

FAIR DEAL – STRENGTHENING PENSION PROTECTION POLICY CONSULTATION

Report of the County Treasurer

Please note that the following recommendations are subject to consideration and determination by the committee before taking effect.
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Recommendation: The Committee approves the consultation response, attached at Appendix 2.

1. Introduction

- 1.1. The Ministry of Housing, Communities and Local Government (MHCLG) released a consultation in May 2016 regarding the introduction of greater pension protection for employees of LGPS employers who are compulsorily transferred to service providers.
- 1.2. The 2016 consultation proposed that, in line with the Government's Fair Deal guidance of October 2013, most LGPS members in this position should have continued access to the LGPS with the new service provider.
- 1.3. A further consultation regarding Fair Deal will be running from 10th January to 4th April 2019, which takes into consideration some of the concerns raised in the initial consultation. The consultation document is attached at Appendix 1.

2. The Consultation and Proposed Changes

- 2.1. The latest consultation is requesting views on the following proposals:
 - Amendments that would require service providers to offer LGPS membership to individuals who have been compulsorily transferred from an LGPS employer, removing the option of offering a broadly comparable scheme.
 - Automatic transfer of LGPS assets and liabilities when employers in the scheme are involved in a merger or takeover.
- 2.2. It is also proposed that all LGPS scheme employers will be considered as Fair Deal employers with the exception of:
 - further education corporations, sixth form college corporations and higher education corporations (i.e. post-1992 universities)
 - admission bodies
- 2.3. Contractors who provide services to the organisations listed above will continue to provide access to the LGPS for transferred staff via an admission agreement with the pension fund (subject to meeting requirements and with the agreement of the contracting employer); however, there would be no obligation for them to do so under the scheme regulations.

- 2.4. A Fair Deal employer must ensure that protected transferees are given access to the LGPS for as long they remain a protected transferee and have an entitlement to membership of the scheme.
- 2.5. Transitional arrangements will cover those staff who have already been outsourced, in order for them to become protected transferees if and when services are re-tendered.
- 2.6. The consultation also proposes that service providers do not necessarily need to become admission bodies to participate in the LGPS. Instead, employers could be given 'deemed employer' status, a classification of employer which already exists within LGPS regulations.
- 2.7. For an employee of a deemed employer, the scheme employer in the LGPS would not be their employer under employment law. For example, the deemed employer of a voluntary school is the associated local authority.
- 2.8. The LGPS Scheme Advisory Board (SAB) will issue guidance to assist employers under Fair Deal with service contracts and to help protect them from potential risks.
- 2.9. The admission body route will remain an option so that Fair Deal employers can decide if they wish for a service provider to become a full scheme employer in the LGPS. This approach may be more appropriate for larger, longer term contracts where it is more fitting for a service provider to have full employer responsibilities under the LGPS regulations.
- 2.10. The draft regulations include an additional paragraph within part 3 of schedule 2 of the LGPS Regulations 2013, confirming that admission agreements may contain details of the risk sharing arrangements agreed between the Fair Deal employer and the service provider. We anticipate that advice issued by the SAB will contain further details regarding the risk sharing provisions that may be included within admission agreements.
- 2.11. The proposed response is attached at Appendix 2.

3. Conclusion

- 3.1. The Fair Deal proposals are intended to strengthen the pensions protections that apply following an outsourcing and it is expected that all transferred staff of relevant LGPS employers will benefit equally from the new provisions.
- 3.2. The Committee is asked to approve the proposed consultation response from the Devon Pension Fund.

Mary Davis

Electoral Divisions: All

Local Government Act 1972

List of Background Papers - Nil

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Ministry of Housing,
Communities &
Local Government

Local Government Pension Scheme: Fair Deal – Strengthening pension protection

Policy consultation



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Scope of the consultation

Topic of this consultation:	<p>This consultation seeks views on proposals to amend the rules of the Local Government Pension Scheme in England and Wales, as set out in the draft Local Government Pension Scheme (Amendment) Regulations 2019 (Annex A). It covers the following areas:</p> <ol style="list-style-type: none"> 1. Amendments that would require service providers to offer LGPS membership to individuals who have been compulsorily transferred from an LGPS employer (and remove the option of a broadly comparable scheme). 2. Proposals that would automatically transfer LGPS assets and liabilities when employers in the scheme are involved in a merger or takeover.
Scope of this consultation:	MHCLG is consulting on changes to the regulations governing the Local Government Pension Scheme (LGPS).
Geographical scope:	These proposals relate to the Local Government Pension Scheme in England and Wales only.
Impact Assessment:	<p>Our Fair Deal proposals will strengthen the pensions protections that apply following an outsourcing and it is intended that all transferred staff of relevant LGPS employers will benefit equally from the new provisions. We do not believe our proposals will have an adverse impact on any section of the LGPS employer workforce, and believe they will have equal positive impacts on groups with and without particular protected characteristics. This is including in relation to staff who work flexibly, part-time or who have taken career breaks. This is because our reforms are intended to equalise pensions rights between those who have and have not been outsourced from their LGPS employer, with them all having continued access to membership of the LGPS.</p> <p>None of the changes contained in this consultation require a Regulatory Impact Assessment under the Small Business, Enterprise and Employment Act 2015. Our Fair Deal proposals will require bodies who provide services to LGPS employers to provide employees with continued access to the LGPS following a transfer. For a small number of transfers, there may be some additional costs associated with outsourcing staff under the new provisions. This may be the case where an LGPS employer is not currently subject to the 2007 or 2012 Directions (see paragraph 8), but it is proposed they would be subject to our new regulations. Nevertheless, we expect this to apply in a minority of situations and only to outsourcings from public bodies or publicly owned companies.</p>

