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pay, pensions and  
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28 February 2007

Dear Brian

## **The Draft Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007**

The LGE is pleased to provide comments on the above draft regulations, as requested in your letter of 22<sup>nd</sup> December 2006.

The draft Benefits, Membership and Contributions Regulations are, however, only one part of a three piece jigsaw. At the time of writing, one other part of the jigsaw - the draft Local Government Pension Scheme (Administration) Regulations 2007 – had only recently been issued and the final piece, the Transitional Regulations (which we understand will detail how the pre and post April 2008 benefit structures will interact) had not been issued. We do not, therefore, yet have the complete picture available to us and the comments we make below should be seen in that light. It must be recognised that there are inherent dangers in adopting a fragmented approach to the issue of draft legislation and in condensing the opportunity for comment on such major scheme changes affecting one of the largest schemes in the country.

### **Terminology**

It is important that the regulations use consistent terminology throughout. For example, regulations 5(1), 5(2) 10(1), 10(5), the existing version of 11(1), 11(2) 12(1), 13(1), 14(3), 16(1), 16(6) all refer to "benefits" or "retirement benefits" whereas regulations 8(1), 9(1), the new version of 11(1), 13(1), 13(2), 16(3), 16(4), 16(5), 16(7) all refer to "pension" or "retirement pension" or "pension entitlement".

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Managing Director Jan Parkinson

Other inconsistent uses of terminology are mentioned in the comments below on individual draft regulations.

The draft Regulations, throughout, refer to leaving / ceasing / retiring from a local government employment – see, for example, regulations 8(1), 12, and 16. This should be defined so as to cover situations where

- the employment by virtue of which the person employed is an active member ceases;
- a member ceases to be an active member by virtue of opting out of membership under regulation 10 of the Administration Regulations (but see comment 1 - Optants Out - under **Other Matters** at the end of this letter)
- a person ceases to be an active member in one employment and immediately becomes an active member in another employment, in which case he shall be treated as if he were a deferred member as respects the first employment, despite never having ceased to be an active member of the Scheme;
- a person who is an active member and is an employee of a transferee admission body shall be treated as leaving a local government employment when he ceases to be employed in connection with the provision of the service or assets under regulation XX as a result of which employment he became eligible to join the Scheme<sup>1</sup>;

but should exclude cases where an active member is TUPE transferred, or transferred by statutory novation, to an employer under which the person is eligible for membership of, and immediately joins, the LGPS.

*Note: to ensure consistency of approach (i.e. that a member is entitled to the award and / or payment of a benefit upon the cessation of a local government employment, rather than cessation of all local government employment) regulation D11(2)(d) of the LGPS Regulations 1995 will need to be amended accordingly.*

Also, it would be helpful if, where possible, the terminology in the 2007 Regulations mirrored that in the Finance Act 2004. Thus, for instance, references to a “death grant” should be replaced by references to a “lump sum death benefit”.

## **Regulation 1 – Citation, commencement, interpretation and application**

In order to better reflect the meaning of full-time, part-time and variable-time employment, and to deal with term-time employees, it would be better to delete the definitions of “part-time employee”, “whole-time employee” and “variable-time employee” and replace them with the following which, in part, reflect definitions already contained in regulation 2 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 [SI 2000/1551]:

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<sup>1</sup> By including this provision in the definition the words “(or is treated for these regulations as if he had done so)” would not be required in regulation 16(1).

“full-time employee” means an employee who, under their contract of employment, is paid by reference to the time he works and, having regard to the custom and practice of the employer in relation to employees employed by the employer, is identifiable as a full-time worker for each week in the calendar year”.

“part-time employee” means an employee who, under their contract of employment, is paid by reference to the time he works and, having regard to the custom and practice of the employer in relation to employees employed by the employer, is not identifiable as a full-time employee nor a variable-time employee.

“variable-time employee” means an employee who, under their contract of employment, is paid by reference to his duties (rather than by reference to the number of hours he has worked) or whose duties only have to be performed on an occasional basis.

## **Regulation 2 – Active members**

Sub-section (1) says that “an employee of a body listed in Part 1 of the Local Government Pension Scheme (Administration) Regulations 2007 is an active member of the Scheme unless he has elected otherwise in accordance with regulation XX of those Regulations”. One assumes that this should, in fact, refer to “Part 1 of Schedule 2 to” i.e. to what are currently referred to as Scheduled bodies. It is unclear how sub-section (1), as presently drafted, will cover employees of resolution bodies and employees of admitted bodies. It is understood that the provisions of regulation 6 of the LGPS Regulations 1997 are to be covered by the Administration Regulations and that Part V (Special Cases) of the LGPS Regulations 1997 is to be covered by either the Administration Regulations or the Transitional Regulations.

It would appear from sub-paragraph (1) that those casual employees who only have a contractual relationship on the days they are offered and accept work will automatically be enrolled into the Scheme on each and every occasion they are an employee, even if they have previously opted out, unless the Administration Regulations cover this by providing that an opt out for such employees remains in force until such time as they rescind it or, alternatively, the Administration Regulations could provide that employees require a minimum 3 month contract before being eligible to join the LGPS. In the latter case, employees who have a contract for less than 3 months but who receive an extension beyond 3 months should be enrolled in the Scheme from the point that it is known the contract will be for more than 3 months. This would replicate the system that used to apply under the Local Government Superannuation Scheme Regulations 1974. Existing casuals who are members of the Scheme at 31<sup>st</sup> March 2008 should be permitted to remain in the Scheme even if their contract is for less than 3 months.

It would also appear from sub-paragraph (1) that existing employees who, at 31<sup>st</sup> March 2008, have opted out of membership of the Scheme will automatically be

enrolled into membership of the Scheme from 1<sup>st</sup> April 2008 (as the opt out clause referred to in sub-paragraph (1) only refers to an opt out made under regulation 10 of the Administration Regulations, not to one made under regulation 8 of the LGPS regulations 1997). Is this intended?

The regulations do not specify what happens to contributions paid by an employee who opts out of the Scheme with less than 3 months membership.

Sub-paragraph (2) should commence with the words "Subject to sub-paragraph (1)" so as to enable those who are active members of the Scheme on both 31<sup>st</sup> March 2008 and 1<sup>st</sup> April 2008 the ability to subsequently opt out of membership of the Scheme. Sub-paragraph (2) refers to "continues in Local Government Pension Scheme employment"; will this be defined?

It should be made clear that an employee with multiple jobs can be a member in some of those jobs and choose to opt out of membership in others i.e. there should not be an all or nothing approach.

Although the word "Membership" is included in the title of the draft regulations there is no specific regulation detailing how membership counts for various purposes e.g. how, and for what purposes, membership will count where a member aggregates / does not aggregate separate periods of membership – will it, for instance, count towards the 2016 and 2020 "85 year rule" protections; whether that part of aggregated membership which falls before 6.4.78. or 6.4.88. will count for, respectively, post retirement widow's and widower's pensions; how and for what purposes added years and augmented membership will count; whether, and for what purposes, that part of membership in respect of which benefits are drawn on flexible retirement will count and whether any part of benefits not drawn on flexible retirement will retain any 2016 and 2020 "85 year rule" protection; whether overlapping membership count twice; how a deferred benefit that was subject to the Earnings Cap and is aggregated with post 1<sup>st</sup> April 2008 membership should be adjusted; etc.

### **Regulation 3 – Contributions payable by active members**

This regulation proposes that the employees' contribution rate should be 5.5% on the first £12,000 and 7.5% on pay thereafter.

As reported in our letter to you dated 12<sup>th</sup> October 2006, 79% of employers who responded to an LGE survey did not support a tiered contribution rate.

Depending on the level of their earnings and career path/working pattern, an employee could under the current pensions system, due to the combination of the employee contribution rate (6%) and the level (if any) of any tax relief and reduced national insurance contributions<sup>2</sup>, be better off **not** joining the local

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<sup>2</sup> The cost of joining the LGPS for lower paid employees who are not paying tax or National Insurance is a full 6% of pay as they will receive no tax relief on their contributions and no reduction in NI contributions.

government pension scheme<sup>3</sup>. The employee could rely instead on the State Second Pension and the Pension Credit<sup>4</sup>. If the earners in a household have always had a low lifetime income, retirement saving may simply be an inappropriate activity for them because current consumption needs will be a very high proportion of their current income leaving little, if any, money to commit to savings. Under the current system, means-tested benefits will, for such people, replace a large proportion of earned income when the earner retires and the Institute of Fiscal Studies comments<sup>5</sup> that, in this situation, a reliance on government-provided retirement income may well be a rational decision. This point is recognised in paragraph 35 of Chapter 5 of *Simplicity, security and choice: working and saving for retirement*, in which it is pointed out that “those on moderate incomes [should] identify their financial priorities and [only] save where it seems sensible to do so.”

