information and explanations as the third party may reasonably require within a reasonable period of request.
15. The third party shall report the findings of any audit direct to the Board, including any recommended actions or improvements. The Investment Manager shall co-operate and work with the Board to address and implement any recommended actions or improvements.
16. The Investment Manager may, subject to any overarching legal or reporting requirements, require an Administering Authority to sign up to a reasonable confidentiality agreement not to disclose the information contained in the Template to any third parties (excluding any third party appointed by the Board).
17. The Board agrees that when an Investment Manager signs up to the Code in the agreed form it will, as soon as reasonably practicable, list the Investment Manager on its website and allow the Investment Manager to use the Code's logo on its marketing literature in accordance with the Code Logo Use and Guidance (available from the Board website and amended from time to time). The Code Logo Use and Guidance can be downloaded from the Board website.
18. The Board owns the Code logo and will retain all intellectual property rights and any other rights in the Code logo. An Investment Manager will not acquire any rights, title or interest in the Code logo and will not use the Code logo except as expressly specified in the Code and the Code Logo Use and Guidelines.
19. An Investment Manager will be permitted to use the Code logo on a non-exclusive basis to communicate their compliance with the Code. The Code logo will convey to stakeholders that the Investment Manager is compliant with the Code and committed to the transparent reporting of LGPS investment costs and fees.
20. An Investment Manager will not use the Code logo for any other purpose nor for the benefit of any other person and will not alter or change the Code logo in any way – ownership of any modifications in the Code logo will vest in the Board.
21. The Board may revoke use of the Code logo and remove an Investment Manager from the list on its website at any time if an Investment Manager is reported by an Administering Authority to be in breach of the Code.

## **Appendix B – Transparency Template**

**Scheme Advisory Board Secretariat**

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## **Appendix C – Briefing note on scope and specification of the requirement for informal market discussions**

**Market sounding:** We propose to discuss with these various parties the following specific questions. This will include indicative costs for the service which would then give an indication of a procurement route, including whether a full EU tender process is required or only part of it.

This informal market sounding will be on a no obligation, non-binding, non-contractual basis and purely to provide more detailed information for the procurement working group to recommend a course of action to the Scheme Advisory Board.

The parties that will be involved in this informal market sounding will have explained to them the background to the request together with the current template.

- 1.1. What is the business model of the supplier? i.e. are they a performance monitoring provider like a) CEM benchmarking or PIRC b) an ALM provider like ORTEC or c) a FINTEC company like E-Vestments or Simplitium.
- 1.2. What is the structure of the team, the individuals the firm would use and the track record of those individuals either at their firm or their previous firm?
- 1.3. What type of platform could be proposed i.e. single or multi party? However information will need to be confidential as this is a requirement to which the Investment managers have signed up to.
- 1.4. Who would they envisage as the owners of the information?
- 1.5. Would the supplier want to a) build and manage a bespoke system b) build a bespoke system but hand over to us for day to day management (how would the relationship work?) c) provide an “off the shelf” package or d) any other offering?
- 1.6. What could the associated costs be (up front and ongoing) with regards to the above?
- 1.7. With regards to 1.5 how would they view the term of the contract i.e. a) a one off or b) Multi year? If so for how long?
- 1.8. If a multi-year contract – How would they look to structure the contract?

- 1.9. How will the supplier work with us with regards to designing the system, working with the Investment Managers/LGPS Funds, fetch functions and reporting?
- 1.10. What could the timeline for delivery be?
- 1.11. Provide the templates to the suppliers with NDA's in place so they can spec out our requirements?
- 1.12. What is the state of play with regards to Freedom of Information?

## **LGPS Advisory Board (SAB) Code of Transparency**

### **Compliance system Specification**

The system described below will be purchased/developed in one of two versions these being

1. Portal - upload and reporting online hosted as a fully secure and completely ring fenced system
2. Lockbox - upload and reporting via manual intervention - hosted offline

Costs/resource requirements should be provided for both

#### **Data receipt**

1. Datasets will be received from approximately 300 sources (institutional pension investment service providers) in either standard excel file format or standard readable import file format (e.g. csv)
2. There will be up to 3 standard formats for datasets
3. Datasets will arrive either quarterly or annually and will be in respect of any one or more of 96 clients (88 LGPS administering authorities and 8 LGPS pools)
4. Each source will submit one dataset for each mandate it holds with a client therefore there could be up to 1000 datasets arriving each period
5. Sources should be able to upload their datasets online (portal version) or by submitting them to a system administrator (lockbox version)
6. Datasets must be accompanied by a self-certified 'true and fair' declaration (online for portal version)