	<p>Additionally our proposals to introduce a new way for contractors to participate in the LGPS (the 'deemed employer' approach) are intended to give greater flexibility to outsourcing employers which will potentially help them obtain better value from their contracts. For contractors, the proposals are intended to give them greater certainty on the pensions costs they will face over the life of the contract.</p> <p>The proposals in chapter 3 that provide for the automatic transfer of assets and liabilities where an employer is subject of a merger or takeover are intended to protect LGPS funds from the unintended consequences of organisational changes. They are also intended to give greater certainty to all parties about the responsibility for pensions liabilities after such events.</p>
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Basic Information

To:	<p>This consultation is particularly aimed at those with an interest in the obligations that apply when a service or function is outsourced from an LGPS employer, including employees, outsourcing employers, and service providers.</p> <p>Any change to the LGPS is likely to be of interest to other stakeholders as well, such as local pension administrators, those who advise them, other LGPS employers and local taxpayers.</p>
Body/bodies responsible for the consultation:	Local Government Finance Reform and Pensions, Ministry of Housing, Communities and Local Government
Duration:	This consultation will last for 12 weeks from Thursday 10 January 2019 to Thursday 4 April 2019.
Enquiries:	For any enquiries about the consultation please contact LGPensions@communities.gov.uk .
How to respond:	<p>Please respond by email to:</p> <p>LGPensions@communities.gov.uk</p> <p>Alternatively, please send postal responses to:</p> <p>LGF Reform and Pensions Team Ministry of Housing, Communities and Local Government 2nd Floor, Fry Building 2 Marsham Street London SW1P 4DF</p> <p>When you reply it would be very useful if you could make it clear which questions you are responding to. Additionally,</p>

	<p>please confirm whether you are replying as an individual or submitting an official response on behalf of an organisation and include:</p> <ul style="list-style-type: none"> - your name, - your position (if applicable), - the name of organisation (if applicable), - an address (including post-code), - an email address, and - a contact telephone number.
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Chapter 1 – Introduction

1. The Ministry of Housing, Communities and Local Government (MHCLG) consulted in May 2016¹ on the introduction of greater pensions protection for employees of LGPS employers who are compulsorily transferred to service providers. The 2016 consultation proposed that, in line with the Government's Fair Deal guidance of October 2013², most LGPS members in this position should have continued access to the LGPS in their employment with the service provider. In doing so, it was proposed that the option to provide transferring staff with access to a broadly comparable scheme should be removed.
2. On 19 April 2018, the Government response to the consultation confirmed our commitment to introduce the strengthened Fair Deal in the LGPS but noted that respondents to the 2016 consultation had raised a number of concerns regarding the specific approach we proposed to adopt. We said we would give full consideration to the points raised and committed to consult on new proposals by the end of the year.
3. Chapter 2 of this document sets out our new policy proposals for introducing Fair Deal in the LGPS, which will enable LGPS employers to obtain better value from outsourced service contracts, and ensure that transferred employees retain the security which comes with membership of the LGPS, a statutory scheme with benefits set out in law. We welcome comments from respondents on our questions.
4. We are also taking this opportunity to consult on another change to the rules of the LGPS (as set out in more detail in Chapter 3). This change would provide for the automatic transfer of LGPS assets and liabilities to a successor body when an exiting LGPS employer is taken over or is part of a merger.
5. Your comments are invited on the questions contained in chapters 2 and 3 and the set of draft regulations at Annex A.
6. **The closing date for responses on the draft regulations at Annex A, and the related questions in Chapters 2 and 3, is Thursday 4 April 2019.**

¹ <https://www.gov.uk/government/consultations/local-government-pension-scheme-regulations>

² <https://www.gov.uk/government/publications/fair-deal-guidance>

Chapter 2 – Fair Deal

7. The Government's 'Fair Deal' policy was introduced in 1999 and sets out how pensions issues should be dealt with when staff are compulsorily transferred from the public sector to independent providers delivering public services. Under the original Fair Deal guidance, transferred staff had to be given access to a scheme certified as being 'broadly comparable' to their previous public service pension scheme.
8. Following the publication of the Government's original Fair Deal guidance, pensions protection for local government employees in England and Wales was provided through:
 - the Best Value Staff Transfers (Pensions Direction) 2007 ('the 2007 Direction' - covering employees of English best value authorities and Welsh Police authorities), and
 - the Welsh Authorities Staff Transfers (Pensions) Direction 2012 ('the 2012 Welsh Direction' - covering employees of Welsh improvement authorities and community councils).
9. Under these Directions, protected employees who are contracted out to a new employer following the transfer of a service or function must be given either continued access to the LGPS by their new employer, or access to a scheme certified by an actuary as 'broadly comparable' to the LGPS.
10. The Government announced in July 2012 that the Fair Deal policy would be reformed. Under the 'new' Fair Deal policy, staff transferring from the public sector would have continued access to their public service pension scheme rather than being offered a broadly comparable private pension scheme, as was previously the case.
11. HM Treasury published its revised Fair Deal guidance in October 2013³. It covers central government departments and their agencies, the NHS, schools that are not local authority maintained (such as academies), and any other parts of the public sector under the control of Ministers where staff are eligible to be members of a public service pension scheme.
12. As set out in the Introduction, the Government now intends to introduce the strengthened Fair Deal in the LGPS. The proposed reforms will mean that independent providers will no longer have the option of providing transferred staff with access to a broadly comparable scheme. Instead, employees will always have continued access to the LGPS. This strengthens existing protections significantly. Protected employees will have increased confidence and security in knowing that, despite their transfer, they will retain a right to all the benefits that come with membership of the LGPS, not least that it is a statutory scheme with benefits set out in law. Moreover, so long as the protected employees remain wholly or mainly employed on the delivery of the service or function

³ <https://www.gov.uk/government/publications/fair-deal-guidance>

transferred, they will continue to have that protection even if the service is subsequently sub-contracted or transferred out again.