Whilst recognising the above we also appreciate that the propositions for a tiered employee contribution are a way of seeking to “equality proof” the scheme and, possibly, to help mitigate some of the issues created by the current State pension and taxation systems. These aims, in themselves, are laudable. Nevertheless, as stated, 79% of employers who responded to the LGE survey did not support a tiered contribution rate. This level of response recognised that:

- i) encouraging the lower paid to join the Scheme by offering a reduced contribution rate on full-time equivalent earnings below a specified level may result in employees joining the Scheme who may not be best served by doing so, due to the impact of the Pension Credit. Until the State creates a position whereby there is no disincentive to save towards a pension, is there merit in designing a scheme to attract the lower paid to join?
- ii) there is little evidence that offering employees a lower contribution rate (other than a 0% rate) on earnings below a specified level would necessarily encourage the vast majority of current non-joiners to join the scheme. The Institute for Fiscal Studies has shown<sup>6</sup> that the bulk of the ‘unpensioned’ are not paying into a pension scheme because of other urgent calls on their money (not because of the level of the contribution rate). The LGPC survey of 554 non Scheme members (see Annex 5 of LGPC Circular 130 at <http://www.lge.gov.uk/lge/core/page.do?pageId=59192>) supports the findings of the Institute of Fiscal Studies. Furthermore, it is difficult to see how a contribution rate of 5.5% on full-time equivalent

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<sup>3</sup> Of course, people on lower pay may not always remain on lower pay and so a decision not to join the LGPS may turn out to only initially have been a reasonable decision. This may be particularly true in respect of parents undertaking part time lower paid work whilst bringing up a family who then subsequently move to a position offering more hours/pay.

<sup>4</sup> For 2006/2007, single pensioners will receive a minimum income of £114.05 per week (couples will receive a minimum income of £174.05 per week)

<sup>5</sup> See Briefing Note 29: Retirement, Pensions and the Adequacy of Saving: A Guide to the Debate on the IFS website at <http://www.ifs.org.uk/bns/bn29.pdf>

<sup>6</sup> Partnership in Pensions; an Assessment: Institute for Fiscal Studies, 1999.

earnings below £12,000 and 7.5% on full-time equivalent earnings above that figure would encourage more employees to join the Scheme.

- iii) despite the “equality proofing” argument being put forward by the Government, it is arguable that a lower contribution rate could be open to claims of indirect age or gender discrimination as it seems likely that the majority of employees benefiting from a lower average contribution rate would be women or would be young employees who may have a larger proportion of earnings below the lower earnings contribution point than older employees. It is recognised, however, that there is an argument that any age or gender discrimination flows from pay and employment policies rather than from the Scheme itself.
- iv) offering a lower contribution rate on full-time equivalent earnings below a specified level would be of benefit to some lower paid staff. However, the Local Government Pay Commission commented at paragraph 112 of their report that “those at the bottom of the earnings distribution [in local government] are better paid, in general, than their whole economy counterparts while those at the top of the distribution are lower paid than their counterparts.” Offering a lower contribution rate to lower paid staff, thereby further increasing the overall remuneration package for lower paid staff, might ultimately require a re-balancing of the pay element of the overall remuneration package for higher paid staff.
- v) a system requiring a contribution rate of 5.5% on full-time equivalent earnings below £12,000 and 7.5 on full-time equivalent earnings above that figure will mean that the greater an employee’s pay, the higher will be their average contribution rate. This could lead to salary drift which would, of course, lead to increased employer costs – not only in terms of additional salary but also in terms of the additional pension and national insurance on-costs on that additional salary
- vi) around one third of local government employees do not presently join the LGPS. These tend to be the lower paid workers and younger members of staff. If these are encouraged to join the LGPS by a lower contribution rate on earnings below a specified level, the employer will need to meet the cost of the employer contribution to the Fund on their salary. The pay bill for these new scheme joiners will therefore increase considerably. Also, the higher contribution rates for those on higher salaries may not offset the pension cost of the increased numbers of people joining at the lower contribution rate. There will clearly be different impacts on employers depending on the make up and salaries of their workforce and on the number of current lower paid non-joiners who decide to opt into the Scheme. Employers with higher than average pay rates could gain from proposed contribution rates (because their employees would be meeting a relatively higher share of the overall pension cost) whereas the opposite would be true of employers with lower than average pay rates

So, the key message is that the vast majority of employers responding to the LGE survey did not support a tiered contribution rate and wish to see a standard

employee contribution rate. If, nonetheless, and as seems likely, the Government still wishes to press ahead with a tiered contribution rate, we believe that the proposals in the draft regulations, as currently worded, are not workable for the following reasons:

- sub-paragraph (2) says “the standard rate is 5.5% on the first £12,000 of his pensionable pay and 7.5% on any amount by which his pensionable pay exceeds that sum”. As the draft does not refer to “£12,000 per annum”, but merely to “£12,000”, it would mean that once a member had earned £12,000 he / she would forever after pay at the rate of 7.5%.
- it is not clear, even with the insertion of the words “per annum”, how contributions should be calculated i.e. would the employee pay 5.5% until the point in the year when they had received £12,000 (pro-rated for a part-timer) and then, in say month 7, start paying 7.5% with the result that their take home pay from month 7 onwards would drop? Would a full – time employee earning £24,000 per annum who leaves 6 months into the year having earned £12,000 only pay 5.5%? Or would there, in effect, be a £1,000 monthly allowance, with the employee paying at 5.5% on any pay received up to £1,000 in the month and at the rate of 7.5% on pay in excess of £1,000?
- how would the rate for those who have multiple jobs be calculated, particularly if those jobs are in different Funds, or with different employers within the same Fund, or on different payrolls (e.g. where the jobs are with different schools each running their own payroll)?
- how would the contributions for a casual or variable-time employee be calculated?
- how would the contributions for a term-time employee be calculated?
- if the full-time hours for a job are, say, 10 per week and the person earns £12,000 per annum for those 10 hours they would pay contributions at the rate of 5.5%. However, a person working 18.5/37ths per week (i.e. half-time) with a full-time equivalent rate of £24,000 would, due to the pro-ration requirement of sub-paragraph (3), pay 5.5% on the first £6,000 and 7.5% on the next £6,000. Both have gross pay of £12,000 but pay different contributions
- also, although a very minor point, there will be valuation certificate and payroll implications for those employers whose contribution rates are currently expressed as a percentage of the employees’ contribution rate.

The proposals would also require significant reprogramming and testing of payroll systems across all employers participating in the LGPS and interfaces with the pensions administration system. This is a considerable, and costly, task. There would also potentially be increased audit costs, difficulties in end of year

reconciliation, and problems with generating full-time equivalent pensionable pay for use on Annual Benefit Statements.

Should the Government, despite employer reservations, proceed with a variable employee contribution rate we believe that a more practicable solution to overcome some of the above problems would be as follows (albeit there would still be significant payroll reprogramming and interface testing costs to be met):

- i) the contribution rate for any job an employee holds should be determined at the start of employment (or upon taking on an additional contract) and, thereafter, at the beginning of each financial year by reference to the full-time equivalent\* annual salary (or full-time equivalent\* hourly rate) for that job. The contribution rate would be accessed from a table of rates held on the payroll system. For example, the table could look something like

Band	Range	Contribution Rate
1	£0-12,000	5.5%
2	£12,001-£15,000	5.9%
3	£15,001-£20,000	6.2%
4	£20,001-£30,000	6.6%
5	£30,001-£50,000	6.9%
6	£50,001-£75,000	7.2%
7	£75,001+	7.5%

- ii) so, if an employee has three part time jobs with full-time equivalent rates of pay of £12,500, £16,000 and £14,000, the contributions rate on the first job would be 5.9%, on the second job 6.2% and on the third job 5.9%
- iii) this approach would make it relatively easy to reconcile contributions and, as now, to gross up contributions to generate a pay figure for use in the production of annual benefit statements
- iv) it is recognised that for those employees earning bonus, weekend enhancement, etc the use of basic pay only to determine the contribution rate may, in some cases, result in the person falling into a lower contribution band than their actual pay should dictate
- v) it would only be necessary for payroll to change the contribution rate at the beginning of each financial year if the employee's basic full-time equivalent pay figure at that point dictates that they should be moved into a higher (or lower) band
- vi) the full-time equivalent\* rate of pay for a part-time and / or term-time employee should be the grossed-up rate of pay
- vii) for variable-time employees the contribution rate would be determined from the fee. For example, a Town Clerk or a returning officer with a fee for doing the job of £10,000 would pay 5.5%

viii) the contribution rate for a councillor would be based on their basic allowance

\* It is important that the contribution rate should be based on the full-time equivalent rate of pay for two reasons.

Firstly, it produces equity of treatment as a half-time employee earning £15,000 (with a full-time equivalent rate of pay of £30,000) would pay the same percentage contribution rate as a full-time employee whose rate of pay is £30,000. Both the half-time and full-time employee will have their benefits based on the full-time equivalent pay rate of £30,000, with the period of membership of the part-time employee being scaled down to half-time. Such an approach appears necessary in order to comply with the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 [SI 2000/1551] and section 62 of the Pensions Act 1995.

Secondly, if the contribution rate for part-time employees is not assessed by reference to their full-time equivalent rate of pay, the employee contributions into the LGPS Funds will be significantly less than would otherwise be the case (as c45% of the membership is part-time and 41% of part timers were below pay point £12018 in 2005). This would result in either an increase in costs to employers (which is not acceptable to us) or there would need to be a corresponding reduction in the benefit package or an increase in the average employee contribution rate (which would not be acceptable to the unions).

A decision will need to be taken as to how and when the band figures should be updated. A link to RPI might be acceptable but this would need to be kept under review by the proposed Policy Review Group.

