LGE
Local Government Employers

Local Government
House, Smith Square,
London SW1P 3HZ

Tel 020 7187 7373
Fax 020 7664 3030

pay, pensions and
employment solutions

The Local Government Pensions Committee
Secretary: Mike Walker

CIRCULAR

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CHANGES TO THE LGPS IN ENGLAND AND WALES

Purpose of this Circular

1. This Circular has been issued to provide information to authorities on the changes to the LGPS in England and Wales contained in the Local Government Pension Scheme (Amendment) (No. 2) Regulations 2006 [SI 2006/2008].

2. In summary, the Amendment Regulations:

- made a number of technical changes to the Local Government Pension Scheme Regulations 1997 in consequence of the introduction in April 2006 of the new HMRC tax regime governing pension schemes;
- ensure that members who pay Additional Voluntary Contributions (AVC's) are able to utilise some or all of their AVC pot to provide a tax free lump sum;
- extend to councillors who are members of the LGPS the option to commute some of their pension to receive a bigger lump sum. For each £1 of annual pension surrendered, the councillor member will receive a lump sum of £12. Up to 25% of the

capital value of the councillor member's pension benefits can be taken in the form of a lump sum;

- provide that a member can only draw accrued pension rights on flexible retirement if the employer agrees;
- require scheme employers to formulate, publish and send to the administering authority their policy on flexible retirement; and
- extend the transitional protections for existing scheme members from the removal of the so-called '85 year rule'.

3. Detailed technical guidance on the Amendment Regulations is provided in Annex 1, including matters to consider when drawing up a flexible retirement policy.

4. Further information on the transitional protections from the removal of the 85 year rule is contained in Annex 2. A flowchart and worked examples are included, respectively, at Annexes 3 and 4.

5. Administering authorities in England and Wales may wish to note that the "How membership counts" table is being updated to take account of the Amendment Regulations. The updated table will be available at http://www.lge.gov.uk/lge/core/page.do?pageId=59097

Actions to be taken

6. Regulation 4 of the Occupational Pension Schemes (Disclosure of Information) Regulations 1996 [SI 1996/1655] requires the pension fund administering authority to notify all scheme members and beneficiaries (except those deferred members and pension credit members for whom no current address is held) of any changes to the scheme rules which may materially affect them. The changes made by the Local Government Pension Scheme (Amendment) (No. 2) Regulations 2006 should have been notified either before the changes took effect or, in any event, not later than 3 months after the effective date of the change. The notification should have been accompanied by a written statement that further information about the scheme is available, giving the address to which enquiries should be sent.

7. Administering authorities will need to consider the impact of the removal of the '85 year rule' and the changes to the transitional protections on the information they provide on Annual Benefit Statements, particularly if the information to be provided on future statements will differ to that provided on statements issued prior to the Scheme amendments.

8. All pension scheme guides, literature, standard letters and computerised pensions administration systems should be updated to reflect the Scheme changes. The standard guides on the LGPC website have all been updated.

9. The national website for Scheme members (see www.lgps.org.uk) has also been updated to reflect the Scheme changes.

10. Administering authorities in England and Wales are asked to copy this Circular to employers in their Fund (other than to Local Authorities to whom this Circular has been sent direct), or bring the Circular to the attention of employers by directing them to the Circular on the LGPC website at http://www.lge.gov.uk/lge/core/page.do?pageId=58678 or, in some other way, bring the main messages in this Circular to the attention of the employers in their Fund.

Terry Edwards
Head of Pensions
January 2007

Annex 1

Technical Guidance on the Local Government Pension Scheme (Amendment) (No.2) Regulations 2006 [SI 2006/2008]

Regulation 1: Citation, commencement, interpretation and application

The Local Government Pension Scheme (Amendment) (No. 2) Regulations 2006, (hereinafter referred to as "the Amendment Regulations") only apply to the LGPS in England and Wales.

"The Amendment Regulations" come into force on 1st October 2006 but:

- the amendment made by regulation 16 has effect from 29th March 2006;
- the amendment made by regulation 5 has effect from 1st April 2006; and
- the amendments made by regulations 3, 4, 6, 7, 8, 9, 10, 11, 15, 17 and 18 have effect from 6th April 2006.

Regulation 2: Amendment of Regulations

"The Amendment Regulations" amend the Local Government Pension Scheme Regulations 1997 (hereinafter referred to as "the Principal Regulations").

Regulation 3: High earners

The intention behind regulation 11A of "the Principal Regulations" is to apportion the membership of those members who were subject to the Earnings Cap before its removal on 6th April 2006 and to do so in such a way that they do not have a "windfall gain" in the value of their benefits following the removal of the Earnings Cap i.e. the value of their accrued

benefits to 5th April 2006 should, on 6th April 2006 (after the removal of the Earnings Cap), be actuarially equivalent to their value on 5th April 2006 (prior to the removal of the Cap).

Prior to "the Amendment Regulations", the drafting of regulation 11A(1) had required the membership adjustment to be applied to <u>all</u> members whose pay in the year ending 5th April 2006 exceeded £105,600, not just Class A members[1] whose pensionable pay had actually been limited by the Earnings Cap i.e. the wording had caught Class B and Class C members[2] as well. Those latter members have now been excluded from the membership apportionment and "the Amendment Regulations" make it clear that apportionment under regulation 11A is only to be applied to a member who was subject to the Earnings Cap immediately before 6th April 2006 and whose pay in the year ending 5th April 2006 exceeded £105,600.

The apportionment is to be performed in accordance with the amended formula set out in regulation 11A i.e.

membership after 5th April 1989 and before 6th April 2006 (excluding any membership credited by virtue of a transfer under regulation 121) multiplied by £105,600 and divided by what would have been the member's pensionable pay in the year to 5th April 2006 if the Earnings Cap had not applied. To this figure is added any pre 6th April 1989 membership and any membership credited by virtue of a transfer in.

Adjusting pre 6th April 2006 membership for those post 31st May 1989 joiners affected by the removal of the Earnings Cap (i.e. pro-rating the accrued membership to 5th April 2006 by dividing the capped pensionable pay by the uncapped pensionable pay) appears to be an equitable method of dealing with this issue and is similar to the formula used to adjust periods of concurrent employment under regulations 32A and 87(4) of "the Principal Regulations".

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[1] Class A members were members who joined the LGPS on or after 1st June 1989

[2] Class B members were members who joined the LGPS on or after 17th March 1987 and before 1st June 1989 and Class C members were members who joined before 17th March 1987 and who, in either case, had not had a continuity break or who had had a break but satisfied one of the continuity conditions (as defined in Schedule 4 of the LGPS Regulations 1997 before its deletion by SI 2006/966)

So, if a capped member has 10 years LGPS membership at 5th April 2006 and, for example, earned twice the cap (i.e. £211,200), their LGPS benefits pre 6th April 2006 would have been:

Pension of 10 x 1/80 x £105,600 = £13,200 and
Lump sum of 10 x 3/80 x £105,600 = £39,600

After the service conversion, their membership would be 10 years x £105,600 / £211,200 = 5 years which will produce benefits of:

Pension of 5 x 1/80 x £211,200 = £13, 200 and
Lump sum of 5 x 3/80 x £211,200 = £39,600

"The Amendment Regulations" also correct a drafting error in regulation 11A(2) by providing that the adjusted period of membership counts in full for qualifying purposes and at the apportioned length for reckonable purposes (in the same way that regulations 10 and 11 of "the Principal Regulations" specify what counts / does not count as qualifying and reckonable membership – but see comment 8 below).

Comments:

1. In order to:

   i) deal with the fact that some members may only have been subject to the Earnings Cap for part of the year to 5th April 2006 (e.g. because they received a pay rise part way through the year); and
   ii) remove any complexities where fluctuating elements of pay are received in the year prior to 6th April 2006

   the numerator in the formula in regulation 11A(3) is the pensionable pay for the year to 5th April 2006 and the divisor is what would have been pensionable pay for the year to 5th April 2006 under regulation 13 of "the Principal Regulations" had the Earnings Cap not applied. This means that, in the case of both the numerator and the divisor, if either of the previous two years pay were higher they should be ignored.

2. The amended formula in regulation 11A(3) of "the Principal Regulations" still results in some membership being proportioned where, arguably, it should not be and vice versa i.e.

i) regulation 11A(3) requires that membership after 5th April 1989 and before 6th April 2006 is apportioned. As mentioned above, the apportionment should only apply to Class A members. However, it is possible to have Class A members with LGPS membership prior to 6th April 1989 e.g. a member with a pre 6th April 1989 Class B or Class C deferred benefit in the LGPS rejoins the Scheme post 31st May 1989 after more than a months break and opts to combine the membership. All of the membership in this scenario would now be Class A membership but the formula in regulation 11A(3) only permits the post 5th April 1989 membership to be apportioned. The LGPC Secretariat understands this is deliberate on the part of the DCLG as they believe the number of cases involved to be small;

ii) regulation 11A(3) specifies that all membership transferred in by virtue of a transfer under regulation 121 of "the Principal Regulations" should be excluded from apportionment. However, transfers in under regulation 121 for Class A members have taken a number of forms i.e.