13. Responses to the 2016 consultation were mixed. Whilst many respondents were supportive of our aims in providing transferred staff with continued access to the LGPS, there were a variety of concerns on the detail of the proposals. More detail on the issues raised are contained in the Government's April 2018 response, but they can be summarised as concerns:

- regarding the employers to which our Fair Deal regulations would apply.
- that those already transferred out under the 2007 Direction would not have continued protection.
- that the proposals did not refer to the protections that apply in Wales (i.e. the 2012 Welsh Direction).
- that the regulations were a missed opportunity to consider introducing more explicit risk sharing provisions.
- that continued use of the admitted body framework could lead to a growing administrative burden for LGPS administrators.
- the lack of guidance.

14. In the following sections, we set out the detail of new proposals which are intended to address each of those concerns in turn and provide the framework for a workable, efficient system of pension protection.

The basics of Fair Deal in the LGPS

Protected transferees

15. The draft regulations apply in both England and Wales. They provide for the introduction of a new regulation 3B in the LGPS Regulations 2013⁴. Under this, an LGPS employer must ensure that protected transferees are given access to membership of the LGPS for so long as they remain a protected transferee and have an entitlement to membership of the scheme. A protected transferee is an individual who:

- a. is an active member or is eligible to be an active member of the LGPS,
- b. was employed by a Fair Deal employer (as defined) immediately before that person's employment was compulsorily transferred under a contract to a service provider in relation to the delivery of a service or a function of the Fair Deal employer.

16. A protected transferee will remain a protected transferee for so long as they remain wholly or mainly employed on the delivery of the service or function transferred, even if the service is subsequently sub-contracted or otherwise transferred to a different service provider.

⁴ S.I. 2013/2356 (as amended)

17. Where an employee is transferred out to an employer which offers membership of another public service pension scheme, the draft regulations provide that they would not be eligible for the LGPS but that they would remain a protected transferee. This ensures that if, following a re-tender, they are subsequently transferred to a new provider which does not offer a public service pension scheme, they do not lose their protection.
18. Service providers and Fair Deal employers may wish to consider offering the same status and protection to all staff who are providing a service as part of contract negotiations, whether or not they were previously employed by the Fair Deal employer. The draft regulations therefore also provide that an employee who is working wholly or mainly on the delivery of the service or function transferred may be treated as a protected transferee even if they were not formerly in the employment of the Fair Deal employer. However, protection for additional staff who are not covered by Fair Deal will remain subject to contract terms. The draft regulations therefore provide that protected transferee status for staff will require the agreement of both the Fair Deal employer and the service provider and it is proposed either party can determine at any time that such an individual is no longer a protected transferee.

Question 1 – Do you agree with this definition?

Fair Deal employers

19. The draft regulations define a new type of scheme employer, a 'Fair Deal employer'. As defined, Fair Deal employers are those LGPS employers whose employees will have protected access to the LGPS following a compulsory transfer of the type outlined above.
20. Some respondents to the 2016 consultation queried our approach on the employers covered by Fair Deal. One concern raised was regarding consistency. It was suggested that it was inconsistent for further and higher education institutions who participate in the LGPS to be excluded on the grounds that they are non-public sector bodies⁵, whilst admission bodies, the majority of whom are also non-public sector bodies, would be covered by the requirements. Aside from those admission bodies who participate in the LGPS in relation to the transfer of a service or function ('transferee' admission bodies), admission bodies are bodies who normally participate in the LGPS because of close links with a local authority or because they provide a public service ('community' admission bodies). They include charities, housing associations and other non-public sector bodies, and are not required to participate in the LGPS.
21. In light of the concerns raised, it is proposed that admission bodies which undertake an outsourcing will have the option of requiring service providers to offer continued access to the LGPS as they do now, but will not be obliged to do so. Whilst we are committed to ensuring that public sector workers who are eligible for the LGPS are protected after being outsourced, we do not wish to limit the freedom that non-public sector

⁵ In the terms set out by the Office for National Statistics,
<https://www.ons.gov.uk/economy/nationalaccounts/uksectoraccounts/datasets/publicsectorclassificationguide>

organisations can reasonably expect in the total package they offer to their staff, including pay and pension.

22. Other respondents felt that the employees of police and crime commissioners (PCCs) worked in the public sector and should be protected under our Fair Deal regulations. In the 2016 consultation, we said that PCCs should not be required to follow Fair Deal because they are not best value authorities. However, in order to be consistent with the approach we are taking for local government and noting the concerns made by respondents to our previous consultation, it is now proposed that employees of PCCs are in the scope of the new regulations, in the same way as is proposed for employees of chief constables.
23. In light of the points noted above, under our draft regulations all LGPS scheme employers will be Fair Deal employers with the exception of:
- further education corporations, sixth form college corporations and higher education corporations (i.e. post-1992 universities), and
 - admission bodies.

As they do now, contractors providing services to the organisations listed above will be able to provide access to the LGPS to transferred staff via entering into an admission agreement with the pension fund (subject to meeting requirements and with the agreement of the contracting employer), but there would be no obligation for them to do so under scheme regulations.

Question 2 – Do you agree with this definition of a Fair Deal employer?

Transitional arrangements

24. It is important to the Government that those who have previously worked in local government and who are protected under either the 2007 Direction or 2012 Welsh Direction do not lose out from the changes we are making. Our draft regulations therefore provide that when contracts that fall under the 2007 Direction or 2012 Welsh Direction are next re-tendered, protected staff will become protected transferees under the LGPS Regulations 2013 and gain a right to membership of the LGPS.
25. This level of protection goes beyond the current requirements of the 2007 and 2012 Directions, which provide that service providers have the option of providing staff with access to a broadly comparable scheme instead. It is our intention to take the necessary steps to ensure that staff who were transferred out under the 2007 Direction or under the 2012 Welsh Direction gain the improved protections the next time a contract is re-tendered. We will work with the Welsh Government on transitional arrangements to deliver this in relation to transfers that have taken place under the 2012 Direction.
26. Transferred employees who were entitled to pension protection under the 2007 Direction or the 2012 Direction and were given access to a scheme certified as broadly comparable to the LGPS will have a right to transfer their benefits from that scheme to the LGPS if the fund receives a request. Under our draft regulations, such transfers would be treated as individual transfers under existing provisions contained in

regulations 100 and 101 of the LGPS Regulations 2013. We propose that the value of transfers be calculated using Cash Equivalent Transfer Value (CETV) factors contained in actuarial guidance issued by the Secretary of State. CETV factors are issued to convert the transfer value received by an LGPS fund to an amount of career average pension on an actuarially neutral basis. This approach is intended to ensure that inward transfers are calculated using an established process that is fair to scheme members, scheme employers and local taxpayers.