A decision will also need to be taken as to how existing members paying the protected 5% contribution rate should be dealt with as from 1<sup>st</sup> April 2008, particularly given the completion of many equal pay claims by that time, the need to move away from a two tier workforce and the need to equality proof the Scheme. At the time of writing, no consensus view had been reached between the employers and unions.

In sub-paragraph (1) amend the word "pay" to "pensionable pay" i.e. use the same terminology as in sub-paragraph (2).

It should be noted that the lack of an equivalent of regulation 13(3) of the 1997 Regulations will mean that part-timers will pay contributions on all "excess hours" above their contractual hours (unless these are deemed to be "non-contractual overtime"). To avoid any doubt, it would be wise to insert the equivalent of regulation 13(3) of the 1997 Regulations into the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007.

Further sub-paragraphs need to be added to provide that:

- a) contributions to the LGPS in relation to a pensionable employment must be limited to 100% [or, in the case of AVCs 50%] of taxable earnings received in that employment in the tax year, except in the case of unpaid leave of absence; and
- b) each employment is to be treated separately [note that the Administration Regulations will need to make it clear that, for HMRC purposes, a member may have multiple “arrangements” i.e. a scheme member with two posts who pays in-house AVCs in relation to one of them has three arrangements – two main scheme arrangements and one in-house AVC arrangement]

#### **Regulation 4 – Meaning of “pay”**

Amend the heading to **Meaning of pensionable pay**.

Amend the references to “employee’s pay” in sub-paragraphs (1) and (2) to “employee’s pensionable pay”.

Remove sub-paragraphs (2)(f), (2)(g), (3) and (4) to the Transitional Regulations. Note that all references in sub-paragraphs (3) and (4) to “the 1986 regulations” and to “the 1995 regulations” should be to “the 1986 **Regulations**” and to “the 1995 **Regulations**” in order to tie in with the definitions in regulation 1. The reference in sub-paragraph (4) to “paragraph (2)(f)” should be amended to a reference to “paragraph (3)” and the word “(iii)” in sub-paragraph (4)(a) should be deleted.

Insert new sub-paragraphs (2)(i) and (j) i.e.

- “(i) any payment made after the member has attained age 75;
- (j) any payment made to buy-out an existing term or condition of employment”

Following discussions at Technical Group it was considered that regulation 13(2) should be amended to specifically exclude “buy – out” payments from being pensionable.

We are not sure whether sub-paragraph (5) is necessary, but if it is retained please amend the word “pay” to “pensionable pay”.

#### **Regulation 5 – Benefits**

In sub-paragraph (1)(a) after “total membership” insert “including [linked] membership under the 1997 Regulations” [see comments on membership in the final paragraph of the comments under regulation 2 above].

The words “membership” and “total membership” which are used in sub-paragraph (1) need to be defined.

It is not clear what entitlement members who leave (or opt out) with less than 3 months membership will be entitled to. There is no reference within the draft regulations to any potential for a refund of contributions.

## **Regulation 6 – Calculations**

These paragraphs could be combined into a single paragraph which could also pick up the calculation for pension debit members by saying “The pension calculation for a deferred member or for a member becoming, on leaving, entitled to the immediate payment of a pension is the member’s final pay multiplied by the member’s total membership divided by 60 but, in the case of a pension debit member, the benefits as so calculated shall be reduced in accordance with GAD guidance.”

It will be necessary to define “total membership” [see comments on membership in the final paragraph of the comments under regulation 2 above].

There will also be a need to qualify the method of calculation in respect of those members who, under regulation 10, decide to take only part of their accrued benefits upon flexible retirement.

In sub-paragraph (2) replace “/60” with “divided by 60”.

## **Regulation 7 – Final pay**

All references to “pay” in regulation 7 should be amended to “pensionable pay” except where the phrase “final pay” is used.

At the end of sub-paragraph (1), as a corollary to the third bullet point of the suggestions below on sub-paragraph (10), delete “in local government employment” and insert “in relation to local government employment with that employer.”

In sub-paragraph (3) either:

- a) add at the end “except for the purposes of calculating the death grant under regulation 15 when actual final pay is used.” or, perhaps preferably
- b) after the words “part-time employment” add “and subject to regulation 15(4)”

For the following reasons we have serious concerns over the wording of sub-paragraph (10), which provides that a member may elect to have benefits calculated on the average of any 3 consecutive years pay in the last 10 years:

- employers do not hold detailed pay records going back 10 years. There is presently only a legal requirement to hold payroll records for the current year plus the previous three years. Regulation 97(8) of the Income Tax (Pay As You Earn) Regulations 2003 [SI 2003/2682] says “For the purposes of this regulation, an employer must keep, for not less than 3 years after the end of the tax year to which they relate, all PAYE records

which are not required to be sent to the Inland Revenue by other provisions of these Regulations.” Employers may, however, retain certain information for periods in excess of the legal minimum, for example, year end earnings and deduction records, particularly as HMRC may claim unpaid tax retrospectively for 6 years.

- employees who voluntarily move to a lower graded post with another employer within 10 years of retirement would be able to have their benefits calculated on the higher pay figure from the previous employer, resulting in a “cost” to the new employer.
- as presently worded the regulation would permit a member to elect to have benefits calculated on the average of any 3 consecutive years pay in the last 10 years, even if these covered a period in respect of which the member holds an (unaggregated) deferred benefit or is already drawing a pension (having previously retired or taken benefits on flexible retirement within the last 10 years)
- the regulation, as presently worded, would permit a member leaving on, say, 30<sup>th</sup> April 2008 to elect to have benefits calculated on the average of any 3 consecutive years pay in the last 10 years i.e. back to 1<sup>st</sup> May 1998. The member would, we presume, under the Transitional Provisions also be able to choose to use the best one of the last three years pay. It appears, therefore, that the member would be able to use the best of all options.

If the Government wishes, nonetheless, to retain such a provision as described in draft regulation 7(10) we believe that a practical solution to overcome some of the above difficulties would be:

- the ability to elect to have benefits calculated on the average of any 3 consecutive years pay in the last 10 years should not include years prior to 1<sup>st</sup> April 2008 i.e. this is a new facility being brought in from that date and should only apply in relation to pay received from that date
- only employees who suffer an actual reduction in their full-time equivalent rate of pay should be able to elect to have benefits calculated on the average of any 3 consecutive years pay in the last 10 years (i.e. the regulation should cover those suffering an actual pay drop and should not be an RPI underpin for all scheme members)
- the ability to elect to have benefits calculated on the average of any 3 consecutive years pay in the last 10 years should not include pay from a previous employer nor pay in respect of which the member holds an (unaggregated) deferred benefit or is already drawing a LGPS pension (although there is an argument that it could include pay in respect of a period in respect of which the member is drawing a flexible retirement pension following a downgrading and that this is something the employer would have to consider when deciding whether or not to agree

to the flexible retirement request; this approach, however, would be inconsistent with the current calculation of final pay in such cases under regulation 21(1), 21(2) and 21(9) of the LGPS Regulations 1997)

- there is an argument that 10 years should be reduced to 6 years (to tie in with the normal period for retention of payroll records)
- the three year average should be based on financial year end pensionable pay figures (or full-time equivalent pensionable pay figures in the case of part-time employees, other than for the purposes of calculating a death grant in respect of a member dying in service).

Sub-paragraph (10) does not specify to whom or by when an election has to be made nor what happens if a member dies before being able to make an election. We suggest therefore that the provisions of regulations 22(6) and (7) of the 1997 Regulations are replicated i.e.

*22(6) An election under this regulation by a member must be made by notice in writing given to the appropriate administering authority before the expiry of the period of one month beginning with the day he is notified of his entitlement to a benefit.*

*22(7) Where a member has died without having made an election under this regulation, the appropriate administering authority may make an election on his behalf (whether or not the period within which he could have elected has expired).*

At the end of sub-paragraph (10) add “with each year being calculated in accordance with paragraphs (1) to (7)”.

Amend sub-paragraph (11) to “Benefits based on the average referred to in paragraph (10) are increased under the Pensions (Increase) Act 1971 using the day following the last day of the period chosen as the Pensions Increase date”. This is to reflect that it should be the benefits that are increased by PI, not the final pay.

A new sub-paragraph needs to be added to specify how the final pay for those in receipt of fees should be calculated. This should mirror the current provision in the LGPS Regulations 1997.

Certificates of Protection issued under the 1997 Regulations should continue in force. We agree that the 2007 Regulations should not contain a provision for the issue of new Certificates as regulation 7 permits all employees to be able to elect for their benefits to be based on the average of any three consecutive years in the last 10.

## **Regulation 8 – Retirement benefits**

As there is no definition of “normal retirement age” the reference is sub-paragraph (1) to “normal retirement age” should be amended to “normal retirement date” (which is defined in sub-paragraph (2)). We are happy for the NRD to be 65 for all scheme members, including Coroners.

## **Regulation 9 – Retirement after normal retirement date**

In sub-paragraph (1) delete “, with the consent of his employing authority,” as it refers to an employment matter, not a pension matter. Also, before “remains in service” insert “who first joins the Scheme on or after age 65 or who”.

In sub-paragraph (2) amend “his retirement or his 75<sup>th</sup> birthday” to “his retirement or the day before his 75<sup>th</sup> birthday” so that it is consistent with draft sub-paragraph (4).

