

REPORT OF THE GROUP DIRECTOR, FINANCE & CORPORATE RESOURCES		
Implementation of the Markets in Financial Instruments Directive (MiFID II)	Classification PUBLIC	Enclosures FIVE
	Ward(s) affected ALL	
Pensions Committee 11th September 2017		

1. INTRODUCTION

- 1.1 This report outlines the impact of the implementation of the Markets in Financial Instrument Directive 2014/65 (“MiFID II”) and in particular the risk to the administering authority of becoming a retail client on 3rd January 2018. The report recommends that the committee agree that elections for professional client status should be made on behalf of the authority immediately.

2. RECOMMENDATIONS

- 2.1 The Pensions Committee is recommended to:
- Note the potential impact on investment strategy of becoming a retail client with effect from 3rd January 2018
 - Agree to the immediate commencement of applications for elected professional client status with all relevant institutions to ensure it can continue to implement an effective investment strategy.
 - Acknowledge and agree to forego the protections available to retail clients (detailed in Appendix 1)
 - Delegate responsibility to the Group Director, Finance and Corporate Resources for the purposes of completing applications and determining the basis of each application as either full or single service.

3. RELATED DECISIONS

- Pensions Committee 18th November 2015 – MiFID II – Impact on LGPS and Local Authorities

4. COMMENTS OF THE GROUP DIRECTOR, FINANCE & CORPORATE RESOURCES

- 4.1 The implementation of MiFID II on 3rd January 2018 will change the status of the London Borough of Hackney Pension Fund from that of ‘per se professional’ client to that of a retail client, unless it is opted up by the investment firms with which it deals to ‘elective professional client’ status

- 4.2 Failure to achieve ‘elective professional client’ status by 3rd January 2018 would severely restrict the range of financial institutions and instruments available to the

Fund, potentially hampering its ability to implement a suitable investment strategy. This could have significant long term implications for the financial health of both the Fund and the Council as the main employer within it.

- 4.3 In extreme cases, the failure to 'opt up' by 3rd January 2018 could resort in the Fund being a forced seller of assets, if managers are unable or unwilling to deal with the Fund as a retail client.

5. COMMENTS OF THE DIRECTOR, LEGAL

- 5.1 The introduction of the Markets in Financial Instrument Directive 2014/65 ("MiFID II") from 3rd January 2018 will see a change in the status of the London Borough of Hackney Pension Fund from a per se professional to a retail client

6. BACKGROUND TO THE REPORT

- 6.1 Under the current UK regime, local authorities are automatically categorised as 'per se professional' clients in respect of non-MiFID scope business and are categorised as 'per se professional' clients for MiFID scope business if they satisfy the MiFID Large Undertakings test. This is currently the case for the London Borough of Hackney. Local authorities that do not satisfy the Large Undertakings test may opt up to elective professional client status if they fulfil certain 'opt-up criteria'.
- 6.2 Following the introduction of the Markets in Financial Instrument Directive 2014/65 ("MiFID II") from 3 January 2018, firms will no longer be able to categorise a local public authority or a municipality that (in either case) does not manage public debt ("local authority") as a 'per se professional client' or elective eligible counterparty (ECP) for both MiFID and non-MiFID scope business. Instead, all local authorities must be classified as "retail clients" unless they are opted up by firms to an 'elective professional client' status. Where a local authority acts as the administering authority for an LGPS Fund, as is the case with Hackney, firms are required to classify the authority's Pension Fund and Treasury management functions separately.
- 6.3 Furthermore, the FCA has exercised its discretion to adopt gold-plated opt-up criteria for the purposes of the quantitative opt-up criteria, which local authority clients must satisfy in order for firms to reclassify them as an elective professional client.

7. POTENTIAL IMPACT

- 7.1 A move to retail client status would mean that all financial services firms like banks, brokers, advisers and fund managers would be required to treat the London Borough of Hackney Pension Fund the same way they do non-professional individuals and small businesses. This would include a raft of protections ensuring that investment products are suitable for the Fund's needs, and that all the risks and features have been fully explained. This would provide a higher standard of protection for the Fund but would also involve more work and potential cost for both the firm and the Fund, for the purpose of proving to the regulator that all such requirements have been met.
- 7.2 Such protections would also come at the price of the Fund potentially being unable to access the wide range of assets needed to implement an effective, diversified

investment strategy; as retail status would significantly restrict the range of financial institutions and instruments available. Many institutions currently servicing the LGPS are not authorised to deal with retail clients and may not wish to undergo the required changes to resources and permissions in order to do so.