Question 3 – Do you agree with these transitional measures?

Question 4 – Do you agree with our proposals regarding the calculation of inward transfer values?

Risk sharing

27. A significant issue highlighted by respondents to the 2016 consultation was in relation to risk sharing, sometimes known as ‘pass-through’. Pass-through is a mechanism for limiting a service provider’s exposure to pensions risk as a scheme employer. As the LGPS is a funded, defined benefit pension scheme there are a number of risks which scheme employers are exposed to, in particular:

- Contributions risk – employer contribution rates are assessed every three years via a funding valuation. If the valuation shows that the financial or demographic position of the employer, or both, has changed since the previous valuation, contribution rates can go up or down.
- Funding risk – when an employer’s last active member leaves the LGPS, any deficit that has built up in relation to the employer’s liabilities has to be paid to the LGPS fund by the scheme employer. For service providers, these deficits can be quite large, even by reference to the total value of the contract.

Under pass-through, a service provider may pay a fixed contribution rate for the life of the contract, or pay the contributions within a certain range. The outsourcing employer may retain the responsibility for any shortfall in contributions, as well as the benefit of any surplus.

28. There are a number of benefits to using a pass-through approach:

- For the service provider, they do not necessarily bear the risks listed above. This makes their cost/benefit analysis when considering bidding for a contract more straightforward. We are aware that for small and medium service providers in particular, pensions risk is a significant barrier, and can mean they do not bid for contracts they otherwise would, because they cannot bear the risk of significant contribution rate increases or of the risk of a large exit payment being required at the end of the contract.
- For the Fair Deal employer they do not have to pay the ‘risk premium’ which service providers sometimes build into their contract prices. Because of contributions risk and funding risk, we understand that service providers often build a buffer into their prices to ensure that it is still profitable for them to operate a contract even if, for example, LGPS contributions end up being much higher than originally stated.

Using pass-through removes the need for such a buffer (and should therefore mean Fair Deal employers get better value for money).

The 'deemed employer' approach

29. We are aware that some LGPS employers already use pass-through arrangements with their service providers where greater flexibility assists outsourcing. However, in light of the views expressed in the responses to the 2016 consultation we want to ensure that Fair Deal employers actively consider the potential benefits of including risk sharing provisions in their service contracts. To achieve this, we are proposing that service providers do not necessarily need to become admission bodies in the LGPS to participate in the scheme. Instead, 'deemed employer' status could be used instead.
30. Deemed employer status is available under the LGPS Regulations 2013 already (see the table in part 4 of schedule 2). It means that, for specific groups of employees, their 'scheme employer' in the LGPS is not their employer in employment law, but is the 'deemed employer' instead. For example, under the LGPS Regulations 2013, the 'deemed employer' for the employees of voluntary schools is the associated local authority.
31. Under our proposals, when an employee is compulsorily transferred from their Fair Deal employer to a service provider, their former employer will have the option of remaining the deemed employer for the transferred staff.
32. Using this approach, the service provider would not have full scheme employer responsibilities under the LGPS Regulations 2013. Instead, the default position would be that the Fair Deal employer would retain the majority of scheme employer responsibilities (including contributions and funding risk). However, we envisage that this would only be a starting point, and the service contract between the parties would cover the detail of the pensions relationship, including the sharing of risk.
33. With appropriate provisions in the service contract, deemed employer status will give Fair Deal employers like local authorities greater flexibility when transferring services and functions to external providers. This will enable them to achieve the benefits of pass-through while enabling flexibility for negotiations around price and risk sharing between the two parties.
34. In addition, a major benefit of this approach is that it will provide a more seamless transition for LGPS members. A frequent issue under the current system is that a contract commences before the admission agreement is signed, leaving members in limbo for long periods of time. Under the deemed employer approach, members would continue in the section of their Fair Deal employer and there would be no uncertainty regarding their pension rights. Administering authorities would also benefit from not having to backdate admission agreements or seek to enforce these retrospectively.
35. The deemed employer approach will also help to tackle a growing issue in the LGPS; the large and rising number of scheme employers (over 16,000 across the scheme in England and Wales), which causes administrative issues at a local level. Making use of deemed employer status would slow the rate of increase and could therefore have administrative benefits for LGPS pension funds.

36. Using deemed employer status may also give greater flexibility to contractors in how they account for their pensions obligations. Currently, contractors who participate in the LGPS via an admission agreement but who have entered into pass-through arrangements may have to account for their liabilities on a defined benefit basis (even though their obligations are more akin to defined contribution liabilities). The deemed employer approach may enable a different accounting treatment because the legal responsibility would remain with the Fair Deal employer.
37. Using deemed employer status in this way has potential risks for Fair Deal employers because it means they are, by default, responsible for the pension liabilities which would, under an admission agreement, automatically be the responsibility of the service provider. However, the Fair Deal employer would be able to protect itself from these risks by including detailed provisions on the pensions relationship between the Fair Deal employer and the service provider in the service contract.
38. The draft regulations state that advice will be issued by the LGPS Scheme Advisory Board (SAB) to help Fair Deal employers put in place service contracts which give them flexibility and protect them from potential risks. We will want to ensure that this advice gives Fair Deal employers the knowledge and confidence they need to outsource services in a way that provides them with value and gives increased certainty to service providers. We will work closely with the SAB on the development of this advice, and expect that it will be issued before or at the same time the Fair Deal regulations are issued.
39. The draft regulations also provide that the deemed employer approach can only be used by the proprietor of an academy where that proprietor has followed guidance on the use of the deemed employer approach given by the Department for Education. Guidance issued by the Department for Education will set out the provisions that must be included in the service contract between a proprietor of an academy and a service provider to protect the proprietor, and ultimately the Department for Education, from pensions risks which should in all cases be met by the service provider.

