

# Scheme Advisory Board

Local Government Finance Stewardship  
Ministry of Housing, Communities and Local Government  
2nd floor  
Fry Building  
2 Marsham Street  
London SW1P 4DF

9 December 2020

Reply to: [jeff.houston@local.gov.uk](mailto:jeff.houston@local.gov.uk)

**Local Government Pension Scheme (LGPS) - Response to consultation:  
The draft Local Government Pension Scheme (Restriction of Exit Payments)  
(Early Termination of Employment) (Discretionary Compensation and Exit  
Payments) (England and Wales) Regulations 2020**

I write on behalf of the Local Government Pension Scheme Advisory Board (England and Wales) in response to the Department's consultation on the draft regulations named above.

The consultation on reforming local government exit pay commenced in September 2020. The draft regulations were published on 14 October 2020.

I would like to draw attention to the following technical considerations in respect of the proposed regulatory amendments:

- Regulations 3 and 4 set out provisions for individuals affected by the Restriction of Public Sector Exit Payments Regulations 2020 to pay extra to offset the early payment reduction that would otherwise apply to their LGPS benefits. There is no corresponding provision for an individual who suffers a reduction as a result of the application of regulation 2. Regulation 3 should be amended to apply to these individuals.
- The deadlines that apply when a member elects to pay extra are different under regulations 3 and 4. We believe the longer deadlines listed in regulation 4 should apply in all cases. If the deadlines were aligned, then regulations 3 and 4 could be replaced by a single regulation. This would reduce complexity for administering authorities, help to clarify the distinction between employer and administering authority responsibilities and allow members sufficient time to make an informed and considered decision.

- Regulation 10 proposes changes that would introduce provisions relating to retirement in the compensation regulations. This would necessitate significant further regulation amendments to extend existing rules to retirements that occur outside of the LGPS Regulations 2013 [the 2013 Regulations]. We would strongly recommend that any changes relating to an individual's retirement are made to the LGPS regulations.
- The regulations do not make it clear whether a 'relevant Scheme member' must be an active member on their termination date. Further clarification is needed on the position for non-active members.
- It is not clear how the proposals would affect retirements under regulation 30(5) of the 2013 Regulations where the employer chooses to waive some or all of the actuarial reduction under regulation 30(8).

Further details of these and other technical issues that I have identified in the draft regulations are set out in Annex 1 which follows this letter.

Yours faithfully

Jeff Houston

A handwritten signature in black ink, appearing to be 'J. Houston', written over a horizontal line.

Secretary to the Board

## **Annex 1: Detailed technical response**

In this section we provide a detailed technical response to the draft regulations. In this part we refer mainly to the draft regulations in their current form. If our recommendations to combine regulations 3 and 4, and to move some provisions in regulation 10 to the LGPS regulations 2013 are adopted, then further changes to certain references will be required.

This section is mainly ordered by regulation number. We have included our commentary on the wording of each regulation in the draft regulations. We have also included comments on areas where further provisions within a regulation are needed to give effect to the stated policy.

### **Introductory text**

Section 24 of the Superannuation Act 1972 allows the Secretary of State to make compensation regulations, subject to section 19 of the Public Service Pension Act 2013 [PSPA 2013]. The introductory text confirms that these regulations are made under specified provisions of the PSPA 2013. We assume that it was intended to make these regulations under the PSPA 2013, when the Superannuation Act 1972 is still in force.

### **Regulation 1**

- 1(2) Regulation 3 of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 [the 2006 Regulations] and regulation 3 of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2000 [the 2000 Regulations] extended the application of those regulations to the Isles of Scilly. There is no such provision in these regulations. We would expect this provision to be replicated here to extend the application of these regulations to the Isles of Scilly.
- 1(4) There are terms used in these regulations that are not defined in regulation 1(4), such as administering authority. We believe it would be appropriate to include an interpretation clause directing readers to the definitions in Schedule 1 of the LGPS Regulations 2013 [the 2013 Regulations].
- 1(4) There are certain employers that:
- were covered by the earlier compensation regulations

- are covered by the Restriction of Public Sector Exit Payments Regulations 2020 [the 2020 Regulations], and
- are not covered by these regulations.

We have provided more information about employers and office holders who appear not to be in scope of these regulations in the later section of this document covering the [Schedule](#).

Employees of the governing body of a voluntary school, foundation school and foundation special school who have been designated as being eligible for membership are not covered by these regulations. This could be corrected by changing the Schedule, or by amending the definition of ‘employing authority’ in regulation 1(4). This could be achieved by adapting the wording from regulation 2(1)(c) of the 2006 Regulations:

(c) in the case of a person who is eligible to be a Scheme member under regulation 2(1B)(b) of the 2013 regulations, the local authority by whom the person is deemed to be employed under Part 4 of Schedule 2 of those regulations.

However, further amendments would be required if the intention is that not all employees and office holders listed in Part 4 of Schedule 2 of the 2013 Regulations should be subject to the proposed reforms.

- 1(4)(b) We believe the reference should be to regulation 2(1B)(a) and not regulation 3(1)(b).
- 1(4) It is not clear whether the definition of ‘relevant Scheme member’ is meant to include only active members.