At the end of sub-paragraph (3) add “or, if earlier, the day before the member’s 75<sup>th</sup> birthday even if he has not retired” and delete sub-paragraph (4).

## **Regulation 10 – Flexible retirement**

If it is intended that an employee should still have to reduce their hours or grade in order to obtain, with employer consent, flexible retirement benefits then:

- in sub-paragraph (1), after the words “to receive” add “from the date of the reduction in hours or grade” in order to clarify from when the benefits are payable
- in sub-paragraph (1), after the words “and those benefits may”, insert the words “, with his employer’s consent, “. This is to reflect the amendment made by SI 2006/966 to regulation 35(1A) of the LGPS Regulations 1997
- in sub-paragraph (5) amend “who is his employer at the date of election” to “who is the employer that agreed to the election under paragraph (1)”. This is to cover cases where the member may be employed “at the date of election” by a different employer to that which agrees to the flexible retirement
- in sub-paragraph (6) amend “member” to “active member”
- also, it is not the date of election for flexible retirement benefits that would be important for the purposes of sub-paragraph (6), but rather the date that the flexible benefits are payable from. Hence, sub-paragraph (6) might more accurately reflect the situation if it were amended to “(6) In the case of a person who is an active member on 31<sup>st</sup> March 2008, and whose benefits following an election under paragraph (1) are payable before 6<sup>th</sup>

April 2010<sup>7</sup>, paragraph (1) applies as if “aged 50” were substituted for “aged 55”.

However, two-thirds of employers who responded to the LGE’s consultation in 2006 believed that a member should not have to reduce the hours he works or the grade in which he is employed in order to be able to take flexible retirement (provided the employer retains the discretion as to whether or not to agree to the payment of flexible retirement benefits). To reflect this position, subparagraphs (1) and (6) should be amended to:

“(1) A member who has attained the age of 55 may elect in writing to the appropriate administering authority to receive immediate payment of all [or part – see comments below] of his retirement benefits and those benefits may, with his employer’s consent, be paid to him notwithstanding that he has not retired from that employment.

(6) In the case of a person who is an **active** member on 31<sup>st</sup> March 2008, and whose makes an election before 6<sup>th</sup> April 2010<sup>8</sup>, paragraph (1) applies as if “aged 50” were substituted for “aged 55”.

The draft regulations permit a member to elect to receive part of his benefits on flexible retirement. The regulation provides no detail of how this would work and it may be that more time needs to be given to consider how this might work in practice. However, if it is decided to retain the provision to permit an election to receive part of the accrued benefits, the regulations will need to specify, the regulation will need to specify how (perhaps in accordance with Government Actuary guidance) the benefits to be drawn are to be calculated (including the pre 1<sup>st</sup> April 2008 benefits), the effect on accrued membership, and whether that part of benefits not drawn will subsequently increase in line with RPI (i.e. be treated as if it were a deferred benefit) or whether it should continue to increase in line with the rise in the member’s earnings. The latter would seem to be the most appropriate.

It is our belief that where flexible retirement occurs before age 60 and the member has met or would meet the protected 85 year rule before age 60, the actuarial reduction should be calculated based on the shortfall to the earlier of

- a) age 60,
- b) the date the protected 85 year rule is met, where this falls after age 60 and before age 65, and
- c) age 65

Under the current GAD guidance, where a protected employee has attained the 85 year rule and is under age 60 or would do so before age 60, there is always a cost to the employer which potentially impacts on the employer’s decision to

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<sup>7</sup> This is 6<sup>th</sup> April 2010 in order to tie in with paragraph 22(9) of Part 3 of Schedule 36 to the Finance Act 2004

<sup>8</sup> This is 6<sup>th</sup> April 2010 in order to tie in with paragraph 22(9) of Part 3 of Schedule 36 to the Finance Act 2004

allow flexible retirement in these cases. If the reductions were calculated as set out above the employer would have the choice to waive the reduction under sub-paragraph (3).

A further sub-paragraph should be added after sub-paragraph (2) along the lines of "If the payment of benefits referred to in paragraph (1) takes effect after the member's 65<sup>th</sup> birthday, the benefits shall be increased in accordance with regulation 9."

Sub-paragraph (4) specifies that where an employer agrees to waive an actuarial reduction, in whole or in part, it shall pay to the Fund the cost incurred as a result of the waiver as calculated by the Fund actuary. However, there is no mention of how or when the cost should be paid e.g. whether it is payable by a lump sum or via the employer's contribution rate, or whether both options are available. This needs to be clarified in the Administration Regulations.

The regulations need to detail how existing added years contracts and the benefits deriving from them should be treated upon flexible retirement (i.e. whether the benefits from that proportion of the added years purchased can be paid and, if so, whether the existing contract remains in force for the remainder of the initial contract period or whether the contract ends). The regulations will also have to detail whether benefits derived from accrued AVC rights will be payable.

Lastly, the Transitional Regulations will need to clarify how the widow's / widower's pension should be calculated where a member marries after taking flexible retirement but before full retirement.<sup>9</sup>

### **Regulation 11 – Early leavers: inefficiency and redundancy**

We understand from the DCLG letter of 4<sup>th</sup> February 2007 that this draft regulation has been rewritten and now reads:

"11 – (1) Where –

- (a) a member is dismissed by reason of redundancy; or
- (b) his employing authority has decided that, on the grounds of business efficiency, it is in the employing authority's interest that he should leave their employment; and
- (c) in either case, the member has attained the age of 55,

He is entitled to immediate payment of retirement pension without reduction.

(2) In the case of a person who is a member on 31<sup>st</sup> March 2008, and is dismissed under (1) before 31<sup>st</sup> March 2010, paragraph (1) applies as if "aged 50" were substituted for "aged 55". "

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<sup>9</sup> LGPC Circular 193 provides more information in relation to this matter (see <http://www.lge.gov.uk/lge/core/page.do?pageld=71952>).

However, it would be helpful if sub-paragraph (1)(a) was amended to “subject to paragraph (3) [and possibly also subject to paragraph (4) – see below], a member is dismissed by reason of redundancy; or” and for a new sub-paragraph (3) [and possibly (4)] to be added as follows:

“(3) Paragraph (1) does not apply where a member who is dismissed by reason of redundancy is offered, by the employing authority, suitable alternative employment (within the meaning of section 141 of the Employment Rights Act 1996) which they unreasonably refuse.” This is to cover cases where a member is offered suitable alternative employment by the employing authority which the member unreasonably refuses. The employee is still dismissed by reason of redundancy but is not entitled to a redundancy payment under the ERA 1996. We are aware of some cases in recent years where employers, although not having to pay a redundancy payment, have nevertheless had to pick up a strain on Fund cost even though they have offered the member suitable alternative employment (which the member refused). The wording suggested above would overcome the loophole by removing the right to an immediate unreduced pension award in such cases.

It might also be appropriate to add a sub-paragraph (4) to exclude fixed-term employees from the automatic<sup>10</sup> payment of benefits under draft regulation 11, subject to this being permissible or objectively justifiable under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 [SI 2002/2034].

Also, sub-paragraph (2) should be amended to “(2) In the case of a person who is an **active** member on 31<sup>st</sup> March 2008, and is dismissed under (1) before 6<sup>th</sup> April 2010, paragraph (1) applies as if “aged 50” were substituted for “aged 55”.” This is to make it clear that the member had to be an active member on 31<sup>st</sup> March 2008; and the dismissal date has been changed to “before 6<sup>th</sup> April 2010” in order to tie in with paragraph 22(9) of Part 3 of Schedule 36 to the Finance Act 2004.

It would help, for the sake of consistency, if the heading to the regulation was amended to “Early leavers: business efficiency and redundancy”

### **Regulation 12 – Early leavers: ill health**

As employers, we have grave reservations about this draft regulation which provides for a 3 tier ill health benefits system i.e.

- accrued pension paid if a member leaves a local government employment on the grounds of ill health but is likely to be able to obtain gainful employment within a reasonable period
- pension based on accrued membership + 25% of shortfall to age 65 paid if a member leaves a local government employment because of ill health

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<sup>10</sup> Employers could be given the choice to pay benefits with an actuarial reduction and the choice to waive the reduction in whole or in part.

- and cannot obtain gainful employment within a reasonable period but is likely to be able to do so before age 65
- o pension based on accrued membership + 50% of shortfall to age 65 if a member leaves a local government because of ill health and there is no reasonable prospect of obtaining gainful employment before age 65

We understand that the rationale for wishing to move to a tiered ill-health retirement pension arrangement is that it is better focussed and targeted compared to the present "one size fits all" ill health retirement arrangements which may, in some cases, be putting unfair pressure on medical advisers and local government employers and managers who are asked to make life long decisions at a single point in time.

Whilst 71% of employer responses the LGE consultation in 2006 supported a move to a two tier ill health system, 99% of respondents were of the view that the scheme should be kept as simple as possible and that more than two tiers should be avoided. This was on the basis that having multiple tiers could lead to numerous appeals from members seeking to be placed into a higher tier in order to increase the amount of enhancement they are awarded, thereby increasing the administrative and appeal burden. Having only two tiers might make matters clearer as there would be an obvious difference between those tiers i.e. to get into the top tier the member would have to be very seriously incapacitated and permanently unable to undertake any gainful or regular employment.