- non-club transfers in where the member was <u>not</u> subject to the Earnings Cap in the sending scheme. In these situations the service credit should have been based on the uncapped salary at the date of joining the LGPS (or the date the transfer was received if more than 12 months after joining). This would have resulted in a reduced service credit compared to what it would have been had it been calculated on the capped salary. In this scenario, regulation 11A(3) is correct as there should be no further apportionment
- non-club transfers in where the member <u>was</u> subject to the Earnings Cap in the sending scheme. In these situations the service credit would have been based on the capped salary at the date of joining the LGPS (or the date the transfer was received if more than 12 months after joining). In this scenario, regulation 11A(3) surprisingly does not permit the transferred in service to be apportioned following the removal of the Earnings Cap

- club transfers in where the member was not subject to the Earnings Cap in the sending scheme. In these situations the service credit would have been based on the salary used by the sending scheme. This would have resulted in a full service credit even though the member was subject to the Earnings Cap in the LGPS. As this was a requirement of the Club rules it seems that, in this scenario, regulation 11A(3) is correct and there should be no apportionment of the transferred in membership
- club transfers in where the member was subject to the Earnings Cap in the sending scheme. In these situations the service credit would have been based on the capped salary used by the sending scheme. In this scenario, regulation 11A(3) again surprisingly does nor permit the transferred in service to be apportioned following the removal of the Earnings Cap

iii) regulation 11A(3) does not appear to adequately deal with returning officers and acting returning officers who have received fees (as opposed to a consolidated salary) and who have not paid contributions on part or all of their fees due to the Earnings Cap. It would have seemed logical in such cases for the membership to be adjusted by the average pensionable pay for the three years to 5th April 2006 divided by what would have been the average pensionable pay for the three years to 5th April 2006 had the Earnings Cap not applied.

3. Regulation 11A only caters for those who were in active membership of the LGPS on 5th April 2006. As presently worded, it does not ensure that any capped LGPS benefits that have not already been adjusted (e.g. a deferred benefit where membership ceased prior to 6th April 2006) which are aggregated on or after 6th April 2006 will be subject to pro ration for that part of the membership that was subject to the Earnings Cap. In these cases, the numerator should be the pensionable pay for the year to the date of leaving and the divisor should be what would have been pensionable pay for the year to the date of leaving had the Earnings Cap not applied. An appropriate amendment to "the Principal Regulations" appears to be required.

4. Where a service adjustment takes place in accordance with regulation 11A it will be necessary, to ensure no detriment for those who leave before 5th April 2007, for their final pensionable pay to be calculated on uncapped pay (even the part prior to 6th April 2006 to reflect the fact that the service prior to that date had been adjusted). An amendment to regulations 21 and 22 of "the Principle Regulations" may be required to ensure this intention is met.

5. Any augmented membership for a capped active scheme member that was granted under regulation 52 of "the Principal Regulations" prior to 6th April 2006 will need to be pro-rated and the proportion of any whole cost added years purchased under regulation 55 of "the Principal Regulations" by a capped active scheme member up to 5th April 2006 will also need to be pro-rated.

6. An apparent requirement of continued participation in the Public Sector Transfer Club post 5th April 2006 is that membership transferred from a Club scheme which retains an Earnings Cap and in which the member was (or potentially would have been) subject to the Earnings Cap in that Scheme, should continue to be subject to the Cap in the LGPS. This appears to mean that the LGPS would need to retain a Cap just for capped Club transferred in membership unless the DCLG agree the LGPS membership apportionment method with the Club administrators. The DCLG is presently following this up and will issue advice in due course.

7. As mentioned above, a service adjustment is probably the simplest method to ensure there is no "windfall gain" for members subject to the Earnings Cap now that the Cap has been removed. Such members will still "gain" to the extent that future pay increases exceed the Retail Prices Index (RPI). The flexibility exists within the present Scheme rules for employers to deal with any perceived detriment that the service adjustment method might produce. Employers have the flexibility to:

   - augment membership under regulation 52 of "the Principal Regulations", or
   - contribute to a Shared Cost AVC (but not if the member has opted for, and wishes to keep, Enhanced Protection under the HMRC rules governing benefit payments)

subject to these being within the limits set by the new HMRC tax regime and as long as the augmentation or contribution to a Shared Cost AVC can be shown to be reasonable within the employer's relevant policy on the use of augmentation or SCAVCs. Equally, employers will need to consider what action to take where an employee has, prior to 6th April 2006, already been compensated for pension benefits being subject to the Earnings Cap (e.g. by being granted an increased salary or where the employer has already contributed to a Shared Cost AVC).

8. Regulation 11A(2) of "the Principal Regulations" as amended by "the Amendment Regulations" says that for an affected high earner the reduced pre 6th April 2006 period counts "for calculating his benefits under these Regulations".

   As the 85 year rule is used to calculate the amount of benefits, it could be argued that the regulations require the reduced period to be used to calculate the date when the 85 year rule is achieved.

   Prior to its amendment by SI 2006/2008, regulation 11A(2) referred to "his period of membership for calculating his entitlement to any benefits" (i.e. qualifying service). SI 2006/2008 deleted the words "entitlement to any" so that that the regulation now reads "his period of membership for calculating his benefits" (i.e. reckonable service). The Secretariat takes this to be a deliberate change, so that the full period still counts as qualifying service but the reduced period counts as reckonable. Whilst the 85 year rule is not a qualifying condition, merely a mechanism to calculate the amount of a benefit, the Secretariat is nonetheless of the view that it is clearly intended the full period should count towards the 85 year rule. If this was not the case, and only the reduced period was meant to count towards the 85 year rule then, in many cases, the date the 85 year rule would be satisfied would have been shifted closer to 65 (or would become age 65). If this was the intention then the formula set out in regulation 11A would have to have provided some form of recompense for the shift in the 85 year rule date. It does not. So, overall, the conclusion is that the full period counts towards the date the 85 year rule is satisfied but the reduced period counts as reckonable service.

9. Consideration will need to be given as to how best to record the pro-rated service on the computerised service history record. For example,

assume that the pro-rated service for a full time employee is 75% of calendar length. The period will need to be shown on the computerised record as full time, but counting as 100% for qualifying purposes and for determining when the 85 year rule is met, and at 75% for reckonable purposes.

Regulation 4: Limit on total amount of benefits

This regulation amends regulation 19A of "the Principal Regulations" so that benefits in excess of a member's Lifetime Allowance, Primary Protection or Enhanced Protection under HMRC rules can be paid to the member, calculated in accordance with GAD guidance.

Comments:

1. The wording of regulation 19A(1) is still inaccurate in that it refers to the Lifetime Allowance being increased by Enhanced Protection. Of course, unlike Primary Protection, Enhanced Protection is not calculated as a multiplier of the Lifetime Allowance.

2. It is understood that where a member has opted for Enhanced Protection but their benefits increase beyond the relevant benefit accrual limit, the member will be able to notionally split the crystallisation of their benefits. In this way, the benefits up to the relevant benefit accrual limit can retain the Enhanced Protection but Enhanced Protection will be lost on the excess benefits.

3. Scheme members electing for Enhanced Protection are required to surrender any benefits as at 5th 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 LGPS Regulations 1997 need to be amended to incorporate this. GAD guidance is needed showing how the surrendered amount is to be calculated. It will also be necessary to consider how any surrendered benefit at 5th April 2006 should be recorded on the computerised pensions administration system. [Note that if a member pays into a money purchase arrangement after 5th April 2006 they will lose Enhanced Protection. Contributions to a Life Assurance AVC do not presently constitute payments to a money purchase arrangement.]

Regulation 5: Calculations;
Regulation 9: Retirement benefits;
Regulation 10: Elections as to use of accumulated value of AVCs

Regulations 20(3A) to 20(3D) were inserted into "the Principal Regulations" by SI 2006/966. These permit a Scheme member whose benefits become payable on or after 6th April 2006 to elect, in writing, to the appropriate administering authority to increase the amount of their tax free lump sum retirement grant by commuting some of their pension. For each £1 of pension given up, the member will receive £12 additional lump sum.

The intention behind "the Amendment Regulations" is that :

- members may take some or all of their accrued AVCs / Shared Cost AVCs as a lump sum (subject to the limit mentioned further below). Although regulation 66(6) of "the Principal Regulations" (which forbade the payment of a lump sum from accrued AVCs) has been deleted it has not been replaced with a specific provision in regulation 64 or 66 stating that a lump sum can be paid. Nevertheless, the wording of regulation 20(3B)(b) and (c) is intended to have this effect[3];
- a lump sum can be taken in respect of membership derived from the transfer of in house AVCs into the scheme (for those who made an AVC election prior to 13th November 2001). However, in such cases, the wording of regulation 20(3F) would mean that the provisions of former regulation 66(8) would continue to apply i.e. the service credit should be calculated on the basis that no lump sum is payable, thereby generating a higher service credit, but the person can then elect to commute some or all of the service credit into a lump sum (subject to the limit mentioned below) using the 12:1 commutation rate;
- the maximum lump sum that may be taken, by way of retirement grant (including any extra sum derived from commutation) and any lump sum received from an in house Additional Voluntary Contribution / Shared Cost AVC arrangement, must not exceed 25% of the capital value of the member's accrued rights in the LGPS (in England and Wales), calculated as shown in guidance issued by the Government Actuary, and including the value of any Additional Voluntary Contributions made by the

[3] A specific amendment to regulation 64 and 66 would, however, be helpful to deliver the intention.

member to the LGPS AVC arrangement or made by the member and the employer to a Shared Cost AVC arrangement; and

- the commutation option also applies to pre 1st April 1998 deferred beneficiaries whose benefits come into payment on or after 6th April 2006.