If the policy is that only active Scheme members on the termination date are relevant Scheme members, then the definition must be changed to make this clear. Further regulation amendments may be needed to ensure exiting employees who are not active members are treated equitably.

If the policy is that a person who is not an active member on the termination date may be a relevant Scheme member, then the regulations as currently worded yield unexpected results. Under regulation 10(2)(b) and subject to 10(3), a person who has opted out of the Scheme would be entitled to an

unreduced pension if they leave due to redundancy or business efficiency at age 55 or over.

We believe that the inclusion of regulation 7(1)(b)(ii) indicates that the intention is that a relevant Scheme member must be an active Scheme member. If this is not the case, then regulation 7(1)(b)(ii) appears to be unnecessary or it requires re-wording to clarify its meaning.

## **Regulation 2**

We understand that this regulation applies when a statutory redundancy payment (SRP) is payable.

This regulation refers to ‘any extra charge payable by the employing authority under regulation 68(2) of the 2013 Regulations’. Paragraph 2(3) of Schedule 2 to the LGPS (Transitional Provisions, Savings and Amendment) Regulations 2014 [the 2014 Regulations] provides for the payment of a strain cost in certain circumstances when benefits built up before 1 April 2014 are paid early. If strain costs are payable under the 2014 Regulations, then references to paragraph 2(3) of Schedule 2 will need to be added to these regulations to ensure the total strain cost is taken into account for various purposes. The same approach may be needed each time strain cost under regulation 68(2) is mentioned.

We are not aware of any circumstance in which a member taking flexible retirement is entitled to an SRP at that point. However, it is possible that a termination agreement could stipulate that an employee will take flexible retirement (incurring a strain cost) followed by later redundancy. The reference to 30(6) of the 2013 Regulations could be retained in regulation 2 to provide for the reduction of strain cost by SRP in this scenario. Further guidance may be required on when and how a member’s pension benefits should be reduced when they become entitled to an SRP some time after the LGPS benefits are paid.

As noted in our comments about regulation 1(4) above, it is not clear whether the definition of ‘relevant Scheme member’ includes only those who are active members on their termination date. If a relevant Scheme member is an active member, then regulation 2 would not require the reduction of the strain cost by SRP in respect of a member who:

- has opted out

- subsequently leaves due to redundancy or efficiency
- elects for payment under regulation 30(5) of the 2013 regulations, and
- the employer waives some or all of the reductions that would apply under regulation 30(8) of the 2013 Regulations.

If a person who has opted out of the Scheme is a relevant Scheme member, then the reference to 30(5) should be retained to provide that the strain payment is reduced by SRP.

We believe that this regulation should also include a reference to benefits becoming immediately payable under regulation 10 of these regulations. We have recommended that provisions currently included in regulation 10 are moved instead to a new regulation 30(7A) in the 2013 Regulations. If that recommendation is taken forward, then the reference to regulation 30(7) should be replaced with regulation 30(7A).

Regulation 2 only provides for the strain cost paid by the employer under regulation 68(2) of the 2013 Regulations to be reduced by SRP paid. It does not require any reduction in the member's benefits as a result of the reduced employer payment. Regulation 10(3) introduces the requirement to reduce a member's LGPS benefits when the cost of their exit exceeds the limit set out in regulation 3 of the 2020 Regulations. There is no corresponding regulation that requires the reduction of a member's benefits when the strain cost payable by the employer is reduced in accordance with regulation 2.

The word 'retirements' in the second line of this regulation should be replaced by 'retirement'.

In the third line, 'a relevant Scheme member' should read 'the relevant Scheme member'.

### **Regulation 3**

Regulations 3 and 4 both cover the reduction of any extra charge under regulation 3 of the 2020 Regulations but include different deadlines by which the member may elect to pay extra, and make such a payment. The regulations do not include a provision that allows a person to pay extra when the extra charge payable by the employer is reduced under regulation 2. We assume that the intention was for

regulation 3 to apply when the extra charge is reduced under regulation 2 and a wording change is required to effect this change.

If regulation 3 is not intended to apply when the extra charge is reduced under regulation 2 then further changes will be needed to:

- explain the difference between regulations 3 and 4 and when the deadlines set out apply, and
- allow members to pay extra when the extra charge is reduced in accordance with regulation 2.

In the remainder of our comments we have assumed that the wording of regulation 3 will be changed to refer to regulation 2 of these regulations instead of regulation 3 of the 2020 Regulations.

There is no provision in regulation 3 that sets out the effect on the member's benefits if they make an additional payment of the type described. We believe that a provision equivalent to regulation 4(3) is required in regulation 3 to deliver the policy intention.

3(a) The phrase 'the day before leaving their employment' should be replaced by 'termination date'. Using the term 'termination date', which is defined in regulation 1(4), will avoid ambiguity.

3(a) It should be made clear who may allow the member a longer period to elect to pay extra under this regulation. We suggest replacing 'or such a longer period as they allow' in parentheses with 'or such a longer period as the administering authority allows'.