The proposed 3 tier mechanism has not addressed our concerns. Furthermore, the use of subjective wording throughout regulation 12 such as "reduced likelihood", "gainful employment", "reasonable prospect", "reasonable period" and "effectively perform" will without doubt lead to a plethora of appeals.

We have other major, and perhaps more significant, concerns in relation to the ill health retirement proposals.

Firstly, the regulation, as presently drafted, would appear to provide an unenhanced pension to any employee who leaves a local government employment on the grounds of ill health, even if they are likely to obtain gainful employment within a reasonable period of leaving, or a pension enhanced by 25% of prospective service to 65 if they are unlikely to obtain gainful employment within a reasonable period of leaving but are likely to do so before age 65. In neither case does there appear to be a criterion that the employee has to be permanently incapable of discharging efficiently the duties of the relevant local government employment, or any available comparable employment with the employer, because of ill health. Thus, all of the good work that has been undertaken in recent years to reduce the headline numbers of ill health retirees following the criticism contained in HM Treasury's report on Ill Health Retirement in the Public Sector (2000) could, at a stroke, be undone. This is not acceptable given the press criticism

that would result from any significant rise in employees leaving with an immediate ill health pension.

Secondly, we are not convinced that the GAD costing of the “savings” that are expected to flow from the new ill health provisions will materialise. Whilst it is difficult for anyone to project with any certainty the numbers and costs of future ill health retirements, it is our belief that, by not having a permanent ill health test in the cases mentioned in the paragraph above, there will be a rise in the absolute numbers and cost of ill health retirements.

Thirdly, a member no longer needs 5 years membership in order to be entitled to an enhanced ill health pension.

Fourthly, there is no provision for the amount of ill health enhancement granted to a part-time employee to be pro-rated.

Fifthly, there is no provision corresponding to that in the 1997 Regulations which prevents a member who is already in receipt of an enhanced ill health pension from again receiving an enhanced pension should they subsequently be retired on ill health grounds for a second (or further) time.

All of the above issues need to be addressed.

It is our view that if there is to be a 3 tier ill health benefit structure, the first question should be “Is the employee permanently incapable of discharging efficiently the duties of the relevant local government employment, or any available comparable employment with the employer, because of ill health?” in the same way that regulation 16(6) includes a permanency test. If the answer to this question is “No”, the employee would not qualify for an ill health pension. If the answer is “Yes” the next questions would be:

- a) “Is the person **unlikely** to be able to undertake gainful employment (whether in local government or otherwise) before his NRD”
- b) “Is the person **unlikely** to be able to undertake gainful employment (whether in local government or otherwise) within the next 2 years<sup>11</sup>, but it is likely that he will be able to undertake gainful employment before his NRD”
- c) “Is the person **likely** to be able to undertake gainful employment (whether in local government or otherwise) within the next 2 years<sup>12</sup>”

If the answer to (a) is “Yes” the person would receive an ill health pension based on accrued membership + 50% of the shortfall to NRD (age 65).

If the answer to (b) is “Yes” the person would receive an ill health pension based on accrued membership + 25% of the shortfall to NRD (age 65).

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<sup>11</sup> 2 years has been inserted for illustrative purposes but the regulations could specify some other period.

<sup>12</sup> 2 years has been inserted for illustrative purposes but the regulations could specify some other period.

If the answer to (c) is “Yes” the person would receive an ill health pension based on accrued membership only.

*Note: an alternative approach would be to recognise that the LGPS is a pension scheme whose primary purpose should be to provide a pension to those who have fully retired from all gainful employment. If this view were to be taken, a benefit would be payable from the LGPS to those in category (a) but not to those in categories (b) and (c). Alternative provisions could be devised for those in the latter two categories e.g. by amending the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 to permit a termination payment to be made in such cases.*

As far as specific comments the wording of the current draft regulation are concerned we would make the following observations:

#### Sub-paragraph (1)

- amend “who leaves local government employment” to “who, in cases falling within paragraph (2), leaves a local government employment or, in cases falling within paragraphs (3) or (5), whose employment is terminated by the employer”. This will need to be further qualified to ensure that it excludes those who, because of their health, cease one employment and accept suitable alternative employment offered by the employer or who, because of their health, take flexible retirement
- at the end of the paragraph add “in relation to that employment”
- amend “reduced likelihood of obtaining gainful employment before his NRD” to “reduced likelihood of being able to undertake gainful employment before his NRD because of his ill health”. This is to link the requirement more specifically to the person’s ill health being the reason that they have a reduced likelihood of being able to undertake gainful employment and to remove any link to the state of the local job market (which the current use of the words “obtaining gainful employment” would have introduced)

#### Sub-paragraph (2)

- amend “of his obtaining gainful employment before his NRD” to “of his being able to undertake gainful employment before his NRD because of his ill health”

#### Sub-paragraph (2)(b)

- amend “reckonable service” to “membership”
- the 50% enhancement figure needs to have a pro-rata formula applied to it for part-timers (otherwise they would receive 50% of future whole time service)

Sub-paragraph (3)

- amend “although he cannot obtain gainful employment” to “although he is unlikely to be able to undertake gainful employment, because of his health,”
- amend “of leaving local government employment” to “of the termination of his local government employment”
- amend “to obtain gainful employment before his NRD” to “to undertake gainful employment before his NRD”

Sub-paragraph (3)(a)

- amend “he left local government employment” to “his local government employment was terminated”

Sub-paragraph (3)(b)

- a amend “reckonable service” to “membership”
- the 25% enhancement figure needs to have a pro-ration formula applied to it for part-timers (otherwise they would receive 25% of future whole time service)

Sub-paragraph (4)

- the 1997 underpin protection should clearly state that it only applies to those who were active members of the LGPS as at 31<sup>st</sup> March 2008 and who, on that date, were aged at least 51 years 243 days (or older)<sup>13</sup>. To extend the protection to younger employees would be difficult to objectively justify under the Age Regulations. Furthermore, to get the underpin protection, the member would have to meet the definition of permanent ill health contained in the LGPS Regulations 1997.

Sub-paragraph (5)

- amend “to obtain gainful employment” to “to undertake gainful employment”
- amend “of leaving local government employment, he is treated as if the date on which he left local government employment were his NRD” to “of the termination of his local government employment, he is treated as if the date of termination of his local government employment were his NRD”

Sub-paragraph (6)

- This simply refers to a report from a medical practitioner. We understand that the Administration Regulations will qualify this in the same way as regulation 97 of the LGPS Regulations 1997 defines that the ill health certificate has to be signed by an independent registered medical practitioner who is approved by the relevant administering authority and who is qualified in occupational health medicine.

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<sup>13</sup> This is to cover those older employees who might have received a better enhancement under the 1997 Regulations.

## **Regulation 13 – Election for lump sum in lieu of pension**

In sub-paragraph (1)

- a) at the beginning of the regulation add “ Other than in the case of a benefit payable under regulation 32”
- b) delete the words “any benefits become payable” and insert “that Benefit Crystallisation Event”.

The suggested wording in (a) above is to reflect that a serious ill health commutation payment is a single BCE. If regulation 32 is not deleted (see later comments on regulation 32) an election to commute would result in a separate BCE and thus no serious ill health commutation payment could be made.

The suggested wording in (b) above is to ensure that a member who has had a previous BCE can still elect to commute part of the pension from the current BCE.

At the end of sub-paragraph (2) add “(including AVCs and SCAVCs) and is to be calculated in accordance with guidance issued by the Government Actuary”.

Delete sub-paragraphs (3) and (4) as they are not relevant to this regulation and are covered within regulation 14.

Although the GAD commutation guidance says that a member cannot commute their pension to below the level of their GMP (if any) and that the requisite benefit test is performed before commutation, would it nonetheless be wise to include these points in the Regulations?

## **Regulation 14 – Limit on total amount of benefits**

In sub-paragraph (1) delete the words from “value of which” to “enhanced protection” and replace with the following “value of which exceeds his enhanced protection, or which exceeds his lifetime allowance increased, where applicable, by his primary protection, except in accordance with guidance issued by the Government Actuary.” This is to reflect the changes made by SI 2006/2008 to regulation 19A of the LGPS Regulations 1997 and to reflect the fact that enhanced protection is not a multiple of the lifetime allowance.

At the end of sub-paragraph (3) add “and is the aggregate of the capital values of his entitlements under the Scheme, the 1997 Scheme and the 1995 Scheme.”

Add a new sub-paragraph (4) “The appropriate administering authority is responsible for deducting from any payments of benefits under the Scheme any tax to which they may become chargeable under the Finance Act 2004.” This is necessary to permit the administering authority to reduce benefits payable by any tax charge due.

Scheme members electing for Enhanced Protection are required to surrender any benefits as at 5<sup>th</sup> April 2006 that exceed the former HMRC limits. As this is a

requirement of the Finance Act 2004 it will be necessary to consider whether the Regulations need to be amended to incorporate this. GAD guidance is needed showing how the surrendered amount is to be calculated.

### **Regulation 15 – Death grants: active members**

In sub-paragraph (3) amend “reckonable pay” to “final pay”.

In sub-paragraph (4) delete both references to “or variable-time”. This is because draft regulation 7 does not require the pay of a variable-time employee to be grossed up and thus only the actual pay of a variable-time employee can be used when calculating any benefit under the Regulations.