Comments:

1. Following the promulgation of "the Amendment Regulations" there are, for those whose benefits come into payment on or after 6th April 2006, three categories of deferred member as far as commutation options are concerned i.e.

   i) those who ceased membership before 1st April 1998 can, by virtue of regulation 48 of the LGPS (Amendment) Regulations 2006 [SI 2006/966], opt out of the deletion of regulations 58 and 59 from "the Principal regulations" and, because the 12:1 commutation option was introduced by a separate Statutory Instrument – the LGPS (Amendment) (No. 2) Regulations 2006 [SI 206/2008] – such members who opt out of the changes to regulations 58 and 59 will, when their deferred benefits fall to come into payment, have the choice of regulations 58, 59 and the 12:1 commutation option, whichever suits them best

   ii) those who ceased membership between 1st April 1998 and 5th April 2006 can, by virtue of regulation 48 of the LGPS (Amendment) Regulations 2006 [SI 2006/966], opt out of the deletion of regulations 58 and 59 from "the Principal Regulations" but, because the 12:1 commutation option was introduced by the same Statutory Instrument, such members who opt out of the changes to regulations 58 and 59 will, when their deferred benefits fall to come into payment, not have the choice of the 12:1 commutation option

   iii) those who ceased membership on or after 6th April 2006 can not opt out of the deletion of regulations 58 and 59 from "the Principal Regulations" (as the opt out clause of regulation 48 of the LGPS (Amendment) Regulations 2006 [SI 2006/966] only applies to leavers before 6th April 2006). Thus, such members will, when their deferred benefits fall to come into payment, only have the choice of the 12:1 commutation option

   Additionally:

- whilst those in category (i) who opt out of the changes will have the choice of regulations 58, 59 and the 12:1 commutation they will, in consequence of opting out of the changes, be subject to the lower of the new HMRC limits on retirement benefits and the old maximum benefit limits set out in Schedule C5 of the Local Government Pension Scheme Regulations 1995 (as Schedule C5 still applies to pre 1st April 1998 leavers)
- those in category (ii) who opt out of the changes will retain the right to make elections under regulations 58 and 59 but will be subject to the lower of the new HMRC limits on retirement benefits and the old maximum benefit limits set out in Schedule 4 of the Local Government Pension Scheme Regulations 1997 (i.e. Schedule 4 will still apply as the person will have opted out of all changes to the 1997 Regulations and so will also have opted out of the deletion of Schedule 4)

2. Regulation 20 of "the Principal Regulations" applies to members whose benefits become payable on or after 6th April 2006 and allows them to increase the amount of their tax free lump sum retirement grant payable. A member is defined in Schedule 1 of the Principle Regulations as having the same meaning as in section 124(1) of the Pensions Act 2004 which defines a member as any active, deferred, pensioner or pension credit member. However, pension credit members will not be able to increase their tax free lump sum because:

i) the lump sum payable to a pension credit member is payable under regulation 153(2) of "the Principal Regulations" and not regulation 20(3),

ii) the lump sum payable to a pension credit member is not a lump sum retirement grant but is, instead, simply a lump sum grant, and

iii) for certain pension credit members (i.e. those whose pension credit was derived following the divorce of a pensioner who had already received the lump sum retirement grant), regulation 147(3) of "the Principal Regulations" prevents any lump sum grant from being paid

3. Regulation 20(3A) requires that those Scheme member whose benefits become payable on or after 6th April 2006 who wish to increase the amount of their tax free lump sum retirement grant by commuting some of their pension have to do so by electing, in writing, to the appropriate administering authority, before **any** benefits become payable. The use of the word "any" should be taken to mean "any benefits in relation to that benefit crystallisation event".

4. As authorities will know, the Courts are now expressly required to take account of pensions on divorce, nullity of marriage, judicial separation or dissolution of a civil partnership and have the power to make the following "earmarking orders":

   - an Order requiring the Scheme to pay a specified percentage or all of a member's pension when that pension comes into payment to the member's "ex-spouse" or "ex-civil partner", if and when the pension becomes payable i.e. the deduction to be paid to the "ex-spouse" or "ex-civil partner" is taken from the member's net pension after tax. (Note: this power does not apply to divorces / dissolutions in Scotland);

   - an Order requiring the member to exchange pension for lump sum if and when the Scheme gives the member that option (Note: this power does not apply to divorces / dissolutions in Scotland);

   - an Order requiring the Scheme to pay part or all of the member's lump sum to the member's "ex-spouse" or "ex-civil partner" if and when the lump sum becomes payable;

   - an Order requiring the Scheme to pay part or all of a lump sum death grant to a member's "ex-spouse" or "ex-civil partner" if and when the member dies i.e. under section 25C(2)(a) of the Matrimonial Causes Act 1973 or section 12A(3)(a) of the Family Law (Scotland) Act 1985.

   Clearly, any existing Earmarking Order requiring a specified percentage of an existing active or deferred member's pension to be paid to the "ex-spouse" or "ex-civil partner" when the pension is brought into payment will probably have been made by the Court based on the current standard LGPS pension and lump sum rules. If, under the new LGPS

rules, the member decides to commute pension into lump sum, the "ex-spouse" or "ex-civil partner" will get a percentage of a smaller residual pension. Where an event occurs which is likely to result in a significant reduction in the benefits payable under the LGPS the administering authority must inform the "ex-spouse" or "ex-civil partner" of the event and the likely extent of the reduction in benefits within 14 days of the event occurring. This is a requirement of regulation 5 of the Divorce etc (Pensions) Regulations 2000 [SI 2000/1123].

Conversely, where under any existing Earmarking Order, the Scheme is required to pay a percentage of the member's retirement lump sum to the member's "ex-spouse" or "ex-civil partner" if and when the lump sum becomes payable and the member either opts to commute some pension into lump sum, or is required by the Order to commute the maximum pension into lump sum, the cash that will be received by the "ex-spouse" or "ex-civil partner" will be greater than perhaps had been anticipated by the Court prior to the LGPS Regulations being amended. Administering authorities should consider alerting any Scheme member who currently has an earmarking order against the lump sum retirement grant which is expressed as a percentage of the lump sum so that the member, if he / she wishes or intends to take a larger lump sum under the new LGPS rules, can seek a variation to the Order under section 31 of the Matrimonial Causes Act 1973.

Regulation 6: Requirements as to time of payment;
Regulation 12: Statements of policy concerning exercise of discretionary functions

Regulations 35(1A) to (1E) of "the Principal Regulations" introduced the concept of flexible retirement into the LGPS.

As from 6th April 2006, flexible retirement has been permitted where a member who is aged 50 or over reduces, with the employer's consent, his / her hours or grade. The member could then make an election to the administering authority for payment of his / her accrued pension benefits whilst continuing to accrue further benefits in the continuing employment.

However, "the Amendment Regulations" have introduced two changes.

Firstly, they now provide that benefits can only be paid on flexible retirement if the employer consents to the reduction in hours or grade **and** agrees to the release of the accrued pension benefits.

Secondly, each Scheme employer (i.e. every Scheduled body, resolution and admitted body with active scheme members) must formulate, publish and keep under review their policy on flexible retirement.

If the payment of benefits under the employer's flexible retirement policy occurs before age 65 the benefits are to be reduced in accordance with guidance issued buy the Government Actuary. However, the regulations allow employers to choose to waive any reduction in whole or in part in the case of flexible retirement. This is different to ordinary early retirements where the employer can waive any reduction on compassionate grounds but only has the power to waive all of the reduction (i.e. the employer cannot waive only part of the reduction). If, in the case of a flexible retirement, the employer chooses to waive a reduction in whole or in part, the cost of doing so has to be paid to the Fund and is to be calculated by the Fund's actuary.

Any benefits paid as a result of flexible retirement shall not be subject to abatement under the administering authority's abatement policy during such time as the person remains in the employment of the employer who employed him / her at the date the member elected to receive benefits.

Comments:

1. <u>The requirement to have a policy statement.</u>

   The amendment to regulation 106 of "the Principal Regulations" requiring employers to formulate and publish their policy on flexible retirement came into force on 1st October 2006. Technically, therefore, employers should have had a policy from that date. There is no provision in "the Amendment Regulations" allowing a period of grace of, say, 6 months to determine and publish a policy.

   When formulating the policy employers must have regard to the extent to which the exercise of the discretion could lead to a serious loss of confidence in the public service. A copy of the policy must be sent to

the administering authority within one month of the date on which the policy is determined.