#### **Regulation 4**

4(1) Regulation 4 does not have the effect of reducing LGPS benefits. The reduction is provided for under regulation 10(3)(b). The current wording 'in the absence of this regulation would become payable without reduction' do not have any effect. As currently worded, we do not think that this regulation would ever apply.

4(2)(a) We recommend amending 'beginning on' to 'beginning with'. This will remove ambiguity and is in keeping with the wording used in regulations 4(2)(b) and 3(2)(b).

- 4(2)(a) Replace 'day after leaving that employment' with 'day after the termination date'. See the comments above on regulation 3(a) for our reasoning.
- 4(2)(a) Replace 'or such a longer period as they allow' with 'or such a longer period as the administering authority allows'. See the comments above on regulation 3(a) for our reasoning.
- 4(3) We do not think that 'enhancement' is the correct term to use in this context. We think that the wording should reflect the fact that an additional payment made by the member would buy out some or all of the early payment reduction that would otherwise apply.
- 4(3) The reference in regulation 4(3) is to pension only. No reference is made to the member option of buying out the reduction that would otherwise apply to any retirement grant that they have built up.
- 4(4) The purpose of regulation 4(4) is not clear to us. According to 4(1), regulation 4 applies when benefits are payable under regulation 10. Regulation 10 applies when:

'a relevant Scheme member who has attained the age of 55 or over is dismissed from an employment by reason of redundancy or business efficiency, or whose employment is terminated by mutual consent on the grounds of business efficiency'.

The ability to waive early payment reductions under regulation 30(8) of the 2013 Regulations applies only to early voluntary or flexible retirements under regulations 30(5) or 30(6). As currently drafted, we do not believe that this paragraph will have any legal effect.

The wording of regulation 4(4) suggests that it is the intention for members:

- whose LGPS benefits are paid early under regulation 30(5) or 30(6) and
- the employer waives in part the early payment reduction that would otherwise apply

to have the option to pay extra to buy out the reduction. Further amendments are needed to ensure that this right is extended to members other than those whose exit occurs as a result of redundancy or efficiency.



4(5) The purpose of this paragraph is not clear. We assume that its aim is to prevent local authorities and fire and rescue authorities circumventing the exit payment cap by using the general power of competence set out in section 1 of the Localism Act 2011.

### **Regulations 3 and 4**

It is clear to us based on conversations with administering authorities that there is confusion over the division of responsibilities between administering authorities and employers when it comes to exits of LGPS members. We believe that the separation of regulations 3 and 4 could exacerbate this problem as the administering authority must know for what reason a strain cost payment has been reduced to ascertain which deadlines will apply.

In our view, it would be preferable to have a single regulation which provides the right for a member who is entitled to partially reduced benefits to pay extra to offset that reduction. The same rules and deadlines would apply irrespective of whether the strain cost has been reduced by the SRP paid or to limit the cost of the exit to that prescribed by the 2020 Regulations.

This change would help to define the dividing line between employer and administering authority responsibilities. In very simple terms, the process would be:

- the administering authority tells the employer the strain cost related to paying unreduced benefits
- the employer informs the administering authority how much strain cost they can pay
- if the employer cannot pay the full strain cost, the administering authority offers the member the option to pay extra to offset the early payment reductions.

As the regulations are currently drafted, we assume that a member whose strain cost is reduced by the amount of SRP paid has a deadline of the termination date to elect to pay extra. This may have been introduced to allow the employer to direct the SRP to the administering authority when an exiting employee makes such an election. We do not believe that this needs to be set out in the regulations. An employer, exiting member and administering authority may enter into a local arrangement concerning payment when a member makes an election to pay extra to the administering

authority before their termination date. If the deadlines in regulation 4 apply and the member makes the election after the termination date, then they may make payment directly to the administering authority.

The amounts of money involved are likely to be greater in a case where the strain cost is reduced because the cost of the exit has been limited by the 2020 Regulations. However, the decision between cash 'up front' and ongoing pension payments is important and irreversible for all members. We believe the three-month deadline to elect to pay extra set out in regulation 4(2)(a) should apply in all cases. There is a risk of future legal claims from members who later consider that they have made the wrong decision, if they feel that they were not provided with the information and time they need to make an informed decision.

## **Regulation 5**

5(3)(a) We assume that the purpose of this change is to specify that regulation 30(7) of the 2013 regulations does not apply to a member covered by regulation 10. This could be problematic if there are any employers covered by the 2020 Regulations that are not covered by these regulations. In this event, the current uncertainty over member entitlements would continue.

5(3)(b) We do not think that this regulation has any effect. Regulation 4 of these regulations only applies to exits that are immediately payable under regulation 10. If the intention is for this paragraph to confirm that the employer cost of a waiver under regulation 30(8) of the 2013 Regulations is subject to the cap, it does not achieve this.

## **Regulation 7**

The numbering of this regulation needs to be corrected. As currently drafted, regulation 7 has a paragraph 2 but no paragraph 1.