Question 5 – Do you agree with our proposals on deemed employer status?

Question 6 – What should advice from the scheme advisory board contain to ensure that deemed employer status works effectively?

Responsibilities for employers

40. In practice, even where the deemed employer approach is used, the service provider will retain an administrative role in relation to the pensions of their employees. As the legal employer, they will be responsible for deducting employee contributions and providing information to the pension fund (for example, for end of year processing). To ensure that the actions of the service provider do not prevent the Fair Deal employer from meeting their responsibilities, the draft regulations state that the service provider must provide sufficient and timely information to enable the Fair Deal employer to meet its scheme functions. We anticipate that this point will be addressed in more detail in advice issued by the Scheme Advisory Board.

41. We are also keen to ensure that, unless service contracts explicitly provide otherwise, responsibility for certain decisions that may give rise to costs arising is retained by the service provider, as well as the responsibility for meeting those costs. In particular, the draft regulations provide that the service provider shall retain the decision-making responsibility for decisions where costs may be payable under regulation 68 of the LGPS Regulations 2013. This covers a variety of costs, including ill-health, redundancy, flexible retirement and the award of additional pension.

Question 7 – Should the LGPS Regulations 2013 specify other costs and responsibilities for the service provider where deemed employer status is used?

Existing arrangements

42. Whilst we believe there are significant advantages of making use of deemed employer status, we propose that the admission body option is retained so that Fair Deal employers can choose to require their service providers to become full scheme employers in the LGPS if they wish. This approach may be more appropriate for larger, longer term contracts where it is more fitting for a service provider to have full employer responsibilities under the LGPS regulations.

43. To make clear that risk sharing practices can also be used where the admission body option is used, our draft regulations insert a paragraph into part 3 of schedule 2 of the LGPS Regulations 2013 confirming that admission agreements may also contain details of risk sharing arrangements agreed between the Fair Deal employer and the service provider. We anticipate that advice issued by the SAB will contain detail on the provisions that may be put into an admission agreement on risk sharing between the parties involved.

Question 8 – Is this the right approach?

Timely consideration of pensions issues

44. An issue that is frequently raised with regard to outsourcing by LGPS employers is the lack of priority given to pensions issues. Often admission agreements are not signed before the contract takes effect leading to periods of limbo for members. This can be a barrier to the parties to a contract sharing risk effectively. Indeed, lack of consideration of pensions issues at the contract negotiation stage could be damaging to those Fair Deal employers using the deemed employer approach. In our April 2018 response to the 2016 consultation, we said we would consider the issues around this further.

45. The draft regulations we are consulting on require that the service contract between a Fair Deal employer and the service provider state whether continued access to the LGPS will be provided via the deemed employer route or via the admission body route. We intend that this requirement will ensure consideration is given to pensions issues at an early stage, and the substantive differences between the two options are fully appreciated.

46. We also expect timely consideration of pensions issues to be covered in the SAB advice, with the benefits of doing so. For example, to ensure that the best value can be obtained from outsourcing exercises, Fair Deal employers should confirm the approach

they intend to adopt at the point they are inviting bids from potential service providers. We welcome views from consultees on other ways in which we can encourage early consideration of pensions issues.

Question 9 – What further steps can be taken to encourage pensions issues to be given full and timely consideration by Fair Deal employers when services or functions are outsourced?

Public sector equality duty

47. Our Fair Deal proposals will strengthen the pensions protections that apply following an outsourcing and it is intended that all transferred staff of relevant LGPS employers will benefit equally from the new provisions. We do not believe our proposals will have an adverse impact on any section of the LGPS employer workforce, and believe they will have equal positive impacts on groups with and without particular protected characteristics.

Question 10 – Are you aware of any other equalities impacts or of any particular groups with protected characteristics who would be disadvantaged by our Fair Deal proposals?

Chapter 3 – Transferring pension assets and liabilities

48. In recent years, the frequency with which LGPS scheme employers have been involved in mergers or takeovers has increased. This increase is partly a consequence of reforms within the public sector (including local authority schools becoming academies, whose proprietors have employer responsibilities in their own right), and of new organisational structures being used by LGPS employers for the delivery of services and functions.
49. When the last active member of an LGPS scheme employer leaves the scheme, the regulations provide that an exit payment usually needs to be paid to the LGPS fund. This means the exiting employer becomes liable for the payment of an amount which is intended to cover the costs of their entire pensions liability, and which is calculated on a low-risk basis. Because of this, the exit payment is often high, particularly in relation to the size of the ceasing employer.
50. Where an LGPS scheme employer merges into, or is taken over by, another organisation this exit payment can sometimes be triggered unintentionally and potentially leave the ceding organisation with a liability they cannot meet. If they cannot do so, the liability will be met by the other employers in the fund (and ultimately the local taxpayer).
51. To address these concerns we propose to amend the regulations to provide that when an LGPS scheme employer is merged into or taken over by another organisation, the responsibility for that pensions liability automatically transfers to the successor body, unless specific legislative provisions require otherwise. This is intended to ensure that normal business activities, such as mergers and takeovers, can take place effectively and efficiently without unintended consequences occurring in respect of an employer's LGPS liabilities.
52. In addition, we propose that where the successor body is also an LGPS employer with active members in another fund, the assets and liabilities must be automatically transferred to that fund and combined with the successor body's assets and liabilities.
53. We propose that the Secretary of State should issue guidance on this area and that, in particular, guidance should cover the terms of transfers of assets and liabilities between pension funds.

Question 11 – Is this the right approach?

Question 12 – Do the draft regulations effectively achieve our aims?

Question 13 – What should guidance issued by the Secretary of State state regarding the terms of asset and liability transfers?