2. Matters to consider when preparing the policy

When designing a flexible retirement policy the employer will wish to ensure it fits with any other flexible working policies the employer may have. There are a number of factors that an employer may wish to consider when devising a flexible retirement policy e.g. flexible retirement may

- be an effective means to reduce capacity
- help to avoid redundancies and the associated strain on Fund pension costs and redundancy payment / compensation costs
- enable the employer to retain or attain a balanced age profile within the workforce
- enable the transfer of skills / knowledge
- offer the opportunity of better succession planning and mentoring
- facilitate the retention of expertise, knowledge and contacts
- offer an acceptable solution to staff who are currently a blockage to promotion or reorganisation
- help alleviate burn out and stress
- improve morale
- offer the flexibility and productivity associated with part-time working / downshifting
- assist staff to
    - ease down into retirement
    - make a gradual adjustment to life without paid employment
    - gradually break free of the routine and habits of work
    - keep mentally / physically active

3. In deciding their flexible retirement policy, employers will need to:

- consider whether or not there should be a minimum reduction in hours or grade. The LGPS Regulations do not specify a minimum but employers might consider that, for example, an employee would have to take a minimum 20% cut in hours or a minimum reduction of one full grade, before flexible

retirement might be considered. There is nothing in the Regulations that would prevent a person being in receipt of a greater income, by way of combined pension and pay following flexible retirement, than they were in receipt of prior to flexible retirement. Nevertheless, an employer could potentially decide to only agree to a flexible retirement if the reduction in hours / grade was sufficient enough to ensure the person is not, overall, better off than before flexible retirement. However, there is no policy intent within the Regulations to limit flexible retirement in this way and such an approach would be complicated, bearing in mind that the pension the person would be in receipt of will not be subject to pension or National Insurance deductions whereas the pay they were receiving prior to flexible retirement would have been

- consider whether, in relation to reduction in hours cases, to restrict consideration of flexible retirement requests to only those cases where the employee is taking a reduction in hours in the same job or whether to extend this to also cover cases where the employee applies for and obtains a different job with the employer on reduced hours. Regulation 35(1A) of "the Principal regulations" can be read as broadly as one wishes as it simply refers to situations where the member "reduces the hours he works, or the grade in which he is employed"

- consider whether or not, for flexible retirement to be considered, the employee should commit to a reduction in hours or grade for a minimum period of time (say 6 months). The difficulty here is that even if the employee were to give such a commitment, what realistic recourse would the employer have if the employee applied for and obtained a new post on higher hours / on a higher grade within the specified period?

- consider whether or not, for flexible retirement to be considered, the employee, particularly if under age 60, should commit to remaining in employment with the employer for a minimum period of time (say 1 year or to age 60 if earlier). The danger for the employer, if they agree to flexible retirement at say 55, is that the employee could resign 1

month later and would, in effect, have achieved early release of benefits accrued to 55 (maybe even in full if they had met the 85 year rule or the employer had waived the actuarial reduction). The person would have a separate deferred benefit in respect of the 1 month of service which he / she could draw at any time from age 60 onwards. The difficulty is that even if the employee were to give a commitment to remain in employment with the employer for a specified minimum period of time after flexible retirement was agreed, what realistic recourse would the employer have if the employee broke that commitment?

- consider that because the LGPS is contracted out of the State Second Pension it must satisfy the various requirements of the preservation and revaluation legislation applying to occupational pension schemes. One of these requirements is that the pension payable to a member from age 60 (women) or from age 65 (men) must not be less than the Guaranteed Minimum Pension (GMP) in relation to any membership the employee has prior to 6th April 1997. When considering agreeing to flexible retirement, employers may wish to consider that it may be possible, where the benefits payable are subject to a large actuarial reduction, for the benefits payable following flexible retirement to fall short of the GMP due from age 60 (women) / 65 (men) or from the date employment ends, if later - but the GMP must be paid from age 65 (women) / 70 (men) if the employee is still carrying on in local government employment at that age, unless the employee consents to postpone payment of the GMP (but to no later than age 75). Thus, in considering whether to give consent to a request for immediate payment of reduced benefits on flexible retirement, employers may wish to take into account whether there is a risk that the pension will later have to be increased to the GMP level (which is a cost that would ultimately be borne by the employer at the triennial valuation of the Fund).

- note that a member needs to be aged 50 or over and either have 3 or more months membership or have transferred other pension rights into the LGPS in order to be eligible to make a

flexible retirement request following a reduction in hours or grade.

4. Does the flexible retirement option only apply from the date of reduction in hours or grade?

Although regulation 35(1A) of "the Principal Regulations" does not specify that the election for benefits on flexible retirement should be for immediate payment from the date of reduction in hours / grade, the LGPC understands that this is the intention of the regulation. This view is backed up by the wording of regulation 35(1E) of "the Principal Regulations" which says that no abatement to the pension should be applied whilst the person remains in the employment of the employer who employed him / her at the date the member elected to receive benefits. If the election for benefits to be paid could be made several months after the reduction in hours / grade, this would potentially render regulation 35(1E) meaningless e.g. the person might have moved to a different employer by then and so would be employed by a different employer at the date of election to the one he / she was employed by at the date of reduction in hours / grade.

5. Is cost a factor that can be taken into account?

The GAD guidance on the actuarial reduction factors to be applied to benefits drawn before age 65 under the flexible retirement provision make it clear that the reductions to be applied will be the same as if the employee were retiring in full. Thus, there will be a strain on Fund cost to be met by employers who agree to the release of benefits on flexible retirement prior to age 60 where the member has either already met the 85 year rule or would meet the rule before age 60. This is a factor that employers will wish to consider, alongside other factors, when devising their policy. The question to be considered, of course, is whether an employer might be open to challenge on age discrimination grounds if it agrees to cases where there is not a strain on Fund cost to be met by the employer e.g.

- requests made on or after age 60[4] or

[4] If the flexible retirement occurs on or after age 60 there will be no strain on Fund cost to be met by the employer because the person will be age 60 or over and will either

- requests made prior to age 60 where the person has not already met the 85 year rule and would not have met it before age 60[5]

but does not agree to cases where there is a strain on Fund cost to be met e.g.

- requests made on or after age 50 and prior to age 60 where the person has already met the 85 year rule or would have met it before age 60[6].

The answer will depend on whether not agreeing to (i.e. turning down) the latter cases can be objectively justified. The test of objective justification consists of two elements, firstly pursuing a legitimate aim and secondly proportionality. Economic factors such as business needs and

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have met the 85 year rule / attained NRD or, if they haven't, the actuarial reduction will be applied based on the period between the date of flexible retirement and the date the member attains the 85 year rule or the date they attain NRD if earlier.

[5] If the flexible retirement occurs before age 60 and the person does not meet the 85 year rule until age 60 or later again there will be no strain on Fund cost to be met by the employer because the actuarial reduction will be applied based on the period between the date of flexible retirement and the date the member attains the 85 year rule or the date they attain NRD if earlier.

[6] If the flexible retirement occurs before age 60 and the person has already met the 85 year rule or would do so before age 60 there will be a strain on Fund cost to be met by the employer because in the former case there is no actuarial reduction and in the later case the actuarial reduction to be applied will be based on the period between the date of flexible retirement and the date the member attains the 85 year rule and not on the period between the date of flexible retirement and age 60. Thus the actuarial reduction, if any, would not meet the full cost of paying the benefits early and the Fund will request a strain on Fund payment. This is different to the position that applied to flexible retirements agreed between 6th April 2006 and 30th September 2006 where, based on a DCLG note of 7th June 2006, the actuarial reduction would have met the full cost of paying benefits early and there would have been no strain on fund cost. As an aside it is interesting to note that the combination of paragraphs 12 and 13 of Schedule 2 to the Employment Equality (Age) Regulations 2006 (as amended) would appear to require that an actuarial reduction be applied, unless otherwise objectively justified, in cases where the retiree was not in membership (or eligible to be in membership) of the LGPS on 1st December 2006. However, regulation 27 of the Age Regulations would appear to permit the benefits to be paid without reduction as it says that it shall not be unlawful if any act is taken is to comply with a statutory provision (and, of course, the LGPS Regulations are a statutory provision).

considerations of efficiency may be legitimate aims but discrimination cannot be justified merely because it will be more expensive not to discriminate. So turning down a flexible retirement request purely on cost grounds could prove problematical. Might it be possible to argue that the decision is not connected with age? For example, two employees, both aged 59, apply for flexible retirement; one meets the 85 year rule and the other doesn't. Both are aged 59 and so the argument would be that the decision is not connected with age. However, whether or not there is a strain on Fund cost to be met by the employer in each of these cases is connected with age as it is determined by whether or not the employee has met the 85 year rule (which the High Court commented was "discriminatory on grounds of age"). So there could still be a potential challenge on age grounds (although, of course, the Government considers that retention of the 85 year rule for a transitional period beyond 31st March 2008 in respect of certain older members can be objectively justified).

Of course, cost might be only one of the factors that an employer considers and, where there are others, it may be that the employer can show that overall there has been no age discrimination.

Rather than have a detailed policy it may be that employers might simply wish to have a policy which states that each flexible retirement request will be considered on its merits and will only be agreed if it is in the employer's economic and / or operational interests to do so.