For deaths occurring before 6<sup>th</sup> April 2006, HMRC have introduced transitional arrangements which allow a death grant to be paid within two years of the date the scheme could reasonably have become aware of the member’s death. This allows more flexibility in scenarios where notification of death is delayed. Representations have been made for a similar provision to be introduced for post 5<sup>th</sup> April 2006 deaths. If such a provision is introduced, it will need to be replicated in the 2007 Regulations.

### **Regulation 16 – Elections for early payment of pension**

There has been some debate in the past as to the meaning of the word “immediately”. For example, in sub-paragraph (1) does it mean “immediately from age 55” or “immediately from the date of election”; and in sub-paragraph (6)(a) does “immediately” mean “immediately from the date the person became permanently incapable” or “immediately from the date of election”? In order to be precise and to ensure consistent application of the regulation replace the word “immediately” in sub-paragraphs (1), (3) and (6)(a) with the words “from the date of election” and delete the word “immediate” in sub-paragraph (7).

Unlike the 1995 Regulations, regulation 16 does not make provision for the formal award of a deferred benefit on leaving; it simply refers to when benefits may be paid. It would be helpful if regulation 16 could provide for the award of a benefit. To achieve this, sub-paragraph (1) could be amended to read

“(1) Subject to regulation 5, a member who leaves a local government employment and who, apart from this regulation, is not entitled to immediate payment of retirement benefits –

- (a) is entitled to the award of a deferred pension, and
- (b) may, once he is aged 55 or more, elect in writing to the appropriate administering authority to receive payment of them from the date of election.”

Although the 1997 Regulations say the election should be to the employing authority it seems more appropriate for the election to be made to the administering authority (who should know what the employer’s policies under

regulations 16(2) and (5) are or can, in any event, liaise with the employing authority).

In sub-paragraph (4), after the words "His pension" insert ", prior to any election under regulation 13, " and, in sub-paragraph (5), delete "and grant"

Sub-paragraph (6) should be re-numbered as sub-paragraph (7) and vice versa. The new sub-paragraph (6) [former sub-paragraph (7)] should then commence with the words "Subject to paragraph (7)," and those words should be deleted from new sub-paragraph (7) [former sub-paragraph (6)]. At the end of sub-paragraph (2) amend the words "but see paragraph (6)" to "but see paragraph (7)".

Sub-paragraph (8) should be amended to "(8) In the case of a person who is an **active** member on 31<sup>st</sup> March 2008, and makes an election before 6<sup>th</sup> April 2010, paragraph (1) applies as if "aged 50" were substituted for "aged 55". This is to make it clear that the member had to be an active member on 31<sup>st</sup> March 2008; and the election date has been changed to "before 6<sup>th</sup> April 2010" in order to tie in with paragraph 22(9) of Part 3 of Schedule 36 to the Finance Act 2004. [Note: this provision will also need to be built into regulation 31 of the 1997 Regulations and regulation D11 of the 1995 Regulations].

### **Regulation 17 – Death grants: deferred members**

Sub-paragraph (3) says that the death grant multiplier for a deferred member who dies should be 5 i.e. equal to 5 years worth of pension. There are two matters to consider

- a) should the multiplier be changed to 3? This produces a 3/80<sup>ths</sup> guarantee for each year of pre 1<sup>st</sup> April 2008 membership (the same as currently applies under the 1997 Regulations for pre 1<sup>st</sup> April 2008 membership) and a 3/60<sup>ths</sup> guarantee for each year of post 31<sup>st</sup> March 2008 membership (representing a benefit improvement compared to the position under the 1997 Regulations); or
- b) should the multiplier be 5? This would constitute a benefit improvement but would be consistent with the death grant multiplier we propose for a pensioner (see comments on regulation 18 below) and would mean that the death grant guarantee for a deferred member who dies just before retirement would be the same as that paid to a deferred member who reaches retirement, draws their pension, and subsequently dies i.e. both would be a 5 year guarantee.

Add sub-paragraph (4) i.e. "(4) If the administering authority have not made payments under paragraph (1) equalling in aggregate the member's death grant before the expiry of two years beginning with his death, they must pay an amount equal to the shortfall to the member's personal representatives."

## **Regulation 18 – Death grants: pensioner members**

Amend sub-paragraph (1) to read “(1) If a pensioner member dies before attaining age 75, a death grant is payable.”

In sub-paragraph (3) the death grant multiplier should be amended from a 10 year guarantee to a lower multiplier, preferably a 5 year guarantee. Also in sub-paragraph (3) it should be made clear that the guarantee is a multiplier of the pension in payment (i.e. post commutation and post actuarial reduction) but ignoring any abatement reduction due to re-employment.

Add sub-paragraph (4) i.e. “(4) If the administering authority have not made payments under paragraph (1) equalling in aggregate the member’s death grant before the expiry of two years beginning with his death, they must pay an amount equal to the shortfall to the member’s personal representatives.”

## **Regulation 19 – Survivor benefits: active members**

In sub-paragraph (2) delete the words “augmented by any provision of these Regulations” and insert “augmented by any<sup>14</sup> additional membership to which the member would have been entitled under regulation 12(2) if he had become entitled to a pension under that regulation on the date he died”. Also, delete the words “final salary” and replace with the words “final pay”.

In sub-paragraph (3) delete the words “or a deferred member” and replace “/160” with “divided by 160”.

Remove sub-paragraph (4) and place it in the Transitional Regulations (but note that the reference to “6<sup>th</sup> April 1988” should be amended to “5<sup>th</sup> April 1988”).

In sub-paragraph (5) amend “jointly entitled” to “jointly and equally entitled”.

## **Regulation 20 – Survivor benefits: pensioners**

In sub-paragraph (2) delete the words “final salary” and replace with the words “final pay”. It should be noted that if the member’s pension had been increased under regulation 9(2), the survivor’s pension under regulation 20(2) is not similarly increased. Is this intentional? If not, the formula in regulation 20(2) will need to be amended to include the same level of percentage increase as had been applied to the member’s pension under regulation 9(2).

At a more fundamental level, however, it is not clear that HMRC rules will permit a survivor benefit to be calculated using the formula contained in sub-paragraph (2) where the member dies after attaining age 75 – see paragraphs 16 to 16C of Part 2 of Schedule 28 to the Finance Act 2004 which would appear to restrict the dependants’ pensions to no more than the pensioner was in receipt of in the

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<sup>14</sup> This is to reflect cases where there may be no enhancement e.g. where a member dies in service after age 65 or, if a member needs 5 years membership in order to get enhancement under regulation 12(2), cases where a member does not have 5 years membership.

previous 12 months plus 5% of any tax free lump sum that had been paid to the member. This could cause difficulties in cases where the member had taken maximum commutation and/or the member's pension had been paid at an actuarially reduced rate, or where the member had commuted his pension on the grounds of serious ill health (and possibly where the member's pension had been subject to abatement during the previous 12 months).

Remove sub-paragraph (3) and place it in the Transitional Regulations (but note that the reference to "6<sup>th</sup> April 1988" should be amended to "5<sup>th</sup> April 1988").

In sub-paragraph (4) amend "jointly entitled" to "jointly and equally entitled".

*Note: regulations 20 and 21 should swap places as it is more logical for "Survivor benefits: deferred members" to precede "Survivor benefits: pensioners".*

### **Regulation 21 – Survivor's benefits: deferred members**

In sub-paragraph (2) delete the words "final salary" and replace with the words "final pay".

Remove sub-paragraph (3) and place it in the Transitional Regulations (but note that the reference to "6<sup>th</sup> April 1988" should be amended to "5<sup>th</sup> April 1988").

In sub-paragraph (4) amend "jointly entitled" to "jointly and equally entitled".

### **Regulation 22 – Meaning of "eligible child"**

The definition of an eligible child does not comply with the definition in paragraph 15 of Part 2 to Schedule 28 of the Finance Act 2004 which says:

(2) A child of the member is a dependant of the member if the child-

- (a) has not reached the age of 23, or
- (b) has reached that age and, in the opinion of the scheme administrator, was at the date of the member's death dependant on the member because of physical or mental impairment.

(3) A person who was not married to, or a civil partner of, the member at the date of the member's death and is not a child<sup>15</sup> of the member is a dependant of the member if, in the opinion of the scheme administrator, at the date of the member's death -

- (a) the person was financially dependant on the member,
- (b) the person's financial relationship with the member was one of mutual dependence, or
- (c) the person was dependant on the member because of physical or mental impairment.

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<sup>15</sup> This is relevant as a child's pension can be paid under the LGPS Regulations to a child who is not a child of the member and thus there would need to be financial dependency or dependency because of physical or mental impairment.

Furthermore, there are transitional arrangements in the Taxation of Pension Schemes (Transitional Provisions) Order 2006 [SI 2006/572] that extend the definition of a child to:

A child of the member is a dependant of the member if the child:

- (a) has not reached the age of 23;
- (b) has reached that age and, in the opinion of the scheme administrator, was at the date of the member's death dependant on the member because of physical or mental impairment.
- (c) has reached that age and is in full time education or undertaking vocational training, or
- (d) on reaching on reaching that age or, if later, on ceasing full time education or vocational training is, in the opinion of the scheme administrator, suffering from physical or mental deterioration which is sufficiently serious to prevent the individual from following a normal employment or which would seriously impair his earning capacity.