7(a) This regulation specifies that Part 3 applies to a person whose employment is terminated by reason of redundancy, dismissal by mutual consent on grounds of business efficiency or when one holder of a joint appointment leaves. Regulation 10 applies to a relevant Scheme member who is dismissed from an employment by reason of business efficiency or whose employment is terminated by mutual consent on grounds on business efficiency. For this to have effect, Part 3 must apply to employees who leave due to both these reasons. 7(a)(ii) should be amended to cover both

dismissals due to business efficiency and terminations by mutual consent due to business efficiency.

- 7(b)(ii) We appreciate that this paragraph has been adapted from the wording that appears in regulation 4(b)(ii) of the 2006 Regulations, however we do not think that it is accurate. The implication is that a person who has opted out of the LGPS is both not a member and not eligible to be a member. We suggest the wording is changed to include both active members and employees who have opted out. For example:

(ii) a relevant Scheme member or would be such a member but for the giving of a notification under regulation 5(2) of the 2013 Regulations (ending active membership) or an equivalent provision of the earlier Schemes.

- 7(2) We assume that the reference to regulations 7 and 8 should be changed to regulations 8, 9 and 10.

### **Regulation 8**

- 8(2)(b) It would be helpful to change the reference from regulation 9 to regulation 9(6), the paragraph that includes the limited week's pay.

### **Regulation 9**

- 9(2) This paragraph requires the employer to make a decision to pay compensation at least three months before the termination date. This is a significant change from the provisions of the 2006 Regulations which currently apply. The employer currently has six months after the termination date to decide to pay compensation.

We understand that there may be logic to this change. Under the current regulations, where an LGPS member is entitled to an immediate pension this has no bearing on their entitlement to a discretionary compensation payment. The discretionary compensation payment is dependent on the employing authority's policies alone.

The introduction of the 2020 Regulations and the proposals in these draft regulations will significantly increase the level of bureaucracy involved in establishing a person's entitlements when they exit due to redundancy or

efficiency at age 55 or over. More information will need to be exchanged between the administering authority and the employer, and passed from the employer to the individual that will enable the individual to make an informed decision. The employee will need sufficient time to decide whether to take:

- an immediate partially reduced pension (with the reduction to any benefits built before 1 April 2014 based on preferential reduction factors)
- a deferred pension plus discretionary compensation or
- an immediate pension reduced based on standard factors plus discretionary compensation.

Many employees will be entitled to less than three months' notice, and a some will be entitled to only one month.

There is, of course, benefit in planning redundancies well in advance where possible. There are statutory obligations to consult with recognised trade unions under the collective redundancies provisions of the Trade Union and Labour Relations (consolidation) Act 1992 before dismissing employees. This has no bearing on notice provisions. The requirement for the employer to make a decision concerning the payment of compensation three months before termination in all cases seems illogical and impractical.

- 9(2) Regulation 31 of the 2013 Regulations allows the employer to award additional pension up to six months after the member's termination date. The requirement to make a decision concerning payment of compensation three months before the termination date is problematic when the ability to award compensation is dependent on the employer **not** awarding additional pension. This process will be difficult to manage given the significant difference in timescales.
- 9(3) We do not agree that compensation is paid under paragraph 2. This paragraph relates to making a decision about whether to pay compensation, rather than making the payment. The reference to 9(2) in paragraph 9(3) should be removed. A reference to 9(10) may be more appropriate as this paragraph deals with the payment of compensation.

- 9(4) There are two aspects that need clarification in relation to calculating the maximum permissible discretionary compensation. They both relate to the number of weeks that count for the purposes of regulation 9(4).

**The type of weeks that count**

The 2006 Regulations place a maximum on compensation payments of 104 weeks' pay, inclusive of any SRP and any increased redundancy payment under Regulation 5 (basing payments on actual week's pay). They contain no specific formula or limitation other than the overriding duty:

- to have regard to the extent to which the exercise of discretionary powers, in accordance with the policy, unless properly limited, could lead to a serious loss of confidence in the public service and
- to ensure that the policy is workable, affordable and reasonable having regard to the foreseeable costs.

It is therefore for an employing authority to decide its policy on discretionary compensation. To ensure that they stay within the exemptions for age discrimination in the Equality Act 2010, most employers will calculate an employee's entitlement to a statutory redundancy payment and apply a common multiplying factor. The maximum number of years' service that is reckonable under the statutory redundancy scheme is 20 years. Depending on an employee's age when made redundant, the number of weeks' pay varies. Someone with 20 years' service could receive between 20 and 30 weeks' pay, 30 being the maximum. For example, an employing authority applying a multiplying factor of 1.5 would provide a maximum number of weeks' pay of 45 weeks.

The draft regulations propose additional limitations, ie a maximum of three weeks' pay per year of continuous service under the Employment Rights Act 1996 (the 1996 Act) and an overriding maximum of 15 months' pay. This imposes an upper limit, allowing employers to make modest additional payments on top of statutory redundancy payments up to those specified limits.