About this consultation

This consultation document and consultation process have been planned to adhere to the Consultation Principles issued by the Cabinet Office.

Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Information provided in response to this consultation, including personal data, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation, and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, as a public authority, the Department is bound by the Freedom of Information Act and may therefore be obliged to disclose all or some of the information you provide. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Ministry of Housing, Communities and Local Government will process your personal data in accordance with the law and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties. A full privacy notice is included at Annex B.

Individual responses will not be acknowledged unless specifically requested.

Your opinions are valuable to us. Thank you for taking the time to read this document and respond.

Are you satisfied that this consultation has followed the Consultation Principles? If not or you have any other observations about how we can improve the process please contact us via the [complaints procedure](#).

Annex A – Draft regulations

STATUTORY INSTRUMENTS

2019 No.

PUBLIC SERVICE PENSIONS, ENGLAND AND WALES

The Local Government Pension Scheme (Amendment) Regulations 2019

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

These Regulations are made in exercise of the powers conferred by sections 1, 3 and 25 of, and Schedule 3 to the Public Service Pensions Act 2013^(a).

In accordance with section 21 of that Act, the Secretary of State has consulted the representatives of such persons as appeared to the Secretary of State to be likely to be affected by these Regulations.

In accordance with section 3(5) of that Act, these Regulations are made with the consent of the Treasury.

The Secretary of State makes the following Regulations:

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Local Government Pension Scheme (Amendment) Regulations 2019.

(2) These Regulations come into force on [xxx] but have effect as follows [xxx].

(3) These Regulations extend to England and Wales.

Amendment of the Local Government Pension Scheme Regulations 2013

2. The Local Government Pension Scheme Regulations 2013^(b) are amended in accordance with regulations 3 to 6.

3. After Regulation 3A^(c) (civil servants etc engaged in probation provision) insert the following regulations—

^(a) 2013 c. 25.

^(b) S.I. 2013/2356; those Regulations have been amended by S.I. 2014/44, S.I. 2014/525, S.I. 2014/1146, S.I. 2015/57, S.I. 2015/755 and by S.I. 2018/493.

^(c) Regulation 3A was inserted by S.I. 2014/1146.

“Pensions protection following a compulsory transfer

3B.—(1) A protected transferee for the purposes of these Regulations is an active member or a person who is eligible to be an active member who was employed by a Fair Deal employer immediately before that person’s employment was compulsorily transferred to a service provider under an ongoing contract in relation to the delivery of a service or a function of the Fair Deal employer on or after [xxx: the date on which the Local Government Pension Scheme (Amendment) Regulations come into force].

(2) The employer of a protected transferee must ensure that the protected transferee has access to membership of the Scheme for so long as that person remains a protected transferee and is entitled to be an active member of the Scheme.

(3) If the employer of a protected transferee is not a Scheme employer under Part 1 or Part 2 of Schedule 2 who designates the protected transferee as being eligible for the LGPS, the Fair Deal employer must provide in their contract with the service provider that a protected transferee must be provided with access to the Scheme either by—

- (a) the service provider entering into an admission agreement under paragraph 1(d) of Part 3 of Schedule 2 to these Regulations; or
- (b) subject to sub-paragraph (4), the Fair Deal employer determining to act as the deemed employer in respect of the protected transferee.

(4) Any determination under sub-paragraph (3)(b) by a Fair Deal employer listed in paragraph 20 of Part 1 of Schedule 2 must be made in accordance with guidance issued by the Secretary of State.

(5) A person remains a protected transferee for so long as that person is wholly or mainly employed on the delivery of the service or function transferred, even if the service or function is subsequently sub-contracted or otherwise transferred to a different service provider.

(6) A person remains a protected transferee even if for a period they are not entitled to be a member of the Scheme because they are entitled to membership of another public service pension scheme in relation to the employment transferred from their Fair Deal employer.

(7) An employee of a service provider who is working wholly or mainly on the delivery of the service or function transferred from a Fair Deal employer other than by a compulsory transfer under sub-paragraph (1) may be treated as a protected transferee with the written agreement of the Fair Deal employer and the service provider.

(8) An agreement under sub-paragraph (7) may be terminated by either the Fair Deal employer or the service provider at any time.

(9) A person who is a former employee of a best value authority or a police authority in Wales^(a) and who is entitled to pension protection or would be entitled to pension protection following a subsequent transfer under the Best Value Authorities Staff Transfers (Pensions) Direction 2007 is to be—

- (a) regarded as being a protected transferee when the contract is next renewed with the same contractor, or the contract passes to a new service provider, and
- (b) shall remain so regarded for such period as that person is—
 - (i) entitled to membership of the Scheme; and
 - (ii) remains wholly or mainly employed on the delivery of the service or function transferred from the best value authority or police authority in Wales.

(10) A person who is a former employee of a Welsh improvement authority^(b) or a community council who is entitled to pension protection or would be entitled to pension protection following a subsequent transfer under the Welsh Authorities Staff Transfers (Pensions) Direction 2012 is to be—

- (a) regarded as being a protected transferee when the contract is next renewed with the same contractor, or the contract passes to a new service provider, and
- (b) shall remain so regarded for such period as that person is—

^(a) Section 1 of the Local Government Act 1999 (c. 27) designates the bodies which are best value authorities.

^(b) Section 1 of the Local Government (Wales) Measure 2009 (c. 02) designates the bodies which are Welsh improvement authorities.

(i) entitled to membership of the Scheme, and

(ii) remains wholly or mainly employed on the delivery of the service or function transferred from the Welsh improvement authority or community council.

(11) A person who is an employee of a service provider working on the delivery of a service or function transferred from a Fair Deal employer who has not been compulsorily transferred to the provider from that Fair Deal employer in relation to the delivery of that service or function is not a protected transferee for the purposes of these Regulations.

(12) Where a transfer is requested under regulation 100(1) (inward transfers of pension rights), the administering authority must grant that request if the request relates to the transfer of a protected transferee's pension rights accrued in a pension scheme to which they had access under the Best Value Authorities Staff Transfers (Pensions) Direction 2007 or the Welsh Authorities Staff Transfers (Pensions) Direction 2012.