#### **Data**

1. Datasets will include approximately 200 data items with multiple data types
2. Datasets will need to be indexed to both the source and the client it is in respect of
3. The relationship between sources and clients will be many to many both ways
4. Datasets will also require indexing by relevant period, date submitted, asset category (listed equity, property, unlisted debt, multi asset etc) and investment vehicle (direct mandate, fund, hedge, joint ventures etc)
5. Sources and clients will require login and contact data (updatable by source and client for portal version or by administrator for lockbox version)
6. Source/client agreed submission periods will need to be stored
7. Datasets will contain some mandatory fields (to be defined by SAB)
8. Datasets will include data items with tolerances (to be defined by SAB)
9. System will need to store regulatory requirement check rules (to be defined by SAB or by third party) and the data items or combination of data items these checks will need to be performed against

#### **Data security**

1. The datasets are to be stored in encrypted format accessible only by trusted users
2. Trusted users will be required to login in to the system using a three level process
3. Storage and use of data must comply with all relevant data protection legislation
4. Data must be stored within the EU preferably within the UK
5. Data cannot be used for any other purpose or shared with any third party without the permission of the SAB
6. Data must be held separately from any other datasets
7. The data for the lockbox version must have no physical or wireless connection to any external networks



8. The portal version must use Extended Validation Certificate SSL
9. The portal version must regularly and successfully complete CREST approved penetration testing
10. A comprehensive Business Continuity service must be included to cover the system to ensure immediate access to a real time mirror system and full recovery within 48 hours

## **Functionality**

On submission of a dataset the system should

1. Check the format of the file and reject if not correct
2. Check that all mandatory fields are present and reject if not
3. Check the 'true and fair' declaration is complete and reject if not
4. Check regulatory requirements and reject if fail
5. Check that data values are within tolerances and set warnings if not
6. Reasons for rejection will be notified to the source immediately (online for portal system or via email for lockbox)
7. Where the file is valid upload the dataset and notify the source and client and include details of any warnings (online for portal email for lockbox)
8. Where the file is rejected also notify the client (online for portal email for lockbox)

## **Exception Reporting**

1. Weekly check of expected submission dates for source/client against valid file receipt dates - report where a valid file has not been received within x days of expected date, include records of invalid submissions and reasons for rejection
2. Reporting will be to source, client and SAB
3. Reporting output will be online for portal system and email for lockbox

## **Requested reporting**

The system must be;

1. Compatible with a standard reporting software (online for Portal version)

## **Extended facilities**

Although not included in the initial purchase/development project indicative costs should be provided for the following functionality in the Portal Version

1. Cost and performance summary screen- to show the client a real-time summary of costs and performance across selectable time period, asset category and investment vehicles
2. Cost drill down screen - the ability for a client to drill down from the summary into individual elements of cost both within and across sources, asset classes, investment vehicles and periods
3. Cost comparison summary screen - to enable the client to compare costs and performance at the summary level with those of all other clients
4. Cost comparison drill down screen - to enable a client to compare individual cost elements with those of all other clients
5. Online report builder - to enable the client to build and store their own reports and run them either on the fly or as timed jobs with the output available on screen and downloadable in both PDF and csv format

6. Screen output for all of the above should be selectable between table and chart formats

Version 1 17.5.2018

DRAFT

# Investment, Governance and Engagement Committee

30<sup>th</sup> May 2018

Item 6 – Paper C

## LGPS Employer owned companies

1. The secretariat via the LGA instructed counsel to give an opinion on the rights of and duties on LGPS scheme members and employers where a transfer of staff takes place to a company owned by an LGPS scheme employer.
2. Instructions are attached as ANNEX 1.
3. Although a written opinion has not yet been received and therefore the views given below which are based on discussions at the conference held in counsel's chamber on 30<sup>th</sup> April cannot be confirmed it would appear that the responses to the questions set out in instructions will be as follows

*4.1. Does the transfer of functions described in the scenario fall under the provisions of "The Best Value Authorities Staff Transfers (Pensions) Direction 2007" issued on 27 June 2007, in relation to local authority employers or Fair Deal for staff pensions: staff transfer from central government October 2013 in relation to Academy schools?*

**Yes in both cases**

*4.2 Does the company meet the requirements of (5) or (6) of part 2 of Schedule 2 of the regulations necessary to offer LGPS membership?*