We have described this issue as the type of weeks that count as there are different measures of continuous service that apply to local government employees under the provisions of the 1996 Act. There is a general

continuous service provision for calculating rights to claim unfair dismissal, etc. This includes employment with the employer but also includes TUPE related service and some specified service between a local authority and schools it maintains. There is a separate redundancy provision which applies to the calculation of SRPs. The Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) Order 1999 modifies the statutory redundancy provisions of the Employment Rights Act 1996 and provides that continuous service with other local authorities and specified local government related bodies is included in the assessment of entitlement to and calculation of the amount of a statutory redundancy payment. Thus, a care worker or teacher who moved from one authority to another maintains, in the right circumstances, continuity for assessing statutory redundancy payments in the same way a nurse moving from one NHS hospital to another or an administrative officer moving posts within the civil service would.

We assume it is this redundancy related service to which the proposed regulations are intended to relate and this must be made clear. Failure to do so would in many cases render the discretionary powers themselves redundant. If a very narrow definition of continuous service were specified inadvertently, the maximum discretionary compensation permitted under Regulation 9(4)(a) could for many employees be less than their entitlement to statutory redundancy pay.

#### **The number of weeks that count**

The maximum number of weeks that are reckonable for the purposes of calculating SRP is 20. If the maximum discretionary payment set out in Regulation 9(4)(a) were limited to 20 weeks' pay, this would result in a maximum payment of 60 weeks' pay. This would be less than the other maximum expressed in Regulation 9(4)(b) of 15 months (or 66 weeks' pay). We therefore assume that when assessing the number of weeks' pay for the purposes of Regulation 9(4)(a) there is no intention for there to be a maximum reckonable number of 20 as there is with SRP.

- 9(5) This paragraph sets out how a week's pay should be calculated for the purposes of calculating a redundancy payment. We believe that there should be a corresponding paragraph that sets out how to calculate a month's pay for the purpose of establishing the limit referred to in regulation 9(4)(b).

- 9(6) We believe that the reference to regulation 9 should be changed to regulation 8.
- 9(6) We believe that it may be beneficial to define how a person's annual pay should be worked out, in order to ensure that the person's pay does not exceed the 'maximum annual equivalent of £80,000' set out in this regulation.
- 9(7) We do not think that the wording 'first day in the pay period' makes sense in this context. We assume that the wording from regulation 9 of the 2013 Regulations has been adapted for use here. We suggest amending the wording so that the dates are fixed and not determined by pay periods, which will differ for different individuals and employers, based on the definition in regulation 9(12). The alternative wording below may deliver a consistent result:

The figure in paragraph (6) is increased on 1 April 2021, and each subsequent 1 April, by the amount (where it is greater than zero) by which it would be increased if it were a pension beginning on 1 April 2020 to which the Pensions (Increase) Act 1971 applied.

The definitions of 'appropriate increase' and 'pay period' in paragraph 9(12) could then be removed.

- 9(8) The reference to regulation 9 should be replaced by regulation 8.
- 9(8) We think that the wording here could be misinterpreted. It should be made clear that the employer payment under regulation 68 of the 2013 Regulations (the strain cost) should be deducted from the total of the payments made under regulations 8 and 9. As currently drafted, this regulation could be interpreted as requiring both payments to be reduced by the strain cost.
- 9(8)(a) As currently drafted, 9(8)(a) would require the compensation to be reduced by any payment made under regulation 68 of the 2013 Regulations. This would include any strain cost paid in respect of a previous flexible retirement and any additional pension awarded under regulation 31 that is not connected with the exit.

- 9(9) We believe that the reference to regulation 10 should be replaced by regulation 8. The requirement to reduce compensation by any strain cost is covered by paragraph 9(8).
- 9(10) We have raised concerns about an employer's decision to award compensation having to be made at least three months before the termination date in our comments on regulation 9(2) above. If that requirement remains in the final version of these regulations, we do not believe that it would be appropriate for that compensation to be paid 'as soon as practicable' after the decision is made. It would be more appropriate for the payment date to be paid as soon as practicable after the termination date.
- 9(12) If the changes that we have suggested to regulation 9(7) are adopted, then regulation 9(12) will no longer be required.

## **Regulation 10**

As we have noted in our introductory comments, we believe that provisions relating directly to retirement should be included in the 2013 Regulations and not compensation regulations. We are preparing a document setting out how the proposed changes could be achieved by making amendments to the 2013 Regulations. We will share this with MHCLG in the coming days.

There are many provisions of the LGPS regulations that are contingent on the member being in receipt of a pension from the Scheme. Providing for the payment of pension benefits in compensation regulations would necessitate a significant number of changes to the 2013 and 2014 Regulations to prevent introducing unintended consequences and anomalies. These could be avoided by providing for the payment of pension benefits only in the LGPS regulations.

We have identified the following issues based on the current wording of the draft regulations:

- There is no requirement for the vesting period to be met. As currently drafted, a member with less than two years' membership could qualify for LGPS benefits under regulation 10. This issue would be avoided by moving retirement provisions from these regulations to the 2013 Regulations.