These provisions apply (if scheme rules wish to adopt them) where:

- (a) a child was already in receipt of a pension on 5 April 2006 (or the member had died before then and the child's pension was due to come into payment); or
- (b) a member was in receipt of a pension on 5 April 2006 and his or her child is born on or before 5 April 2007

At the end of sub-paragraph (3) of the draft regulation add "and may suspend such payment during the break". This is allowable following the deletion of paragraph 16(3) of Part 2 of Schedule 28 to the Finance Act 2004.

### **Regulation 23 – Children's pensions**

To ensure consistency of approach with regulations 19(2) and (3)

- i) amend sub-paragraph (4) to read "If the deceased was an active member whose total membership was at least three months, the pension is calculated by multiplying his membership, augmented by any<sup>16</sup> additional membership to which the member would have been entitled under regulation 12(2) if he had become entitled to a pension under that regulation on the date he died, by his final pay and divided by
  - (a) 320 where there is one eligible child and a survivor pension is payable under regulation 20, or
  - (b) 160 where there is more than one eligible child and a survivor pension is payable under regulation 20, with the pension being apportioned among them equally

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<sup>16</sup> This is to reflect cases where there may be no enhancement e.g. where a member dies in service after age 65 or, if a member needs 5 years membership in order to get enhancement under regulation 12(2), cases where a member does not have 5 years membership.

- (c) 240 where there is one eligible child and no survivor pension is payable under regulation 20, or
  - (d) 120 where there is more than one eligible child and no survivor pension is payable under regulation 20, with the pension being apportioned among them equally”
- ii) insert a new sub-paragraph (4A) to read “If the deceased was an active member whose total membership was less than three months, the pension is calculated by multiplying his membership by his final pay and divided by
- (a) 320 where there is one eligible child and a survivor pension is payable under regulation 20, or
  - (b) 160 where there is more than one eligible child and a survivor pension is payable under regulation 20, with the pension being apportioned among them equally
  - (c) 240 where there is one eligible child and no survivor pension is payable under regulation 20, or
  - (d) 120 where there is more than one eligible child and no survivor pension is payable under regulation 20, with the pension being apportioned among them equally”

Amend sub-paragraph (5) to read “If the deceased was a deferred member, the pension is calculated by multiplying the total membership he would have been entitled to if on the date of death he had become entitled under regulation 8 by his final pay and divided by

- (a) 320 where there is one eligible child and a survivor pension is payable under regulation 20, or
- (b) 160 where there is more than one eligible child and a survivor pension is payable under regulation 20, with the pension being apportioned among them equally
- (c) 240 where there is one eligible child and no survivor pension is payable under regulation 20, or
- (d) 120 where there is more than one eligible child and no survivor pension is payable under regulation 20, with the pension being apportioned among them equally”

Amend sub-paragraph (6) to read “If the deceased was a pensioner member, the pension is calculated by multiplying his total membership by his final pay and divided by

- (a) 320 where there is one eligible child and a survivor pension is payable under regulation 20, or
- (b) 160 where there is more than one eligible child and a survivor pension is payable under regulation 20, with the pension being apportioned among them equally
- (c) 240 where there is one eligible child and no survivor pension is payable under regulation 20, or

- (d) 120 where there is more than one eligible child and no survivor pension is payable under regulation 20, with the pension being apportioned among them equally”

It should be noted that if the member’s pension had been increased under regulation 9(2), the child’s pension under regulation 23(6) is not similarly increased. Is this intentional? If not, the formula in regulation 23(6) will need to be amended to include the same level of percentage increase as had been applied to the member’s pension under regulation 9(2).

Delete sub-paragraph (7).

At a more fundamental level, it is not clear that HMRC rules will permit a survivor benefit to be calculated using the formula contained in sub-paragraph (6) above where the member dies after attaining age 75 – see paragraphs 16 to 16C of Part 2 of Schedule 28 to the Finance Act 2004 which would appear to restrict the dependants’ pensions to no more than the pensioner was in receipt of in the previous 12 months plus 5% of any tax free lump sum that had been paid to the member. This could cause difficulties in cases where the member had taken maximum commutation and/or the member’s pension had been paid at an actuarially reduced rate or the member has commuted his pension on the grounds of serious ill health (and possibly where the member’s pension had been subject to abatement during the previous 12 months).

#### **Regulation 24 – Pension increases under the Pensions (Increase) Acts**

This regulation should be moved into the Administration Regulations or into regulation 5 of the LGPS (Management and Investment of Funds) Regulations 1998<sup>17</sup>.

#### **Regulation 25 – Power of employing authority to increase total membership**

At the end of sub-paragraph (1) delete the words “of an active member” and replace with the words “of a member during active membership or up to 6 months after ceasing active membership”. There are a number of reasons for this:

- being able to augment at, or up to 6 months after, the point of leaving would mean that employers could make use of the exemptions in paragraphs 13 and 13B of Schedule 2 to the Employment Equality (Age) Regulations 2006 (as amended by SI 2006/2931). These permit the enhancement of an age related benefit paid before NRD. Restriction the augmentation facility to active members only would mean that employers

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<sup>17</sup> It might also be helpful to allow those employers who under regulation 91 of the 1997 Regulations are still recharged Pensions Increase to capitalise the Pensions Increase liability and make a payment into the relevant Fund to discharge their liability.

could not rely on the exemptions (because they would be augmenting an active member's membership, not augmenting an age related benefit).

- there may be circumstances where a redundancy / efficiency retirement occurs before the next relevant Committee date at which an employer would wish to determine / authorise an augmented award.
- if a person lodges a successful appeal under IDRPs against the non-award of augmented membership, any award would, by its very nature, have to be made after the date of leaving.
- a six month window would be consistent with the provision in regulation 6 of the 2006 Discretionary Compensation Regulations which permits an employer to make a lump sum compensation payment of up to 104 weeks pay (inclusive of any statutory and discretionary redundancy pay) up to six months after leaving.

There are no provisions within regulation 25 explaining how and when the cost of augmentation is to be met. We understand that this will be covered in the Administration Regulations.

At the end of sub-paragraph (2) amend "is the shortest" to "is the shorter" (on the grounds that there are only two options). It would be preferable to amend "65" to "75" in sub-paragraph (2)(b) so as to permit employers to augment the membership of employees over the age of 65.

The regulation does not specify how augmented membership should be pro-rated for part-time employees. However, this is acceptable as it provides scope for employers to deal with such cases as they see fit.

### **Regulation 26 – Power of employing authority to award additional pension**

We would suggest that this provision is not needed and should be deleted, particularly as employers can make use of the augmentation provisions of regulation 25.

However, should the regulation not be deleted then, in sub-paragraph (1), delete "a person" and insert "a member". Would the power to award an extra pension be limited to active members only? If not, there are specific HMRC rules requiring that where the increase to a pension in payment rises above a defined cost-of-living measure a further lifetime allowance test may be triggered.

It should be noted that due to the method of calculating a survivor or child's pension (as specified in regulations 19(3), 20(2), 21(2), 23(4), 23(5) and 23(6)) no survivor or child's pension would attach to any extra pension granted under regulation 26.

There are no provisions within regulation 26 explaining how and when the cost of any extra pension awarded under the regulation is to be met. We understand that, if regulation 26 is retained, this will be covered in the Administration Regulations.

Is it intended that a member could elect under regulation 13 to commute part of the pension awarded under regulation 26?

### **Regulation 27 – Election in respect of additional pension**

Amend “A member” to “An active member”.

There are no provisions within regulation 27 explaining how the cost of additional pension is to be calculated, when the contributions may commence / end, how the amount of additional pension will be pro-rated if the member does not finish paying the contributions, whether or not the contributions will be deemed to have been completed if the member retires on ill health grounds or dies in service, etc. This needs to be covered in the Administration Regulations.

### **Regulation 28 – Election to pay AVCs**

We assume that it is still intended to retain a Shared Cost AVC facility. If so, amend the heading to regulation 28 to read “Election to pay AVCs / SCAVCs”.

### **Regulation 29 – Death benefits: AVCs**

Amend the heading to read “Death benefits: AVCs / SCAVCs”.

In sub-paragraph (1) delete “under a pension policy” and amend “AVCs” to read “AVCs or SCAVCs”.

In sub-paragraph (2) delete “The policy must provide for the administering authority to pay the company the same amounts as the AVCs to be so used within” and insert “The policy must provide for the employing authority to pay the death benefit AVCs or SCAVCs to the company as soon as is reasonably practicable but in any event no later than” .

Delete sub-paragraphs (3) and (5); the first is irrelevant and the second bears no relationship to how life assurance policies work.

At a more fundamental level the regulation does not appear to reflect the provisions of Schedule 29 of the Finance Act 2004 relating to the payment of lump sum death benefits. For example, there should surely be a provision that no lump sum death benefit can be paid if the member dies after the age of 75; that the lump sum death benefit must be paid within 2 years of the date of death; etc. It may be that something along the following lines would suffice “The benefits derived from the payment of death benefit AVCs / SCAVCs must reflect the restrictions contained in Part 2 of Schedule 28 to the Finance Act 2004”.