**Yes**

*4.3 Having regard to the answer to 4.1 and wider TUPE legislation what protections are available to the employees transferring under TUPE in relation to pensions in the scenario described?*

**Employees of scheme employers covered by the Direction or Fair Deal with existing rights to access the LGPS must have those rights protected**

*4.4 Having regard to the answer to 4.1 and 4.2 and wider Automatic Enrolment legislation what obligations are placed on the employer with regard to the provision of pensions based on the scenario described?*

# Investment, Governance and Engagement Committee

**To provide access to pensions for its employees of which the LGPS must be the default (but not the only) option offered to those employees covered by the answer in 4.3 above**

*4.5 Having regard to the answers to 4.3 and 4.4 and should the employer offer different pension schemes to different employer groups in what circumstances would an employee be able to make a claim against the employer under the regulations or automatic enrolment legislation?*

**An employee covered by 4.3 must continue to have access to the LGPS which will meet the employers obligations under automatic enrolment, other employees may be offered access to the LGPS or if not must be offered access to another 'qualifying' pension scheme. Employees would have cause to make a claim against the employer either via the Pensions Regulator and/or the Pensions Ombudsman if such access was not made available.**

*4.7 Generally on any other matters relevant to this issue.*

**Such companies would be 'associated' for the purposes of equal pay and therefore would be subject to potential claims as if these employees continued to be employed directly by them**

- 4. Committee are asked to note the contents of this report and agree to recommend to the Board that the opinion when received be published on the Board website**

**IN THE MATTER OF THE LOCAL GOVERNMENT PENSION SCHEME  
AND SCHEME EMPLOYERS OWNED COMPANIES**

**INSTRUCTIONS TO LEADING COUNSEL MR JAMES GOUDIE QC  
TO  
ADVISE IN CONSULTATION ON MONDAY 30<sup>TH</sup> APRIL 2018  
AND IN WRITING**

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Leading Counsel's attention is drawn to the following relevant legislation, regulations and direction:

1. Local Government Pension Scheme Regulations 2013
2. The Best Value Authorities Staff Transfers (Pensions) Direction 2007
3. Fair Deal for staff pensions: staff transfer from central government October 2013
4. Transfer of Undertakings (Protection of Employment) Regulations 2006
5. The Pensions Act 2008 (<http://www.legislation.gov.uk/ukpga/2008/30/data.pdf>)

**1. Instructions**

Leading Counsel is instructed by Thelma Stober Corporate Legal Adviser and Company Secretary for the Local Government Association (LGA) and associated companies. LGA provides secretariat support to the LGPS Advisory on whose behalf of whom it is seeking Leading Counsel's opinion on number of questions relating to Local Government Pension Scheme (LGPS) and Scheme Employer owned companies as set out below.

**2. The Local Government Association (LGA)**

2.1 Leading Counsel will be familiar with the LGA having provided legal advice and representation on its behalf in the past. The LGA is an unincorporated Association of Local Authorities which operates under the Constitution which was adopted by the LGA's Shadow General Assembly on 17 December 1996, subsequently amended from time to time.

In total, 415 authorities are members of the LGA for 2017/18. These include English Councils, Welsh Councils via the Welsh LGA, 30 Fire Authorities, seven National Parks, Passenger Transport Authorities plus one town council.

2.2 The LGA is the national voice of local government. It is a politically-led, cross-party organisation that works on behalf of councils to ensure local government has a strong, credible voice with national government. It aims to influence and set the political agenda on the issues that matter to councils so they are able to deliver local solutions to national problems. The LGA work with councils to support, promote and improve local

government. Details of the purpose objects and powers of the LGA are set out in its Constitution

### 3. Context

3.1 The creation of companies by LGPS scheme employers is becoming more commonplace and a number of issues are being raised in relation to pension provision, the LGPS and the potential for two tier workforces. The Local Government Pension Scheme Regulations 2013 “the regulations”, establish a scheme for the payment of pensions and other benefits to or in respect of persons working in local government service. Schedule 2 part 1 of the regulations sets out who can be Scheme employers and makes provision relating to admission agreements between employers who are not listed within the Schedule and administering authorities.

3.2 The scenario which provides the context for the questions set out below upon which Leading Counsel is asked to advice relates to a scheduled scheme employer listed in Schedule 2 part 1 of the regulations establishing a wholly owned company “the company,” then transfers a function or functions to the company without a public sector procurement using the Teckel exemption. Staff of the employer are then transferred to the company using TUPE. In the 1999 judgment of *Teckel* (C-107/98) the ECJ established an exemption from public procurement for the award of contracts by a public authority to a separate entity provided certain requirements were met.

