SUMMARY OF THE APPLICATION OF THE STATUTORY CAP ON EXIT PAYMENTS TO THE LGPS

Hertfordshire County Council

1 BACKGROUND

1.1 This document has been prepared by Hertfordshire County Council (the **"Administering Authority"**) in its capacity as the administering authority of the Fund and sets out the Administering Authority's expectations of scheme employers participating in the Fund in light of the following:

(a) Regulation 30(7) (**"Regulation 30(7)"**) of the Local Government Pension Scheme Regulations 2013 (the **"LGPS Regulations"**), which (broadly) entitles an active member who is made redundant on or after the age of 55 to an immediate, unreduced early retirement pension; and

(b) the coming into force on 4 November 2020 of the Restriction of Public Sector Exit Payments Regulations 2020 (the **"Cap Regulations"**), which restrict the overall value of redundancy packages to public sector employees to £95,000 (the **"Capped Amount"**).

1.2 Critically, the value of any payment made to the Fund to meet the additional cost of paying a pension under Regulation 30(7) counts towards the amount of the redundancy package under the Cap Regulations. The Administering Authority is entitled to claim additional contributions from scheme employers under Regulation 68(2) of the LGPS Regulations where an unreduced early retirement pension is paid on the grounds of redundancy or business efficiency. This type of payment is often called the "strain cost" because it reflects the funding strain arising from paying an unreduced pension for longer than previously anticipated. The fact that a strain cost counts towards the amount of the redundancy package creates a significant difficulty if the strain cost cannot be met within the Capped Amount.

1.3 Regulation 8 of the Cap Regulations (**"Regulation 8"**) provides that, where a scheme employer is prevented by the Cap Regulations from paying a strain cost that exceeds the Capped Amount (either on its own or when aggregated with the rest of the redundancy package), the scheme employer must instead make an equivalent (capped) payment to the member. However, it is not explicitly clear whether the Cap Regulations do in fact prevent payment of a strain cost to an LGPS fund.

1.4 Therefore, there is presently a direct conflict between Regulation 30(7) and the Cap Regulations, where the strain cost for an individual member would result in the aggregate exit package exceeding the Capped Amount.

1.5 A consultation is presently underway on proposed amendments to the LGPS Regulations, so that the benefits of members who are subject to the Cap Regulations can be adjusted to reflect the Capped Amount. This document does not consider those proposals, which are not anticipated to come into force until 2021; it focusses on the

1 Please insert name of the Fund.

2 Please insert name of the administering authority.

Administering Authority's expectations of scheme employers in the period until the LGPS Regulations are so amended.

2 THE ADMINISTERING AUTHORITY'S EXPECTATIONS OF THE SCHEME EMPLOYER

2.1 The Cap Regulations apply to payments made by scheme employers (i.e. the strain cost) rather than to payments made by the Administering Authority (i.e. the pension).

2.2 The obligation on the Administering Authority under Regulation 30(7) to pay qualifying members an immediate, unreduced early retirement pension is not explicitly conditional upon the relevant scheme employer paying the associated strain cost under Regulation 68(2). Unless Regulation 30(7) is overridden by the Cap Regulations or amended (as is proposed and expected to occur in 2021), that benefit payment obligation potentially remains, even where the relevant scheme employer cannot meet the full strain cost without contravening the Cap Regulations.

2.3 The Administering Authority's priority is to ensure that members receive the intended benefits and the cost of providing early retirement benefits on redundancy is met in full by the relevant employer paying the strain cost.

2.4 In the first instance, the Administering Authority will engage with scheme employers to explore whether proposed redundancies can be delayed until the LGPS Regulations are amended.

2.5 **Where redundancies proceed before the LGPS Regulations are amended, and the aggregate value of a member's redundancy package (including strain cost) exceeds the Capped Amount:**

(a) the Administering Authority will pay a *reduced* early retirement pension (or a deferred pension payable at normal retirement age); but

(b) the scheme employer should not immediately pay the member a cash sum under Regulation 8 equivalent to the capped strain cost.

2.6 The Administering Authority acknowledges it is likely that the member will complain to the Pensions Ombudsman, an employment tribunal or the Court if they are entitled to an unreduced pension under the LGPS Regulations and only receive a reduced pension. The outcome of such complaint will provide greater clarity about the obligations of the Administering Authority and scheme employer and the benefits that should be provided to members during this interim period until the LGPS Regulations are amended.

2.7 Delaying payment of a cash sum under Regulation 8 until the outcome of any complaint is known will enable the scheme employer to make at least a partial payment of the strain cost if an unreduced pension is ordered, or potentially give the member an opportunity to ask the scheme employer to pay some or all of the cash payment to the Fund to provide additional pension benefits. This is therefore the Administering Authority's preferred approach, but scheme employers should seek their own legal advice.

2.8 [Scheme employers who nonetheless decide to make an immediate payment under Regulation 8 may wish to make that payment conditional upon the member not bringing a claim for an unreduced pension. The purpose of that agreement would be to facilitate reclaiming the payment should a successful claim be brought, enabling the scheme employer to meet part of the strain cost. There are risks with this approach and so the administering authority recommends that the scheme employer seeks its own legal advice before proceeding down this route.][3]

2.9 Communications to members should be carefully worded to explain the position clearly; there is no obligation to encourage claims.

3 PRACTICAL CONSIDERATIONS

3.1 Where the Administering Authority is asked to provide redundancy quotes, we will require the scheme employer to confirm whether it is subject to the Cap Regulations and whether the aggregate value of a member's redundancy package (including the strain cost quoted) exceeds the Capped Amount. If that is the case, we will also ask the scheme employer to confirm whether or not the Capped Amount is to be waived in relation to a particular member, in line with the Directions issued by HM Treasury[4].

3.2 Individual members may not understand their present entitlement under Regulation 30(7) and how that is (or is not) impacted by the Cap Regulations. The Administering Authority is under a disclosure obligation to tell members what their benefit entitlements are at particular points and on request; however, these obligations do not extend to explaining legal uncertainties of the type caused by the Cap Regulations.

3.3 Should any claims be brought by members in relation to their entitlement under Regulation 30(7), the Administering Authority will deal with any claim (or any general queries about the benefits payable) honestly and transparently. Claims will be dealt with on an accelerated basis under the Fund's internal dispute resolution procedure (unless the Pensions Ombudsman confirms that members do not have to bring a complaint under the Fund's internal dispute resolution procedure, in which case members will be directed straight to the Pensions Ombudsman).

3.4 The Administering Authority is currently obtaining actuarial advice:

(a) to understand how the factors currently used by the Fund to calculate strain costs compare with the draft factors published by the Government Actuary's Department (**"GAD"**)[5] and how the Fund's funding position may be impacted by adopting GAD's factors;

(b) on how any residual funding impact on the Fund of paying early retirement pensions on redundancy should be addressed; and

we will update scheme employers as necessary following the receipt of such advice.

4 REVIEW OF APROACH

The Administering Authority will keep this document under review [on an ongoing basis]. Should there be any legislative or case law developments in this area which

3 Administering Authorities may wish to delete this paragraph if they prefer not to raise this possibility with scheme employers.

4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/794150/mandatory_HMT_directions_exit_payments.pdf

5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927508/Benefits_on_redundancy_-_draft_GAD_guidance.pdf

impact upon our current approach, we will update this document and communicate with scheme employers.

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