Appendix 2

THE £95K EXIT CAP AND WIDER EXIT PAY REFORM

As reported at the last committee, HM Treasury (HMT) consulted on the implementation of a long-awaited reform of exit pay for public sector employees. This introduced limits on compensation paid by an employer as well an overall exit cap of £95,000 on all employer payments made when an employee exits the public sector. This usually would apply in relation to redundancy but can relate to other cessations of employment. Crucially it also confirmed that the "pension strain" would be included as an exit payment so fell within the test against the overall £95k exit cap. The HMT Regulations to implement the reforms were expected to be signed and implemented in conjunction with the changes required to the LGPS Regulations.

On 7 September 2020, MHCLG then launched its own consultation (until 9 November) on:

- how the exit cap would operate within the LGPS, and
- how it would interact with the employer compensation payments made to members,

resulting in more options and decisions for affected members. Crucially, it included draft LGPS regulations and draft Government Actuary's Department (GAD) guidance covering how the pension strain would be calculated, as well as how pensions could be reduced where the overall exit cap of £95,000 is breached, in order to bring the overall compensation back within the limit.

Other than the draft Regulations, the consultation was primarily to consider if any groups of employees were adversely affected and so the Pensions Advisory Panel concluded a Fund response was not appropriate. This conclusion was also mindful of the Local Government Association intention to issue a comprehensive response on the matters identifying the disproportionate implications for lower paid employees in particular. The consultation on the change to the LGPS regulations and GAD guidance was subsequently extended by MHCLG to 18 December. The Fund Actuary has responded with comments on the application of the draft guidance. It is expected that the new LGPS regulations and guidance will not be in force until February/March 2021 at the earliest.

Despite requests for the two sets of Regulations to be implemented simultaneously, HMT regulations to implement the £95,000 exit cap were agreed in the House of Commons on 30 September, and the Statutory Instrument was signed on 14 October 2020 meaning that the legislation came into force on 4 November 2020.

This now means there is a conflict between the existing LGPS Regulations and the new HMT Regulations, which puts Funds (and employers) in an extremely difficult position for members who will exceed the cap. The Scheme Advisory Board (SAB) therefore sought Counsel's opinion on the best way forward. Separately there have been several proposed Judicial Review applications on the introduction of the new HMT Regulations and their application to the LGPS. We wait to see the outcome of these challenges.

As a consequence of the conflict, on 30 October a number of documents were published by HMT and the SAB relating to the operation of the exit cap for exits on or after 4 November. These also set out a possible way forward in the interim until updated LGPS regulations are in place. This affects all Funds and employers listed in the schedule to the HMT regulations in England and Wales. It also set out the waiver process in England and noted that the waiver process in Wales will be determined by Welsh Government.

On 2 November, Welsh Government issued a letter stating that subject to legal advice they are considering introducing a general waiver applying in Wales which excludes the pension strain cost from the assessment against the exit cap where legally possible. This would greatly simplify the position in Wales, as it means that whilst members would be capped for payments made by the employer, they would still be entitled to their full pension benefits. We await further confirmation on this issue.

If, after taking legal advice, this general waiver is not confirmed by Welsh Government, the Fund will have to form a policy on how to approach this conflict between the current LGPS Regulations and the HMT Regulations for members where the £95k cap may bite. For members under the cap or members who work for employers not subject to the HMT Regulations there will be no change i.e. members will continue to be entitled to full benefits.

Cases Where The £95,000 Cap May Bite
Key policy considerations would be:

- Should the Fund pay unreduced benefits in line with the current LGPS Regulations?
- If unreduced benefits are paid can the strain cost above £95,000 be collected from the employer now or in the future?
- How should the Fund calculate the strain costs? In line with the anticipated GAD guidance or maintain the current approach?
- Should the Fund and employers take legal advice on the best course of action given the conflict between the two sets of regulations?
- What are the consequences for the Fund, employers and importantly the members?
- Are the Fund and employers content to follow the SAB proposed approach i.e. pay reduced benefits or offer a deferred pension, accepting this approach is likely to lead to potential challenge from affected members for payment of full benefits?

LGA has issued information notes for employers and for Funds on how to approach the issues, which are available from the Public Sector Exit Payments page and we would recommend keeping up to date at this page as the situation continues to develop.

Irrespective of the answers to the questions above, it is clear that if a temporary policy has to be implemented it will mean great difficulty in administering the outcome as well as communicating the arrangements to members affected. This is another reason why the potential waiver in Wales is important.