6. <u>Can employees agree to pay the employer strain on Fund costs?</u>

We are aware that some employers have been approached by employees who have stated that if the employer agrees to a flexible retirement, the employee would be willing to meet the capital sum of any strain on Fund cost. There is nothing within the LGPS Regulations 1997 that would permit the Pension Fund to accept a one off lump sum payment into the Fund from an employee / scheme member. The capitalised strain on Fund cost is a cost which must be paid over to the Fund by the employing authority (see comments on regulation 11 further on in this Circular). Whether a local authority employer has the vires to accept a payment from an employee to mitigate the strain on Fund payment it pays over to the Fund as a result of agreeing to flexible retirement is not strictly a pension question. It is a question for the

authority's legal advisers i.e. whether or not the authority has the vires to accept such a payment.

7. What are the implications of agreeing to waive or reduce any actuarial reduction?

Where flexible retirement is agreed, an employer might wish to consider waiving, in whole or in part, any actuarial reduction that would be applied to the early payment of benefits, particularly in cases where the cost of doing so may be less than a cost that may otherwise arise e.g. where agreeing to flexible retirement and waiving the reduction (in whole or in part) is less costly than the cost of redundancy that might otherwise arise if the workforce cannot be scaled down via other means. Whilst the LGPS regulations permit the employer to waive the reduction in whole or in part, paragraph 13 of Schedule 2 to the Employment Equality (Age) Regulations 2006[7] [SI 2006/1031] only provides an exemption for doing so in cases where the employee was an active or prospective member of the LGPS on 1st December 2006. Where the employee became an active or prospective member of the LGPS after that date the employer would have to be prepared to objectively justify waiving (in whole or in part) the reduction if challenged (although regulation 11 of the Employment Equality (Age) Regulations 2006 permits discrimination in respect of pension rights built up prior to 1st December 2006).

8. Regulation 35(1D) of "the Principal Regulations" requires that the cost of a decision by the employer to waive, in whole or in part, any actuarial reduction to benefits has to be paid to the Fund. It also stipulates that the amount to be paid is to be calculated by the Fund's actuary. It does not, however, specify when such a payment has to be made and no clarifying amendment has been made to regulation 80 of "the Principal Regulations".

9. Can an employee retire flexibly more than once?

There is nothing within the regulations that would prevent multiple flexible retirement. For example, an employer could agree to flexible retirement

[7] As amended by the Employment Equality (Age) (Amendment No.2) Regulations 2006 [SI 2006/2931]

where an employee reduces their contractual hours and draws the benefits accrued up to that point and the employer could subsequently agree to the employee reducing their hours even further and taking the further benefits accrued between the first and second reduction in hours.

10. Can an employee flexibly retire after age 65?

Where an employee remains in post beyond age 65 and subsequently reduces their contractual hours or grade the employer can agree to flexible retirement at that time (i.e. beyond age 65[8]).

11. What happens when someone with an added years contract takes flexible retirement?

Regulation 55 of "the Principal Regulations" assumes that the member purchasing added years enters into a commitment to pay extra contributions from the birthday following their election through to the birthday immediately preceding or coincident with their Normal Retirement Date (NRD). Regulations 55(10) and (11) of "the Principal Regulations" say that if the member continues paying the additional contributions until then, the whole of the additional period under the contract can be counted as membership; otherwise only a proportion may be counted in accordance with regulation 83 of "the Principal Regulations".

Regulation 83(1) allows a member to elect to stop paying additional contributions even if he continues to be an active member of the LGPS.

If the member opts to stop paying before taking flexible retirement it would seem that he can then count the proportion paid for and draw it with his main LGPS benefits upon flexible retirement. He would then, if he wished to carry on with an added years contract in his continuing role (on reduced hours or in a post on a reduced grade) have to take out a new contract which could only commence from his next birthday. This would be based on the (higher) factors for that birthday; not the factors relating to the original contract. He would also be limited to a total of 6 2/3rd additional years in aggregate (i.e. including the number

[8] At any time up to age 75 (the latest age an employee can be in the Scheme as pension benefits have to be paid at age 75 under HMRC rules).

of years purchased under the initial contract[9]), but pro rated if he is part time. He could not continue making payments under the original contract because regulation 83(9) of "the Principal Regulations" only permits this if the member stops paying the additional contributions before NRD **and** has not become entitled to the payment of any benefit under the scheme – the member would, of course, have become entitled to payment of benefits upon flexible retirement.

If the member does not opt to stop paying before taking flexible retirement, the provisions of regulation 83 of "the Principal Regulations" do not apply. Thus, the member could not draw benefits in respect of the added years purchased up to the date of flexible retirement. He would continue making payments under the original added years contract, albeit that he would be purchasing a lesser period of added years if he has reduced his hours, or would be paying for a reduced level of benefit from the added years if he has reduced his grade.

The member would, therefore, need to consider the pros and cons of ceasing the contract before the date of flexible retirement.

12. <u>What happens when someone who is paying AVCs takes flexible retirement?</u>

Regulation 35 of "the Principal Regulations" says:

"(1) Retirement benefits under this Chapter may not be paid to a person before he has retired from the employment in which he was a member.

(1A) But where, after 5th April 2006, a member who has attained the age of 50, with his employer's consent, reduces the hours he works, or the grade in which he is employed, he may elect in writing to the

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[9] Technically the member will already have taken out a contract "to make additional contributions to the Scheme to increase his total membership by an additional period" which must not exceed 6 2/3rd years. If that contract was for, say, 6 2/3rd years he would not be able to take out a subsequent contract if he ceased the initial contract for 6 2/3rd years before its due completion date. Morally, however, it is difficult to see why a person who has only managed to purchase, say, 2 years of the initial 6 2/3rd years contract should not subsequently be able to take out a new contract for 4 2/3rd years as the maximum Fund liability would still be constrained.

appropriate administering authority and such benefits may, with his employer's consent, be paid to him notwithstanding that he has not retired from that employment."

The crucial words in sub-paragraph (1) are "under this Chapter". Regulation 35 falls under Chapter IV of Part II of "the Principal Regulations". The AVC provisions, however, fall under Chapter IV of Part III of "the Principal Regulations". So, the flexible retirement regulation (regulation 35) does not in itself permit payment of benefits in respect of the accrued AVCs.

Furthermore, regulation 66(1) of "the Principal Regulations" says:

" (1) Subject to paragraph (8), this regulation applies where a person –

(a) leaves his employment with the employer who was his employing authority when he made an election under regulation 60(1) or 60(11) without entitlement to the immediate payment of retirement benefits;

(b) stops being an active member without leaving that employment;

(c) leaves his employment with the employer who was his employing authority when he made an election under regulation 60(1) or 60(11) with entitlement to the immediate payment of retirement benefits –

(i) under regulation 25 (normal retirement) or 26 (redundancy etc); or

(ii) by virtue of an election under regulation 31 (early payment); or

(d) becomes entitled to an ill-health pension under regulation 27."

None of these cover the flexible retirement scenario[10] and regulation 35 of "the Principal Regulations" is not cross referred to within regulation 66. So, again, the regulations do not allow payment of benefits in respect of the accrued AVCs upon flexible retirement.

[10] Even if one takes the view that the member is remaining in the same employment, in which case regulation 66(1)(b) would apply, this would only allow the member to use the accumulated value to subscribe to a personal pension scheme.

The overall conclusion, therefore, is that (subject to the following) benefits cannot be taken from the accrued AVC pot upon flexible retirement.

The only scenario where the regulations would currently permit payment of the AVC pot upon flexible retirement relates to members who elected to start paying AVCs before 13th November 2001.

Regulation 66(8) of "the Principal Regulations" says:

"(8) A person who made an election under regulation 60(1) prior to 13th November 2001 shall continue to have the rights to make elections as to the use of the accumulated value as under the provisions of this regulation prior to its amendment by the Local Government Pension Scheme (Amendment No. 2) Regulations 2001 and accordingly, so far as is necessary to give effect to those rights and to make provision for any matters incidental to them, those provisions shall be treated as if they had continued in effect."

One can therefore argue that a member who elected prior to 13th November 2001 to pay AVCs can elect under regulation 60(9) of "the Principal Regulations" to stop paying AVCs before the date of flexible retirement and could then convert the AVC pot into a period of Scheme membership which could be paid upon flexible retirement. This is the only scenario that would currently permit the AVC pot to be paid on flexible retirement.

DCLG have, however, stated that it was not the intention that AVCs could not be put into payment upon flexible retirement. In their view, the GAD guidance on regulation 35, issued in October 2006, made it clear that flexible retirement should be treated as full retirement for benefits purposes. The DCLG say that they note the concern over the current drafting of "the Principal Regulations", which may not unambiguously meet the policy intention and will consider the need to amend further "the Principal Regulations".

13. <u>What happens when someone who is paying part-time buy back contributions under the 1990 buy-back terms takes flexible retirement?</u>

There may be some cases where an employee is still paying additional contributions to purchase pre 1st April 1986 part-time membership under the 1990 buy-back terms (i.e. in accordance with regulation C7A of the Local Government Pension Scheme Regulations 1986 as carried forward into Schedule C6 of the Local Government Pension Scheme Regulations 1995 and regulations 12 and 15 of the Local Government Pension Scheme (Transitional Provisions) Regulations 1997). In such cases, paragraph 7 of Schedule 4A of the 1986 Regulations and paragraph 6 of Schedule C6 of the 1995 Regulations provided that where a person ceased to be a pensionable employee / scheme member before completing payment of the additional contributions the person would be entitled to count as a period of reckonable membership X / Y multiplied by Z where

X = the aggregate additional contributions paid by the employee and, where the employer had agreed to meet part of the cost, the additional contributions paid by the employer;
Y = the total additional contributions that were due; and
Z = the period of reckonable membership that would have been purchased if contributions had been completed.