- A pension paid under regulation 10 may not qualify as a pension paid 'under the Scheme'. This could have multiple consequential effects on the member including meeting the vesting period in a future period of membership and the ability to transfer out a deferred benefit despite having a pension in payment. This issue would be avoided by moving retirement provisions from these regulations to the 2013 Regulations.
- Regulation 32 of the 2013 Regulations sets out the rules for the commencement of pensions when a member retires under regulation 30. We believe further amendments will be needed to ensure that the relevant provisions in this regulation apply to retirements under regulation 10. This issue would be avoided by moving retirement provisions from these regulations to the 2013 Regulations.
- A member is entitled to commute pension for additional lump sum under regulation 33 of the 2013 Regulations if they are 'entitled to a pension under the Scheme'. If the member's entitlement to a pension arose under regulation 10, then the option to commute appears not to be open to them. This issue would be avoided by moving retirement provisions from these regulations to the 2013 Regulations.
- Regulation 50 of the 2013 Regulations prevents the payment of pension benefits under those regulations that exceed the lifetime allowance (except in accordance with actuarial guidance). This provision would not apply to a pension paid under regulation 10. This issue would be avoided by moving retirement provisions from these regulations to the 2013 Regulations.
- Regulation 4 of the 2014 Regulations provides for an underpin calculation in respect of certain members. Care is needed to ensure that members who take their pension benefits under regulation 10 receive the same level of underpin protection as those who take their pension benefits under regulation 30 of the 2013 Regulations.
- Regulation 11 of the 2014 Regulations requires the payment of benefits built up in the LGPS before 1 April 2014 that are aggregated with the relevant pension account when a member takes their pension under regulation 30 of the 2013 Regulations. If regulation 11 is not effective when a member retires under regulation 10, then the

aggregated benefits built up before 1 April 2014 appear not to become payable.

10(2) We believe it should be made clear who the relevant Scheme member must make an election to concerning the immediate payment of their retirement benefits. Based on 10(5), it is the employer who must provide the member with details of their options. We assume that the election must also be made to the employer, but this should be explicit in the regulations.

10(2) We believe that the employer should be able to allow members a longer period to make a decision under this regulation. In the short term, administering authorities and employers will need to re-design their processes, re-write standard correspondence and potentially run manual calculations. This is likely to extend the time it takes for the administering authority and employer to be able to provide the figures needed. The total strain cost will not be known until the member's pensionable pay for the last year is finalised. For a member paid in arrears, this could be after their termination date. If the cost of the exit is close to the £95,000 limit, the member's options may not be known until after leaving. Members will be presented with an array of options when they are made redundant or retire on efficiency grounds. Their decision may have a significant impact on their income in retirement. There is a risk of legal challenge from a member who later feels that they were not given sufficient information or time to make an informed decision. Allowing the employer to extend the period the member has to make a decision would add flexibility and reduce the risk of a successful challenge.

We believe that the default position should be specified. We assume that the default position would be for the employee to be awarded deferred benefits (and potentially discretionary compensation in line with the employer's policy). However, this could mean that the individual loses the right to a valuable strain cost payment without making a positive election to that effect.

10(2) We believe that the regulations should specify what happens if a member does not make an election to take immediate payment of their benefits under this regulation.

- 10(2)(a) We appreciate that the wording of this regulation is copied from the 2013 Regulations, but additional pension is not payable under regulation 16. We suggest the word 'payable' is replaced with the words 'in respect of an arrangement'.
- 10(2)(b) The definition of 'relevant Scheme member' in 1(4) does not specify that the member must be active. A relevant Scheme member, as supplemented by regulation 7(1)(b)(ii), includes both active members and those who have opted out of the LGPS with an entitlement to a deferred benefit. As currently drafted, a member who has opted out with deferred benefits who subsequently retires on redundancy or efficiency grounds would be entitled to unreduced benefits (subject to the limits set out in 10(3)). We do not believe that this result reflects the policy intent.
- 10(3) We understand that the 'payment' referred to in 10(3) is the strain payment under regulation 68(2) of the 2013 Regulations. We believe the wording here should be amended to make this explicit.
- 10(3) 10(3) provides for the reduction of member's pension benefits when the strain cost has been restricted by regulation 3 of the 2020 Regulations. There is no corresponding provision that requires a reduction when the strain cost has been reduced by SRP. As currently drafted, when the employer pays a strain cost reduced by SRP, there would be no impact on the member's LGPS benefits. They would remain entitled to an unreduced pension.
- 10(3) We believe a cross-reference to regulation 4 would be useful here. This would make it clear that when an employer pays a reduced strain cost, the member has the option to pay extra to offset the reductions that would otherwise apply.
- 10(3)(b) For clarity, we believe that this paragraph should confirm that the actuarial guidance has been issued in accordance with regulation 2(3) of the 2013 Regulations.
- 10(4) The meaning of this paragraph is not clear. The employing authority is not responsible for paying retirement benefits. Retirement benefits are not payable under regulation 4 and so the reference to regulation 4 is irrelevant. We assume that the purpose of this regulation is to reduce the

strain cost by any SRP amount, but the current wording does not achieve this.