(13) A Fair Deal employer must have regard to advice issued by the Scheme Advisory Board on the matters to be considered in regard to the provision of pensions protection to a protected transferee or persons who may be regarded as protected transferees, including the sharing of risk.

(14) The employer of a protected transferee must—

- (a) provide sufficient and timely information to enable the Fair Deal employer to meet its Scheme functions under these Regulations; and
- (b) be responsible for, and meet any costs arising from, decisions taken by the employer which may give rise to payments under regulation 68 (employer's further payments) in the absence of express provision to the contrary in the service contract between the Fair Deal employer and the service provider.

(15) In this regulation "employer of a protected transferee" means a service provider who employs a protected transferee who is provided with access to the LGPS under this regulation."

4. In regulation 64 (special circumstances where revised actuarial valuations and certificates must be obtained), after sub-paragraph (10) insert—

"(11) Where a Scheme employer becomes an exiting employer as a consequence of the Scheme employer being merged into, or taken over by, another organisation—

- (a) the successor body becomes responsible for the exiting employer's assets and liabilities, in the absence of any express legislative provision to the contrary; and
- (b) shall be treated for the purpose of these Regulations as the Scheme employer in relation to the employees and former employees of the exiting employer.

(12) Where the successor body is a Scheme employer with active members in that administering authority or another administering authority, the assets and liabilities of the exiting employer must be automatically transferred to the administering authority of the successor body and combined with the successor body's assets and liabilities.

(13) A transfer of assets and liabilities under sub-paragraph (12) must be determined in accordance with guidance issued by the Secretary of State."

5.—(1) Schedule 1^(a)(interpretation) is amended as follows.

(2) After the definition of "European pensions institution" insert—

"“Fair Deal employer” means a Scheme employer listed in paragraphs 1 to 13 and 15 to 25 of Part 1 of Schedule 2 or in paragraphs 1 to 3 and 5 to 15 of Part 2 of Schedule 2;”.

(3) After the definition of "permanently incapable" insert—

"“protected transferee” has the meaning given in regulation 3B(1);”.

(4) After the definition of "Scheme year", insert—

"“service provider” means a body contracted to deliver a service or a function of a Fair Deal employer;”.

(a) There are amendments to Schedule 1 which are not relevant to these Regulations.

(5) After the definition of “statutory pay” insert—

““successor body” means a body which either—

(a) takes over a Scheme employer, causing that employer to become an exiting employer; or

(b) takes on the functions of a Scheme employer following a merger between that employer and one or more organisations, and which causes that employer to become an exiting employer;”.

6.—(1) Schedule 2 (Scheme employers) is amended as follows.

(2) In Part 3, after paragraph 5 insert—

“5A. An admission agreement made under paragraph 1(d)(i) may include details of risk sharing arrangements between the Scheme employer and the admission body, provided that the Scheme employer has had regard to any advice issued by the Local Government Pension Scheme Advisory Board.”.

(3) In Part 4, in the table insert at the end—

“An employee of a service provider who is a protected transferee, where the Fair Deal employer has determined under regulation 3B(3)(b)) that the protected transferee should be deemed to be an employee of the Fair Deal employer	The Fair Deal employer referred to in column 1”
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We consent to the making of these Regulations.

Names

Date Two of the Lords Commissioners of Her Majesty’s Treasury
Signed by authority of the Secretary of State for Housing, Communities and Local Government.

Minister

Date Minister of State
Ministry of Housing, Communities and Local Government

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Local Government Pension Scheme Regulations 2013 (“the 2013 Regulations”).

Regulations 3, 5 and 6 implement the Government’s “Fair Deal” policy for local government workers with the effect that most members of the Local Government Pension Scheme who are compulsorily transferred to another employer will retain the right to membership of the Scheme.

Regulation 4 provides that where a Scheme employer becomes an exiting employer as a consequence of a takeover or a merger, the assets and liabilities of that employer automatically transfer to the successor body.

Annex B

Personal data

The following is to explain your rights and give you the information you are be entitled to under the Data Protection Act 2018.

Note that this section only refers to your personal data (your name address and anything that could be used to identify you personally) not the content of your response to the consultation.

1. The identity of the data controller and contact details of our Data Protection Officer

The Ministry of Housing, Communities and Local Government (MHCLG) is the data controller. The Data Protection Officer can be contacted at dataprotection@communities.gov.uk.

2. Why we are collecting your personal data

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

3. Our legal basis for processing your personal data

The Data Protection Act 2018 states that, as a government department, MHCLG may process personal data as necessary for the effective performance of a task carried out in the public interest. i.e. a consultation.

Section 21 of the Public Service Pension Act 2013 requires the responsible authority, in this case the Secretary of State, to consult such persons as he believes are going to be affected before making any regulations for the Local Government Pension Scheme. MHCLG will process personal data only as necessary for the effective performance of that duty.

3. With whom we will be sharing your personal data

We do not anticipate sharing personal data with any third party.

4. For how long we will keep your personal data, or criteria used to determine the retention period.

Your personal data will be held for two years from the closure of the consultation.

5. Your rights, e.g. access, rectification, erasure

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right:

- a. to see what data we have about you
- b. to ask us to stop using your data, but keep it on record
- c. to ask to have all or some of your data deleted or corrected

d. to lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113.

6. **Your personal data will not be sent overseas**
7. **Your personal data will not be used for any automated decision making.**
8. **Your personal data will be stored in a secure government IT system.**

Appendix 2



Corporate Services
County Treasurer

LGF Reform and Pensions Team
MHCLG,
2nd Floor, Fry Building,
2 Marsham Street
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SW1P 4DF

County Hall
Topsham Road
Exeter
EX2 4QD

Tel: 01392 381933
Email: charlotte.thompson@devon.gov.uk
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February 2019

Dear Sirs

Local Government Pension Scheme: Fair Deal – Strengthening pension protection

I am writing on behalf of Devon County Council in its capacity of administering authority in response to the consultation published 10th January 2019. This response has been approved by the Investment and Pension Fund Committee following consultation with the Devon Pension Board.