Paragraph 8 of Schedule 4A of the 1986 Regulations and paragraph 6 Schedule C6 of the 1995 Regulations went on to say that where the person ceased to be a pensionable employee / scheme member and this was because he had ceased to be employed by an LGPS employer, he could within one month of the date he so ceased pay off the balance of the contributions so that the whole period would count.

Clearly the precise wording of the 1986 and 1995 Regulations did not envisage flexible retirement. It would seem logical, as the person has not ceased to be employed, to:

- calculate the proportion of the membership being purchased that had been paid for at the point of flexible retirement and include this in the flexible retirement benefit calculation; and
- permit the employee to continue paying additional contributions in the ongoing employment to pay for the remainder of the outstanding period of membership being purchased. Subject to completion of payment of those remaining contributions, the outstanding period of membership being purchased would be

included in the calculation of benefits when the person finally leaves / retires from the ongoing employment.

14. What happens when someone who is paying part-time buy back contributions under the Preston judgment takes flexible retirement?

The part-time buy-back agreement with the national unions (see paragraph 26 of LGPC Circular 152) says:

"If the person leaves with the **immediate payment of pension benefits** before completion of the contract owing an outstanding balance of contributions, the balance of the outstanding contributions (calculated in accordance with the agreed GAD model spreadsheet) will be deducted from the lump sum retiring allowance due and, if necessary, by making a deduction from the monthly pension in payment (although the deductions should not exceed the additional monthly pension payable as a result of the buy back of part time service unless the person agrees to a higher deduction) until any outstanding sum due is recovered. In these circumstances the respondent will need to reduce the amount recoverable by the amount of tax relief the employee will not receive on the outstanding contributions." Thus, as immediate benefits are payable upon flexible retirement, the above provisions should be followed.

15. How does flexible retirement impact on how membership counts?

There are two questions here.

Firstly, do the transitional 85 year rule protections for older members as set out in the Schedule to SI 2006/966, as amended by SI 2006/2008, extend to the benefits payable under the flexible retirement provisions? Logically they should but paragraph 1 of the Schedule to SI 2006/966 (as amended) only refers to protections applying where the member makes an election for early payment of benefits under regulation 31(1) of "the Principal Regulations" (i.e. an election for early payment following full retirement) and makes no reference to protections applying in the case of elections made under regulation 35 (i.e. flexible retirement elections). However, the GAD guidance on regulation 35 indicates that the protections apply equally to benefits paid under regulations 31(1) and 35 of "the Principal Regulations". The LGPC Secretariat, when responding to the consultation on the draft LGPS

(Amendment) Regulations 2007, will be seeking an amendment to paragraph 1(a) of the Schedule to SI 2006/966 so that the protections in that paragraph also apply to benefits drawn following flexible retirement under regulation 35.

The second question is whether, following flexible retirement, the membership in respect of the benefits being drawn counts in the continuing employment towards:

- the 85 year rule;
- the minimum period needed under regulation 19(1)(a) to be entitled to benefits;
- the period needed to be entitled to an enhanced ill health pension under regulation 28(1)

Regulation 29 of "the Principal Regulations" needs to be amended to clarify whether the membership does or doesn't count for the above purposes. If the purpose of flexible retirement is to make it easier for employers to retain experienced employees for longer, one assumes that the membership in respect of the benefits being drawn should count for all of the above purposes (otherwise the non-counting of the membership for these purposes would be a major barrier to flexible retirement). However, allowing the previous membership to count for these purposes would mean that flexible retirees would be in a better position than actual retirees (for whom the previous membership does not count if they become re-employed in local government).

The DCLG have issued draft regulations which would mean that the membership relating to the benefits being drawn will count in the continuing employment towards:

- the minimum period needed under regulation 19(1)(a) to be entitled to benefits;
- the period needed to be entitled to an enhanced ill health pension under regulation 28(1)

but will **not** count towards the 85 year rule in the continuing employment. This will be a major issue for those members wishing to make use of flexible retirement who would have satisfied the 85 year rule before age 65 as the benefits from the continuing employment will be subject to an actuarial reduction if drawn before age 65 whereas, if the member had

not taken flexible retirement, none of the benefits (when paid) would have been subject to an actuarial reduction (or, if drawn before the 85 year rule was met, would have been subject to a smaller actuarial reduction i.e. based on the shortfall to the 85 year rule being met, rather than the shortfall to age 65).

16. What final pay is used if a member who has flexibly retired, retires fully within the next 12 months?

Where an employee flexibly retires and carries on in the Scheme for, say, a further 200 days before fully retiring, the final pay used for the second benefit should be the pay for those 200 days x 365/200. Regulation 21(1) of "the Principal Regulations" says that a member's final pay is his pay for as much of the final pay period as he is entitled to count as active membership. Regulation 21(2) says that a member's final pay period is the year ending with the day on which he stops being an active member but regulation 21(9) says that if the member is only entitled to count part of the year specified in regulation 21(2) as a period of active membership *in relation to the employment which he ceases to hold*, his final pay is his pay during that part multiplied by 365 and divided by the number of days in that part. Although the employee was a member throughout all the last 365 days, he was only entitled to count 200 days *in relation to the employment which he ceases to hold* and so the pay for those 200 days has to be grossed up.

17. What abatement provisions apply?

Regulation 35(1E) of "the Principal regulations" requires that no abatement should be applied to the pension of a member who takes flexible retirement during "any subsequent employment with the person who is his employer at the date of his election." The words "subsequent employment" should be read as "employment subsequent to the election". It should be noted from the wording of the regulation that should the member leave that employment and, after a break, return to employment with that employer, no abatement can be applied. Administering authorities might wish to consider whether their abatement

policy for normal retirements, when compared to the non-abatement rule for flexible retirements, introduces any equity issues.

18. What are the implications if the member marries after flexible retirement and before full retirement?

Regulation 42(1) of "the Principal Regulations" provides that where a male "pensioner member" marries (after becoming a pensioner member) the widow's short and long-term pension is to be based only on so much of the pensioner's pension as is attributable to the period of membership in contracted-out employment after 5th April 1978. A pensioner in receipt of benefits following flexible retirement is a "pensioner member" and so regulation 42(1) would apply. Thus, if the member were to subsequently marry after flexible retirement but before full retirement the widow's pension payable in respect of the flexible retirement pension would be based only on the post 5th April 1978 contracted-out membership[11]. This contrasts with the position if the member had not flexibly retired but had married before full retirement. In that case the widow's pension would have been based on all membership (including any pre 6th April 1978 membership).

Similarly, regulation 42(2) provides that where a female "pensioner member" marries (after becoming a pensioner member) the widower's short and long-term pension is to be based only on so much of the pensioner's pension as is attributable to the period of membership after 5th April 1988. A pensioner in receipt of benefits following flexible retirement is a "pensioner member" and so regulation 42(2) would apply. Thus, if the member were to subsequently marry after flexible retirement but before full retirement the widower's pension payable in respect of the flexible retirement pension would be based only on the post 5th April 1988 membership[10]. This contrasts with the position if the member had not flexibly retired but had married before full retirement. In that case the widower's pension would have been based not just on the post 5th April 1988 membership but also on any pre 6th April 1988 membership where the employer had resolved that such membership would count for widower's pension purposes.

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[11] The widow's / widower's pension payable in respect of the membership accrued after flexible retirement and before full retirement would be based on all the member's pension accrued for that period.

The LGPC secretariat is not convinced that, in the above two scenarios, the policy intention is to exclude, respectively, the pre 6th April 1978 and pre 6th April 1988 membership and has asked the DCLG for clarification.

19. What happens if a member taking flexible retirement has a pre-existing Earmarking Order attached to their benefits following divorce, nullity of marriage, dissolution or nullity of a civil partnership, or judicial separation?

By virtue of sections 25B, 25C and 25D of the Matrimonial Causes Act 1973 and Schedule 5 of the Civil Partnership Act 2004 the Courts are expressly required to take account of pensions on divorce, nullity of marriage, dissolution or nullity of a civil partnership, or judicial separation and have the power to make the following "Earmarking Orders":

- an Order requiring the Scheme to pay a specified percentage or all of a member's pension when that pension comes into payment to the member's "ex-spouse" or "ex-civil partner", if and when the pension becomes payable i.e. the deduction to be paid to the "ex-spouse" or "ex-civil partner" is taken from the member's net pension after tax. (Note: this power does not apply in Scotland);

- an Order requiring the member to exchange pension for lump sum if and when the Scheme gives the member that option (Note: this power does not apply in Scotland);

- an Order requiring the Scheme to pay part or all of the member's lump sum to the member's "ex-spouse" or "ex-civil partner" if and when the lump sum becomes payable;

- an Order requiring the Scheme to pay part or all of a lump sum death grant to a member's "ex-spouse" or "ex-civil partner" if and when the member dies i.e. under section 25C(2)(a) of the Matrimonial Causes Act 1973 or section 12A(3)(a) of the Family Law (Scotland) Act 1985 or Schedule 5 of the Civil Partnership Act 2004.