The Teckel exemption was formally codified into the 2014 EU Procurement Directive (Article 12), and therefore our Public Contracts Regulations 2015 (Regulation 12).

3.3 Working in partnership with the private and third sectors to modernise and reform the delivery of public services often involves the transfer of public sector employees to new employers. The success of these projects will depend, critically, on the fair treatment of the transferring staff that will need reassurance that their rights will be fully respected and that they will be treated fairly throughout an outsourcing exercise.

3.4 In addition LGPS Schemed Employers are increasingly setting up owned company and transferring staff to those companies. The questions upon which Leading Counsel is asked to advice relates to this situation.

3.5 Under provisions in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) [SI 2006/246], the pay, and terms and conditions of employment for transferred employees are protected, preventing these entitlements from being changed without agreement. The Transfer of Employment (Pension Protection) Regulations 2005 [SI 2005/649] covers the pension and contribution arrangements for employees to which a TUPE transfer applies.

3.6 With effect from 1 October 2007, best value contracting authorities in England and police authorities in Wales have been required to comply with The Best Value Authorities Staff Transfers (Pensions) Direction 2007 made under section 101 of the Local Government Act 2003. This means that a best value authority must secure pension protection for each TUPE transferring best value authority employee which

must be the same as, broadly comparable to, or better than, those they had a right to acquire prior to the transfer.

3.7 The Fair Deal for Staff pensions 2013<sup>1</sup>, is a non-statutory policy setting out how pensions issues are to be dealt with when staff are compulsorily transferred from the public sector to independent providers delivering public services. It sets out the standard practice which the Government will follow when its own staff are compulsorily transferred to non-public sector employers.

#### **4. Instructions**

4. Leading Counsel is asked to advise in consultation and in writing on the following of questions and generally:

4.1 Does the transfer of functions described in the scenario fall under the provisions of “The Best Value Authorities Staff Transfers (Pensions) Direction 2007” issued on 27 June 2007, in relation to local authority employers or Fair Deal for staff pensions: staff transfer from central government October 2013 in relation to Academy schools?

4.2 Does the company meet the requirements of (5) or (6) of part 2 of Schedule 2 of the regulations necessary to offer LGPS membership?

4.3 Having regard to the answer to 4.1 and wider TUPE legislation what protections are available to the employees transferring under TUPE in relation to pensions in the scenario described?

4.4 Having regard to the answer to 4.1 and 4.2 and wider Automatic Enrolment legislation what obligations are placed on the employer with regard to the provision of pensions based on the scenario described?

4.5 Having regard to the answers to 4.3 and 4.4 and should the employer offer different pension schemes to different employer groups in what circumstances would an employee be able to make a claim against the employer under the regulations or automatic enrolment legislation?

4.7 Generally on any other matters relevant to this issue.

Other questions may arise during the course of consultation upon which Leading Counsel will be asked to advise.

#### **5. Attendance at Consultation**

Instructing Solicitor Thelma Stober and Jeff Houston Head of Pensions, Phil Bundy Senior Adviser Employment and Colin Meech, (unison) but in his capacity as a member

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<sup>1</sup> Staff transfers within the public sector are outside of the scope of this guidance – such transfers are matter for the Cabinet Office Statement of Practice on Staff Transfers within the public sector ([http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/stafftransfers2\\_tcm6-2428.pdf](http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/stafftransfers2_tcm6-2428.pdf)).

of the LGPS Advisory Board, will be attending the consultation with Leading Counsel on **30 May 2018 at 11.30am in chambers**. Should Leading Counsel require any further information please contact requires any further information or clarification prior to the consultation please contact Thelma Stober on ( tele) Mobile 07899 896 562 or Telephone 0207 664 3246 (email) [thelma.stober@local.gov.uk](mailto:thelma.stober@local.gov.uk)

**IN THE MATTER OF THE LOCAL GOVERNMENT PENSION SCHEME  
AND SCHEME EMPLOYERS OWNED COMPANIES**

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**INSTRUCTIONS TO LEADING COUNSEL MR JAMES GOUDIE QC  
TO  
ADVISE IN CONSULTATION ON MONDAY 30<sup>TH</sup> APRIL 2018  
11.00AM AND IN WRITING**

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John Davit  
Clerk to  
**Mr James Goudie QC**  
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