10(5)(b) We have set out our concerns about the deadlines for a member decision in our comments about regulation 10(2) above. We think there should be further flexibility in the regulations to provide for cases where it is not possible for the employer to supply an estimate of the retirement benefits one month before the termination date.

10(5)(c) We do not know why this regulation is required. Amended regulation 68(2) of the 2013 Regulations will require the employer to pay the strain cost to the administering authority. These regulations contain numerous references to the amount payable under regulation 68(2). Adding a new regulation under which the same payments could be made will add confusion.

### **Regulation 11**

11(1) The regulations do not include the date by which an employer must publish their compensation policy statement. This may be intentional, but if it is not intentional then the regulations should specify the deadline.

11(2) The word 'decide' should be replaced with 'decides'.

11(2) The wording of this regulation implies that the employer will be able to comply by amending their existing policy under the 2006 Regulations. If this is not the case, then we recommend a wording change to make the meaning clear.

### **Regulation 12**

We note that the wording of this regulation is unchanged from the wording in regulation 8 of the 2006 Regulations. The 2006 Regulations provided for the payment of compensation by the employer only. If regulation 10 stays in the compensation regulations, then regulation 12 will need amending. As currently drafted, the employer would be responsible for making good any error in pension or retirement grant payments made by the administering authority under regulation 10. This clearly is not the intention.

12(1) We are not aware that any compensation payments could ever be paid in trust. It is possible that this wording is a remnant from the 2000

Regulations. The 2000 Regulations contained provisions about the payment of children's compensation. We believe that the reference to compensation payable in trust can be removed.

#### **Regulation 14**

We believe that these regulations must save the provisions in Schedule 2 of the 2006 Regulations. Schedule 2 relates to compensatory added years (CAY). It still applies to those members who were awarded CAY and are re-employed and provides for survivor benefits to be paid in respect of CAY. We believe that the following wording could achieve this:

'The revocation by these Regulations of any provision which previously revoked any provision subject to savings, does not affect the continued operation of those savings, in so far as they remain capable of having effect'.

#### **Regulation 15**

We understand that the policy is for a transitional period that would serve to reduce member uncertainty and allow employers to progress workforce reforms that commenced before these regulations come into force. Where regulations 15(a) and (b) are satisfied, we believe the intention is for transitional arrangements that mean:

- an employer may pay discretionary compensation under their current policy (and subject to regulation 3 of the 2020 Regulations) without applying the new limits set out in regulation 9, and
- there would be no requirement to reduce the strain cost by SRP as required by regulation 2.

The transitional measures as currently drafted would not deliver this result and, in respect of some exits, would perpetuate the uncertainty faced by many members following the introduction of the 2020 Regulations.

This regulation would not prevent regulations 8 and 9 coming into force. Regulations 8 and 9 are not 'made by or under the 2013 Regulations'. Discretionary compensation paid after these regulations come into force would be subject to the restrictions imposed by regulation 9, even if the requirements of 15(a) and (b) are satisfied.

Regulation 15 would serve to perpetuate the uncertainty faced by LGPS members following the introduction of the 2020 Regulations. If the cost of an exit exceeds the limit set out in regulation 3 of the 2020 Regulations and the requirements of regulation 15(a) and (b) are satisfied:

- the standard calculation of strain cost would not apply, meaning inconsistent application of the cap across the country depending on local methods of strain cost calculation
- it will not be possible to partially reduce the member's benefits. The current conflict between the LGPS regulations and the 2020 Regulations would continue
- the member would not have the option to pay extra in exchange for an unreduced pension.

15 In the first line, 'a' should be replaced by 'an'.

15(a) The word 'came' should be replaced by 'come' and we assume the word 'those' should be replaced by 'these'. If the reference is to different regulations, then they should be specified.

15(a) The inclusion of the word 'agreement' excludes cases where the employer has unilaterally decided to terminate a person's employment.

15(b) If the intention is for the six-month period to include the day on which these regulations come into force, then we suggest the amended wording 'within 6 months beginning with the date on which these regulations come into force' to avoid any ambiguity.

15 The final lines could be interpreted as disapplying the changes brought about by these regulations universally. We suggest an amendment to make it clear that, where the requirements of 15(a) and (b) are satisfied in respect of an exit, that the effect of this regulation is to disapply certain changes **in respect of that exit only**.

## Schedule

We understand that the intention is for these regulations to cover the same employers and office holders that are in scope of the 2020 Regulations. There are risks associated with maintaining two separate lists of employers. To achieve this

aim, these regulations could include a reference the Schedule of the 2020 Regulations instead of an independent list of employers in scope. This would remove the need to update both sets of regulations when a new public sector employer or office is created.

We have identified a number of issues with and differences between the two schedules:

We believe that there is an error in the 2020 Regulations relating to schools as employers covered by the cap. The two relevant entries are:

- The governing body as the employer of staff in community schools, community special schools, pupil referral units, maintained nursery schools, and voluntary controlled schools in England
- The local authority as the employer of staff in foundation schools, foundation special schools, and voluntary aided schools in England

In our view, the employer in these categories is incorrect. The local authority is the employer for the first category and the governing body is the employer for the second. In the corresponding entries for employers in Wales, the correct employer has been listed.