It would be helpful if the major AVC providers were consulted on the wording of regulation 29 to ensure it mirrors their practices and meets the requirements of the Finance Act 2004.

### **Regulation 30 – Retirement benefits: AVCs**

Amend the heading to read “Retirement benefits: AVCs / SCAVCs”.

In sub-paragraphs (1), (2) and (6) amend “AVCs” to read “AVCs or SCAVCs”.

In sub-paragraph (2) insert at the beginning “Subject to paragraph (6),” and amend the reference to “regulation 27” to read “regulation 28”.

Sub-paragraph (2) does not reflect what happens to those members not wishing (or not able, because they have not attained age 50) to immediately purchase an annuity. Such members, in effect, have a paid-up policy. By using the words “under a pension policy”, sub-paragraph (2) implies that a member who has paid AVCs or SCAVCs will only be able to purchase an open market annuity and that the option of a scheme “top-up” pension is not available. Is this intended?

Sub-paragraph (3) should contain a restriction that no such payment can be made if the person dies after age 75 and should state that where the accumulated value is payable to the member’s personal representative this must be paid within 2 years of the date of death.

Sub-paragraph (5) should be amended to read “The value of the benefits payable must be reasonable considering the accumulated value.”

Sub-paragraph (6) should be amended to read:

“(6) The AVCs / SCAVCs may be used to provide benefits in the form of a lump sum if –

- (a) paragraph (3) applies; or
- (b) a refund of AVCS or SCAVCs is payable; or
- (c) the member’s pension and AVC / SCAVC benefits are to be commuted under regulation 31 (commutation of small pensions); or
- (d) the member elects in writing to the appropriate administering authority before the Benefit Crystallisation Event to take some or all of the accumulated AVCs / SCAVCs in the form of a lump sum, subject to the lump sum, when aggregated with the capital value of his other benefits under the Scheme and the 1997 Regulations, not exceeding 25% of the capital value of his entitlements as calculated in accordance with regulation 14(3).”

It would be helpful if the major AVC providers were consulted on the wording of regulation 30 to ensure it mirrors their practices and meets the requirements of the Finance Act 2004.

### **Regulation 31 – Commutation: small pensions**

Add at the end “and the amount shall be calculated in accordance with guidance issued by the Government Actuary.”

The regulation should also state that the commutation extinguishes all benefits and prospective benefits under the Scheme and the 1997 Regulations.

In relation to small pensions generally it would be helpful if there were a provision, presumably in the Administration Regulations, permitting small pensions in different Funds to be aggregated and paid from one Fund (with the paying Fund receiving a capital payment from the other Fund). This would reduce pension payroll costs.

### **Regulation 32 – Commutation: exceptional ill health**

There are some arguments that this regulation should be deleted as:

- a) some doctor's are reluctant to sign certificates stating that a member has less than 12 months to live
- b) the death grant for a death in service is being increased to 3 times pay
- c) if the death grant for a pensioner member is more than 5 years it would not make sense for a member to take commutation due to exceptional ill health. Instead, the member could take the maximum lump sum under regulation 13 (via the 12:1 commutation facility) and would know that there would still be a death grant payable under regulation 18.

If, however, regulation 32 is retained, it needs to reflect all the provisions of paragraph 4 of Part 1 of Schedule 29 to the Finance Act 2004 i.e.

- (a) before it is paid the scheme administrator must have received evidence from a registered medical practitioner<sup>18</sup> that the member is expected to live for less than one year,
- (b) it can only be paid when all or part of the member's lifetime allowance is available,
- (c) it can only be paid in respect of an uncrystallised arrangement (which effectively means that the regulation would need to make it clear that **instead** of paying a pension the administering authority would pay a serious ill health lump sum). An uncrystallised arrangement is an arrangement in respect of which there has been no previous benefit crystallisation event,
- (d) the payment extinguishes the member's entitlement to benefits under the arrangement, and
- (e) it can only be paid if the member has not reached the age of 75.

Furthermore, if the payment means that, overall, the member exceeds the available lifetime allowance the excess creates a lifetime allowance charge (at the rate of 55% of the excess). The administering authority must account for the charge due, and so the regulation should permit this to be deducted from the

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<sup>18</sup> A registered medical practitioner means a fully registered person within the meaning of the Medical Act 1983. However, in circumstances where the member is overseas, the term "registered medical practitioner" may also be interpreted for the purpose of the tax rules as including a certificate from someone with equivalent overseas qualifications.

serious ill-health lump sum paid to the member (so the payment will be net of the lifetime allowance charge due).

### **Regulation 33 – Guidance on future costs**

We welcome the proposal to convene a Policy Review Group to agree cost sharing mechanisms.

#### **Other matters**

##### 1. Optants out

There needs to be a regulation specifying that an optant out (who meets the requirements of regulation 5) is to be awarded a deferred benefit under regulation 16 and that deferred benefit cannot come into payment under the provisions of regulation 16 until the member has ceased the employment from which they opted out of the LGPS.

##### 2. Pension Credit Members

The regulations need to cover the benefit provisions for Pension Credit Members.

##### 3. Councillor Members

The regulations need to cover the benefit provisions for Councillor Members. We can see no reason why Councillor Members should not have the new scheme applied to them as from 1<sup>st</sup> April 2008 (subject to the necessary adjustments to reflect the fact that they are in a CARE scheme rather than a final salary scheme). However, to ensure the value of the pension package offered to councillor members is roughly the same as that to be provided for employees, consideration will need to be given to the revaluation rate. Currently, the average age of Councillor members will in all likelihood be higher than that for employees, meaning that the cost of pension provision for Councillors is higher. It may be, therefore, that the revaluation rate should be greater than RPI but less than RPI + 1.5%. Conversely one might argue that RPI + 1.5% is reasonable as the Government's approach in recent years has been to modernise the allowance system with a view to attracting younger councillors and so, over time (and assuming the Government's policy is successful), the average age profile for Councillors should drop and, in any event, the pension scheme should be seen as part of an overall package designed to encourage people to stand for office.

##### 4. Refunds

The regulations are currently silent on what happens to a member's contributions if they leave or opt out of the scheme with less than three months membership and have not had a transfer in of pension rights from another scheme. Our initial reaction is that the Regulations should specify that the contributions are to be refunded (unless the member requests otherwise and has

a frozen refund) but we will consider this further before making a formal response in our comments on the draft Administration Regulations.

#### 5. Death of a member with a frozen refund

To fit in with HMRC rules the regulations need to provide that in the case of the death of a member with a frozen refund, the refund is payable to the member's personal representatives as a lump sum death benefit and that a Certified Amount may be deducted from the payment. There would normally be no tax deduction.

#### 6. Bona Vacantia

Where a death grant is payable, but there are no known beneficiaries, payment is currently made to the Treasury Solicitor. A number of schemes contain a Bona Vacantia rule which permits the sum to revert to the Fund rather than paying it to the Treasury Solicitor. This would be a welcome amendment to add into the 2007 Regulations.

#### 7. Interest

The regulations contain no interest provisions. Although these are included in the Administration Regulations the interest payable is nonetheless a benefit and perhaps there should, therefore, be a reference to interest in the Benefit Regulations.

#### 8. Age 75

In the light of potential difficulties with making unauthorised payments after age 75 it would be helpful if the new Scheme only permitted employees to join / remain a member until age 74 ½.

#### 9. Civil partners and cohabiting partners

We understand that the intention is to define a cohabiting partner, referred to in regulations 19(1), 20(1) and 21(1), in the same way as in the Teachers Pension Scheme and that this definition will be used until such time as any change to primary legislation requires an adjustment to be made.

We also understand that it is intended that only post 5<sup>th</sup> April 1988 membership will be used in the calculation of survivor pensions for civil partners and cohabiting partners and that consideration will be given to allowing members who wish their pre 6<sup>th</sup> April 1988 membership to count towards a civil partner's or cohabiting partner's pension to do so and to meet the cost by either

- a) the payment of additional contributions, or
- b) having a reduction applied to their pre 6<sup>th</sup> April 1988 membership.

#### 10. Pre and post April 2008 membership

We understand that the interaction between membership and benefits accrued up to 31<sup>st</sup> March 2008 with membership and benefits accruing post 31<sup>st</sup> March 2008 will be contained in Transitional Provisions. In general, a member who was an active member on 31<sup>st</sup> March 2008 and who continues to be a member on 1<sup>st</sup> April 2008 will have his benefits calculated on a 1/80<sup>th</sup> pension plus 3/80<sup>ths</sup> lump sum basis in respect of all membership accrued up to 31<sup>st</sup> March 2008 and on a 1/60<sup>th</sup> pension basis for all membership after that date. The benefits will be based on the final pay (as defined in regulation 7) and it will be made clear that, although a split calculation, the pension payable will constitute a single Benefit Crystallisation Event for the purposes of the Finance Act 2004.

#### 11. GMPs and Requisite Benefits

Although GMPs and Requisite Benefits relate to periods of membership prior to the introduction of the new Scheme on 1<sup>st</sup> April 2008 they nevertheless may affect the benefits of members retiring on or after that date. Hence, should they not be referred to in the Benefits Regulations?

Yours sincerely

A handwritten signature in black ink that reads "TBE Edwards". The signature is written in a cursive style with a large, looped 'E' at the end.

Terry Edwards  
Head of Pensions