Q1. Do you agree with the definition (protected employees)?

We agree with the definition however we note in paragraph 17 that if an employee was eligible to join another public pension scheme, they would not be eligible to join the LGPS. This is also the current position though there are some exceptions in regulation 4 (2) of the LGPS Regulations 2013. We would question whether these exceptions are still required.

Q2. Do you agree with the definition of a Fair Deal employer?

We are pleased to see that admitted bodies are now excluded from this definition. There may be an issue with Further education corporations etc being excluded. It is possible, especially for post 1992 universities to have wholly owned companies set up. It is therefore possible that such a company could opt to join the LGPS under Part 2 (6) of schedule 2 and would then become a fair deal employer whilst the post 1992 University would not.

Q3. Do you agree with the transitional measures?

Agree, no further comments

Item 8

Q4. Do you agree with the proposals regarding the calculation of inward transfer values?

Agree, no further comments

Q5. Do you agree with our proposals on deemed employer status?

We are not convinced that this proposal solves all the issues associated with admitted bodies. We do not believe that it would reduce the administration burden, in fact we would argue that it would increase as pension administration teams get caught in the middle between two parties when it comes to chasing for timely and accurate data. It could be established that all correspondence, instructions and monthly contributions come from the Fair Deal employer however this just transfers the admin headache from the pensions team to the employers.

Paragraph 18 refers to the option of offering all staff who work on the contract the same status and protection though the additional staff not covered by Fair Deal will remain subject to contract terms – effectively the same as an open admission agreement. Paragraph 31 states that ‘the Fair Deal employer would have the option of remaining the employer for the transferred staff’. Who would be the employer for the non-transferred staff? We assume that these would not fall back on the Fair Deal employer and therefore can only imagine that the contractor would have to enter an admission agreement for these staff? If the deemed employer proposals move forward, is it appropriate and workable to offer the LGPS to non transferred staff? Could the non transferred staff also come under the Fair Deal employer?

Paragraph 32 mentions that the service provider would not have full scheme employer responsibilities. We would question this as the contractor would still be involved in the deduction and submission of monthly contributions, be the decision maker for ill health retirements/redundancy retirements/early release of benefits etc and therefore by default be responsible for employer discretions.

We agree with paragraph 36 and have had experience of admitted bodies being able to avoid FRS102 via a pass through agreement. FRS102 causes a number of issues for admitted bodies and small employers.

We fully understand the reasonings behind finding some alternative solution to admitted bodies – the drive to ensure that outsourcings are value for money, avoid risk premiums, contractors knowing what they are signing up for and known costs and negating FR102. We wonder if all this could be achieved by retaining the admitted body status and having a LGPS wide standard pass through agreement whereby the admitted body pays the same employer rate as the original scheme employer (or could there be a standard contractor rate across the whole LGPS?) and all the liabilities and assets pass back to the Fair Deal employer at the end of the contract/admission agreement. There would be no requirement for opening/closing new employer valuations.

We welcome the attempt to address the issue of employers outsourcing services whilst the pension provisions are often forgotten or ignored, particularly in the academy and education sector. Regarding paragraph 39, what would happen to a service contract if one was entered into without the Department of Education provisions etc being included? There needs to be some consequence of failing to comply in order to ensure that pensions are not forgotten in the future.

Q6. What should advice from the scheme advisory board contain to ensure that deemed employer status works effectively?

It has to be crystal clear who is the LGPS employer and what duties fall under the Fair Deal Employer and which fall to the contractor. Should there be any failings leading to a breach in regulations, it must be very clear who would be responsible for that breach.

The LGPS employers and potential contractors will need some guidance on how exactly pass through arrangements work. If this guidance comes from the scheme advisory board it should also ensure that all funds adopt the same approach subject to individual contract negotiations.

Q7. Should the LGPS Regulations 2013 specify other costs and responsibilities for the service provider were deemed employer status is used?

As per our response under Q6, who is responsible for what must be clear. It would seem sensible to therefore include this either in the regulations or statutory guidance.

Q8. Is this the right approach to existing arrangements?

Paragraph 42 states that it would be for the Fair Deal employers to choose whether they require their service providers to become full scheme employers. We can't see an issue with this for contract that fall under Part 3, schedule 2 - 1(d) due to backstop provisions in regulation 64.3(a).

Assuming that admitted bodies which fall under 1a of Part 3 schedule 2 continue, we would propose that the Administering Authority makes or agrees the decision due to any outstanding debts on closure falling on the fund.

Q9. What further steps can be taken to encourage pension issues to be given full and timely consideration by Fair Deal employers when services or functions are outsourced?

This is a difficult area as the pension issues often get overlooked even now when there is already a Directive in place with similar requirements. Perhaps some statutory guidance aimed at scheme employers could be issued alongside the Scheme Advisory Board guidance.

Q10. Are you aware of any other equalities impact?

No

Q11. Is this the right approach? (automatic transfer of assets and liabilities on mergers/takeovers)

On the whole we agree with this approach. We are concerned however on the proposals to move assets and liabilities to another fund should the new employer already be active in another fund. Our understanding of wider pensions legislation is that you would be unable to transfer pensioner and deferred members liabilities and assets to another fund. If this is correct, this proposal would cause more problems than it would solve and surely a simpler solution would be for the new employer to just join the original fund.

Item 8

Q12. Do the draft regulations effectively achieve our aims?

We believe so

Q13. What should guidance issued by the Secretary of State state regarding the terms of asset and liability transfer?

We believe for this to be effective all liabilities should transfer so the guidance should make this clear. In order to avoid any protracted actuarial discussions, we wonder whether the high level actuarial basis could be included.

Yours faithfully

Charlotte Thompson APMI
Investment Manager