The local authority is deemed to be the employer for pension purposes for those employed at foundation schools, foundation special schools and voluntary aided schools by virtue of Schedule 2 Part 4 of the 2013 Regulations. None of the employers or office holders listed in Schedule 2 Part 4 is covered by these regulations. We believe that these types of school should be included in the Schedule.

A Police and Crime Commissioner (PCC) is included in Parts 1 and 2 of the Schedule to the 2020 Regulations. This means that employees of a PCC and a PCC as an office holder are covered by those regulations. The Schedule to these regulations includes a PCC as an employer only. We believe a PCC as an office holder should be added to the Schedule.

We note that coroners are not covered by these regulations nor the 2020 Regulations. We understand that it is not possible for a coroner to be made redundant and so assume that they have been excluded intentionally.

The Schedule includes a Mayoral development corporation within the meaning of section 198 of the Localism Act 2011. These bodies do not appear in the Schedule to the 2020 Regulations. To ensure a consistent approach, a change is needed so that they are covered by both sets of regulations or neither.

### **Explanatory note**

The explanatory note to regulation 10 refers to an employer's 'discretion to make payments to persons not awarded additional pension'. This may be a reference to an earlier draft of the regulations. No such discretion is provided for in the current wording of regulation 10.

### **Amendments to other regulations**

This section includes amendments to other regulations that may be required in response to the proposed changes.

Regulation 4 of the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 sets out the payments that must be credited to the pension fund. We believe that amendments will be required to ensure that any member payments made under regulations 3 or 4 of these regulations are credited to the pension fund.

Paragraph 2(3) of Schedule 2 to the 2014 Regulations currently allows an administering authority to require additional payment from a Scheme employer when a strain cost arises in certain circumstances. Changing the wording from 'may require' to 'must require' would maintain consistency with the amended regulation 68(2) of the 2013 Regulations.

### **Voluntary retirements**

The policy intention related to waiving early payment reductions in whole or in part under regulation 30(8) of the 2013 Regulations is not clear. The employer may utilise this regulation when a member takes their benefits under regulation 30(5) or 30(6) of the 2013 Regulations. The event that is most likely to be affected by the 2020 Regulations is when the reductions are waived in respect of the retirement of an active member. There are other less common events that could also be affected by the 2020 Regulations and these proposed reforms that must be considered:



- A member who has opted out of the Scheme is subsequently terminated due to redundancy or efficiency over age 55. The employer agrees to waive the early payment reductions under regulation 30(8) as part of the exit agreement. In this circumstance, we would expect regulations 2 and 9(8) to apply - the strain cost should be reduced by the SRP amount and the compensation reduced by the strain cost. What changes are required to achieve this aim depends on whether a 'relevant Scheme member' must be an active member on the termination date.
- An active member is terminated due to redundancy or efficiency over age 55. The member opts not to take their LGPS benefits under regulation 10, but to take them immediately under regulation 30(5) of the 2013 Regulations. The employer waives all or part of the early payment reduction that would apply. As above, we would expect the provisions of regulation 2 and 9(8) to apply in this case.

The wording of regulation 4(4) suggests that a member has the option to pay extra to offset the actuarial reduction that would otherwise apply when their employer has agreed to waive some of an early payment reduction under regulation 30(8) of the 2013 Regulations. However, the regulations do not deliver this policy. If this is the intention, the regulations will need to be clear:

- that this option is open to members
- whether the option is only available when the strain cost payable by the employer has been restricted by the 2020 Regulations
- whether the member is limited by the full strain cost the employer would have elected to pay, but for the restriction imposed by the 2020 Regulations, or
- whether the fact that the employer has waived the reductions in part allows the member to buy out the whole reduction.

There are further complexities associated with the strain cost when a member flexibly retires and subsequently leaves employment due to redundancy or efficiency. We have provided more detail on this issue in our comments on [regulation 2](#).

## **Award of additional pension**

An employer may award additional pension to a member who leaves due to redundancy or business efficiency under regulation 31(1)(b) of the 2013 Regulations. The cost of any such award would be subject to the limit set in the 2020 Regulations. Regulation 9 prevents an employer from paying discretionary compensation if they have awarded additional pension under regulation 31. The regulations do not introduce any further restrictions on whether an employer may make such an award. In the absence of any further restrictions, the following scenarios may arise:

1. A member over age 55 leaves due to redundancy or efficiency and opts to receive immediate payment of their pension under regulation 10. The strain cost would be reduced by any SRP amount, and the pension benefits partially reduced accordingly. The employer may award additional pension under regulation 31(1)(b) to offset the actuarial reduction, fully or in part. That additional pension would be payable without reduction and would therefore increase the pension strain cost.
2. A member over age 55 leaves due to redundancy or efficiency and opts for reduced benefits under regulation 30(5). The employer could award additional pension under regulation 31(1)(b) to offset the actuarial reduction, fully or in part. Any additional pension would be actuarially reduced.

The limits set out in the 2020 Regulations and in regulation 31(2) of the 2013 Regulations would apply in both scenarios.