Where an event occurs which is likely to result in a significant reduction in the benefits payable under the LGPS the administering authority must inform the "ex-spouse" or "ex-civil partner" of the likely extent of the reduction in benefits within 14 days of the event occurring.

The Courts can vary an Earmarking Order.

There will, undoubtedly, be cases of flexible retirement where there is a pre-existing Earmarking Order issued by the Court which has to be applied to the member's benefits.

There are a number of matters to consider in such a situation:

- what are the terms of the existing Earmarking Order?
- if the Earmarking Order was issued before 6th April 2006 the Court may not have envisaged a situation where benefits could be drawn on flexible retirement
- flexible retirement could materially reduce the overall benefits payable under the LGPS (i.e. where the benefits paid on flexible retirement are paid at an actuarially reduced rate)
- will the terms of the existing Earmarking Order apply both to the first set of benefits drawn from the LGPS under flexible retirement and to the subsequent benefits built up in the LGPS after flexible retirement when those benefits are drawn?

This is not just a question applicable to the LGPS as many pension schemes may operate a flexible retirement policy after 5th April 2006. It is, therefore, a question that perhaps the Courts need to consider / address. In the meantime, administering authorities should carefully consider the terms of the existing Earmarking Order, apply it as appropriate to the benefits drawn on flexible retirement, and perhaps suggest that either party might wish to seek legal advice as to whether they should ask the Court to consider whether the Earmarking Order should be varied to reflect the new HMRC permitted world of flexible retirement.

20. Does a manual worker paying the 5% protected contribution rate retain that right after flexible retirement, or will they have to pay a 6% contribution in the ongoing employment?

It is the view of the LGPC Secretariat that the member would retain the right to pay 5% under regulation 14(2)(b)(i) of "the Principal Regulations" because the member has remained in continuous employment (as determined in accordance with Chapter I of Part XIV of the Employment Rights Act 1996) and continued in the same capacity (which the Secretariat takes to mean "carrying on in a manual job" rather than "carrying on in the same manual job").

21. Is flexible retirement available to Councillor members?

Councillor members do not appear to be able to avail themselves of flexible retirement as the provision only applies where a scheme member, with their employer's consent, reduces their hours or grade (neither of which seem to be appropriate in the case of councillors as they do not have contractual hours or grade).

22. Can a scheme member whose benefits on flexible retirement are trivial commute them for a lump sum?

Where a member reduces their hours or grade and, with the agreement of their employer, takes flexible retirement, the administering authority can choose to commute the benefits if they are trivial, subject to meeting the requirements of both "the Principal Regulations" and HMRC rules.

The current requirements of regulation 49 of "the Principal Regulations" are:

- the member must have attained State Pension Age i.e. 65 for men and 60 for women (rising in stages from 60 to 65 between 2010 and 2020)
- the pension must not exceed £195 per year (or, if the member is entitled to more than one LGPS pension in England / Wales, the pensions in aggregate must not exceed that sum)

For trivial commutation to be permitted under HMRC rules the requirements are that:

- pension benefits can only be commuted once a scheme member reaches age 60 and before they attain age 75 – however, the Occupational Pension Scheme (Contracting-out) Regulations 1996, as amended, do add an additional complication by specifying that

a GMP can only be commuted if it is in payment, effectively meaning that men can not commute the GMP part of their pension until age 65;

- no trivial commutation payment must have previously been paid (by any registered pension scheme) or, if such a payment has previously been paid, the trivial commutation under the LGPS must be paid within 12 months of the date the first trivial payment was made;
- it is paid when all or part of the member's lifetime allowance is available (which is a given, when you consider the next requirement);
- the total benefits (i.e. relating to all the member's tax-privileged pension arrangements), crystallised and uncrystallised, must have a value of less than 1% of the standard lifetime allowance on the "nominated date", i.e. £15,000 for 2006/07. The nominated date is a date that the scheme member may specify as being the date that they want their pension rights valued. If the scheme member does not nominate a date, then the nominated date will be the same date as the payment of the first trivial commutation lump sum to the member by one of his or her pension schemes. If the scheme member nominates a date, then the first trivial commutation lump sum payment must be made within 3 months of that date.
- commutation payment extinguishes the member's rights to all benefits in the pension scheme at the date of payment (i.e. any other active, deferred, pension or pension credit entitlement, whether or not in the same fund, as well as the contingent benefits that would be paid to dependants on the death of the member, but note the Scheme in England and Wales is a separate Scheme from that in Scotland);
- the lump sum is subject to income tax (usually as a whole).

So, subject to meeting all the above requirements, there would appear to be nothing to prevent a member who is to receive pension benefits as a result of flexible retirement from receiving a trivial commutation payment. The only obstacle will be to ensure the correct timing of the payment so as to ensure that any further LGPS entitlement as a result of the ongoing active membership does not result in the payment being

unauthorised. To ensure this doesn't happen, the payment will need to be on the date the pension benefits are first paid (i.e. immediately before active membership recommences) and the "nominated date" (described above) within the three months immediately preceding that date. Alternatively, to allow for delays in processing the payment, the scheme member might need to defer rejoining the scheme for a short period. Clearly the scheme member will need to be made fully aware of the implications of taking a trivial commutation payment at this point in time, including the fact that he or she will not be able to commute on triviality grounds the benefits they are accruing in the future, whereas if they don't commute now and wait until they eventually retire they might be able to commute all their benefits if they then meet all of the above criteria.

23. Beware of recycling of the lump sum paid on flexible retirement!

The Finance Act 2006 introduced new rules regarding the recycling of tax-free lump sums into pension scheme contributions. The government is concerned about people who use their tax-free lump sum received on retirement to re-invest in the same or other pension arrangements. The use of a tax-free lump sum in this way is known as "recycling".

The criteria for determining whether there is recycling taking place are quite complicated but, broadly speaking, it will occur if:

- the member receives a lump sum from the pension scheme
- because of the lump sum, the amount of contributions paid into a registered pension scheme in respect of the individual is significantly greater than it would otherwise have been. HMRC will generally take the view that a significant increase occurs where, because of the lump sum, the amount of the additional contributions are more than 30% of the contributions that might have been expected
- the additional contributions are made by the member (or by someone else, such as an employer)
- the recycling was pre-planned
- the amount of the lump sum, taken together with any other lump sum taken from a pension scheme in the previous 12 month period, exceeds 1% of the standard lifetime allowance, i.e. exceeds £15,000 in 2006/07, and

- the cumulative amount of the additional contributions exceeds 30% of the lump sum.

Administering authorities will need to be alert to this potentially happening (e.g. where a member pre-plans to use the lump sum paid on flexible retirement as a means to pay / increase AVCs or buy added years in the ongoing employment). Scheme members who breach the recycling rules will be liable to a potential "unauthorised payments charge" of 40% of the lump sum paid and a potential additional unauthorised payment surcharge of 15%. A scheme sanction charge of between 15% and 40% may become payable by the administering authority if there is recycling.

As from 11th August 2006 HMRC have put the onus on the scheme member to notify the administering authority within 30 days of receiving the lump sum if they are planning to use it to break the recycling rules. However, in reality, it is quite unlikely that all scheme members will admit if this is the case. HMRC has, therefore, confirmed that if the scheme administrator considers it has reasonable grounds for doing so, they can ask for the scheme sanction charge to be discharged. The example provided in the HMRC guidance is where a scheme asks the scheme member to declare whether or not they are taking a lump sum with the intention of significantly increasing contributions to a registered pension scheme and the member declares otherwise, and then does use (and intended to use all along) the lump sum for recycling. It would appear wise for administering authorities to update their declaration forms to ask whether recycling is intended or, at least, to point out in the notes sent to members that HMRC will deem recycling of a lump sum to be an unauthorised payment resulting in tax penalties for the member (and potentially for the scheme).

Further guidance on recycling is available at:
http://www.hmrc.gov.uk/manuals/rpsmmanual/RPSM04104900.htm

24. What are the options if the employee reduces their hours or grade and the employer does not agree to the release of accrued benefits under the flexible retirement provisions of regulation 35(1A) of "the Principal Regulations"?

Scenario A: Member voluntarily reduces hours or grade on or after age 50 and before age 60.

The member would need the employer's permission to draw benefits straight away under the flexible retirement provisions of regulation 35(1A) of "the Principal Regulations". If the employer does not give consent, could the employee opt for a deferred benefit under regulation 32(10) of "the Principal Regulations"? Regulation 32(10) says "where a person ceases to be an active member in one employment and immediately becomes an active member in another employment .... 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".