- 7.3 Even if an institution secures the ability to deal with retail clients, the range of instruments it could make available to the Fund would be limited to those defined under Financial Conduct Authority (FCA) rules as 'non-complex' which would exclude many of the asset classes currently included in LGPS fund portfolios. In many cases managers would no longer be able to even discuss ('promote') certain asset classes and vehicles with the authority as a retail client.

8. ELECTION FOR PROFESSIONAL CLIENT STATUS

- 8.1 MiFID II allows for retail clients which meet certain conditions to elect to be treated as professional clients (to 'opt up'). There are two tests which must be met by the client when being assessed by a financial institution: the quantitative and the qualitative test.
- 8.2 The Local Government Pension Scheme Advisory Board (SAB) and the Local Government Association (LGA) along with the Department of Communities and Local Government (DCLG) and the Investment Association (IA) have successfully lobbied the FCA to make the test better fitted to the unique situation of local authorities.
- 8.3 The new tests recognise the status of LGPS administering authorities as providing a 'pass' for the quantitative test while the qualitative test can now be performed on the authority as a collective rather than an individual. A summary of and extracts from the FCA policy statement which sets out these new tests is attached at Appendix 2
- 8.4 The election to professional status must be completed with all financial institutions prior to the change of status on 3rd January 2018. Failure to do so by local authorities would result in the financial institution having to take 'appropriate action' which could include a termination of the relationship at a significant financial risk to the authority.
- 8.5 The SAB and the LGA have worked with industry representative bodies including the IA, the British Venture Capital Association (BVCA) and others to develop a standard opt-up process with letter and information templates. This process should enable a consistent approach to assessment and prevent authorities from having to submit a variety of information in different formats.
- 8.6 A flowchart of the process is attached at Appendix 3 and the letter and information templates are attached at Appendices 4 and 5.
- 8.7 Applications can be made in respect of either all of the services offered by the institution (even if not already being accessed) or a particular service only. A local authority may wish to do the latter where the institution offers a wide range of complex instruments which the authority does not currently use and there is no intention to use the institution again once the current relationship has come to an end, for example, if the next procurement is achieved via the LGPS pool. It is recommended that officers determine the most appropriate basis of the application, either via full or single service.

8.8 Authorities are not required to renew elections on a regular basis but will be required to review the information provided in the opt-up process and notify all institutions of any changes in circumstances which could affect their status, for example, if the membership of the committee changed significantly resulting in a loss of experience, or if the relationship with the authority's investment advisor was terminated.

9. LGPS POOLS

9.1 LGPS pools will be professional investors in their own right so will not need to opt up with the external institutions they use. Local authorities will however need to opt up with their LGPS pool in order to access the full range of services and sub-funds on offer.

9.2 In some circumstances, in particular where the pool only offers access to fund structures such as ACS, the pool could use 'safe harbour' provisions resulting from local authorities continuing to be named as professional investors in both the Financial Promotion Order (the "FPO") or in the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order (the "PCISO"). These provisions would enable the promotion and potential sale of units in fund structures to local authorities as retail investors.

9.3 Elections to professional status will be needed for every financial institution that the authority uses outside of the pool, both existing and new, together with a continuing review of all elections. If all new purchases are made via fund structures within the pool then no new elections will be required, only an ongoing review of the elections made with the pool and any legacy external institutions, the number of which would reduce as assets are liquidated and cash transferred.

NEXT STEPS

10.1 To continue to effectively implement the authority's investment strategy after 3rd January 2018, applications for election to be treated as a professional clients should be submitted to all financial institutions with whom the authority has an existing or potential relationship in relation to the investment of the pension fund.

10.2 This process should commence as soon as possible in order to ensure completion in good time and avoids the need for appropriate action to be taken by institutions in relation to the authority's pension fund investments.

10.3 The Group Director, Finance and Corporate Resources should be granted the necessary delegation to make applications on the authority's behalf and to determine the nature of the application on either full or single service basis.

Ian Williams

Group Director, Finance and Corporate Resources

Report Originating Officer: Rachel Cowburn ☎020-8356 2630

Financial considerations: Michael Honeysett ☎020-8356 3332

Legal comments: Stephen Rix ☎020-8356 6122

Attachments

- Appendix 1 – Retail client protections
- Appendix 2 – Summary of FCA policy statement
- Appendix 3 – Opt up process flowchart
- Appendix 4 – Opt up letter template
- Appendix 5 – Opt up information template