The regulation does not, however, define what "ceasing to be an active member in one employment and immediately becoming an active member in another employment" actually means. The LGPC Secretariat believes it has generally been interpreted as meaning that there has been a new contract of employment rather than a variation to an existing contract of employment. So the answer will depend on whether or not there has been a new contract of employment or a variation to an existing contract. It is likely that, in most cases, a reduction in grade would result in the issue of a new contract. A reduction in hours could result in the issue of a new contract (particularly if also accompanied by a change in duties) but could be dealt with as a variation to an existing contract. If there is a variation in the existing contract, then regulation 32(10) of "the Principal Regulations" would not apply and deferred benefits could not be awarded. If there is a new contract, regulation 32(10) would apply and a deferred benefit could be awarded. Where deferred benefits are awarded, the member would have 12 months from the date of the reduction in hours / grade (or such longer period as the employer may allow) to decide whether or not to aggregate the deferred benefit with the ongoing period of membership. If the member decides to aggregate, no benefits are immediately payable. If they decide to keep separate benefits the member could apply for immediate early payment of the deferred benefits under regulation 31(1) but would need employer consent to the release of benefits before age 60. If the deferred benefits are brought into payment, the administering authority's abatement policy under regulation 109 would then apply. If the member did not apply for immediate early payment (or immediate early payment was turned down by the employer in the case of a request from a member under age 60) the member could opt to draw benefits from age 60 under regulation 31(1), as it would appear that the member should be treated as having left a local government employment, but

again the administering authority's abatement policy under regulation 109 would apply. If the member carried on in employment until and beyond age 65 (NRD) without electing to draw the deferred benefit it would seem that, due to regulation 31(7A), the deferred benefits could not then be drawn until the member ceased to be employed unless the employer agreed to the release of the deferred benefit on or after age 65 and before employment ceased (and then the administering authority's abatement policy under regulation 109 would apply).

Scenario B: Member voluntarily reduces hours or grade on or after age 60 but before NRD

The member would need the employer's permission to draw benefits straight away under the flexible retirement provisions of regulation 35(1A) of "the Principal Regulations". If the employer did not give permission, could the employee opt for a deferred benefit under regulation 32(10) of "the Principal Regulations"? The initial question is whether regulation 32(10) applies. As stated above, the LGPC Secretariat believes that "ceasing to be an active member in one employment and immediately becoming an active member in another employment" has generally been interpreted as meaning that there has been a new contract of employment rather than a variation to an existing contract of employment. So the answer will depend on whether or not there has been a new contract of employment or a variation to an existing contract. If the latter, then regulation 32(10) would not apply and deferred benefits could not be awarded. If the former, regulation 32(10) would apply and a deferred benefit would be awarded. The member would then have 12 months from the date of the reduction in hours / grade (or such longer period as the employer may allow) to decide whether or not to aggregate the deferred benefit with the ongoing period of membership. If the member decided to aggregate, no benefits would be immediately payable. If the member decided to keep separate benefits the member could apply for immediate early payment of the deferred benefits under regulation 31(1) as it would appear that the member should be treated as having left a local government employment, but the administering authority's abatement policy under regulation 109 would apply. If the member carried on in employment until and beyond age 65 (NRD) without electing to draw the deferred benefit it would seem that, due to regulation 31(7A), the deferred benefits could not then be drawn until the member ceased to be employed unless the

employer agreed to the release of the deferred benefit on or after age 65 and before employment ceased (and then the administering authority's abatement policy under regulation 109 would apply).

Scenario C: Member voluntarily reduces hours or grade at or after NRD

Regulation 25 of "the Principal Regulations" says that where a member who has attained NRD retires from a local government employment he shall be entitled to the immediate payment of pension benefits but this is tempered by regulation 35(1) which says that benefits may not be paid before a person has retired from the employment in which he was a member (unless the flexible retirement provisions of regulation 35(1A) apply). The member would need the employer's permission to draw benefits straight away under the flexible retirement provisions of regulation 35(1A) of "the Principal Regulations". If the employer did not give permission, could the employee opt for a deferred benefit under regulation 32(10) of "the Principal Regulations"? Again, the initial question is whether regulation 32(10) applies. As stated above, the LGPC Secretariat believes that "ceasing to be an active member in one employment and immediately becoming an active member in another employment" has generally been interpreted as meaning that there has been a new contract of employment rather than a variation to an existing contract of employment. So the answer will depend on whether or not there has been a new contract of employment or a variation to an existing contract. If the latter, then regulation 32(10) would not apply and deferred benefits could not be awarded. If the former, regulation 32(10) would apply and a deferred benefit could be awarded. The member would then have 12 months from the date of the reduction in hours / grade (or such longer period as the employer may allow) to decide whether or not to aggregate the deferred benefit with the ongoing period of membership. If they decide to aggregate, no benefits are immediately payable. If they decide to keep separate benefits then, due to regulation 31(7A), the deferred benefits could not then be drawn until the member ceased to be employed unless the employer agreed to the release of the deferred benefit on or after age NRD (age 65) and before employment ceased (and then the administering authority's abatement policy under regulation 109 would apply).

Regulation 7: Children's long-term pensions

This regulation amends the amount of pension payable to a surviving child where a pensioner member had commuted part of his / her pension under regulation 20(3A) of "the Principal Regulations" in return for an increased lump sum retirement grant. The amendment to regulation 46(7) of "the Principal Regulations" makes it clear that a child's long-term pension is to be based on the deceased pensioner's pre commutation level of pension i.e. the long term child's pension in such cases is to be calculated as the greater of:

- half of the deceased member's pension (after adding back the various reduction elements mentioned in regulation 20(6) of "the Principal Regulations") and
- half the deceased member's pre commutation pension (after adding back the various reduction elements mentioned in regulation 20(6) of "the Principal Regulations")

Comment:

1. No change has been made to the short term child's pension provisions under regulation 45 of "the Principal Regulations". Thus, the short term child's pension payable in respect of a deceased pensioner is equal to the deceased's post commutation pension (but adding back the various reduction elements mentioned in regulation 20(6) of "the Principal Regulations").

Regulation 8: Power of employing authority to increase total membership

This regulation amends regulation 52(11) of "the Principal Regulations" and provides that a period of additional (augmented) membership awarded under regulation 52 will be treated as post 1st April 2008 membership if the resolution to award the augmented membership was made on or after that date.

Comment:

1. Even if the resolution to augment membership is passed after 31st March 2008, and the augmented membership counts as post 31st March 2008 membership, it will nonetheless count towards determining when "the 85 year rule" will be met in respect of the member's pre 31st March 2008

membership (or pre 1st April 2016 / pre 1st April 2020 membership for those with Transitional Protection).

Regulation 9: Retirement Benefits;
Regulation 10: Election as to use of accumulated value of AVCs

These two regulations delete, respectively, regulations 64(6) and 66(6) from "the Principal Regulations" thereby permitting members to take some or all of their accrued AVCs / Shared Cost AVCs as a lump sum (but see the information and comments on regulation 5 above).

Regulation 11: Employer's further payments

This amends regulation 80(5) of "the Principal Regulations" to allow the administering authority to charge an employer for any strain on Fund cost that arises from the employer agreeing to a flexible retirement (see footnote 6).

Regulation 12: Statements of policy concerning the exercise of discretionary functions

This amends regulation 106 of "the Principal Regulations" to require employers to have a policy statement, as from 1st October 2006, on flexible retirement (see comment 1 under regulation 6 above).

Regulation 13: Right to count credited period

Regulations 122(6C) and (6D) of "the Principal Regulations" are amended with the effect that a credited period of membership arising from the acceptance of a transfer value under regulation 121 of "the Principal Regulations" counts:

a) as a period of membership before 1st April 2008 if the person was an active member of the LGPS immediately before that date, and

b) as a period of membership after 31st March 2008 if the person becomes an active member on or after 1st April 2008.

Comments:

1. With regard to (a) above, it is imperative that employers who agree to extend the normal time limit of 12 months from joining the Scheme within which a member must opt to transfer pension rights into the LGPS are aware that, if they do so, the credited period will count as pre 1st April 2008 membership and will, for those who were active members on 30th September 2006, attract the Transitional Protections outlined in regulation 17 below and Annex 2 to this Circular.

2. Regulation 122(4) of "the Principal Regulations", as amended by SI 2006/966, says that in calculating membership credits in respect of non-club transfers in, the period for which allowance for earnings increases must be made runs to the member's NRD in all cases. This implies that in calculating credits, the assumed retirement date should be the new NRD of age 65 in all cases. However, although there is no specific saving provision contained in SI 2006/966 for the 'pre-amendment' regulation 122(4), it seems reasonable that the method of calculating a credited period for a person who was an active member on 30th September 2006 should reflect the fact that the service credit will, by virtue of regulation 122(6C), be treated as membership prior to 31st March 2008. Thus, the period for which allowance for earnings increases must be made in such cases should be as defined in regulation 122(4) of "the Principal Regulations" as it stood prior to its amendment by SI 2006/966. Additionally, regulation 122(4) does not state that an NRD of 65 must be used for all purposes when calculating the service credit, merely for making an allowance for the increase in pay. This means that for other purposes, such as determining whether to apply a conversion factor to the service credit where the member's NRD or, in transitional protection cases, the attainment of the 85 year rule falls after age 60, administering authorities should perform the calculation in accordance with GAD guidance. In other words, the calculation of the service credit for a person who was an active member on 30th September 2006 should be calculated in the same way as before the amendment to regulation 122(4) came into force by reference to the earlier of the member's NRD (as defined in regulation 25(3A) before its deletion by SI 2006/966) or the date at or after age 60 when the member would have satisfied the 85 year rule.

3. The extant GAD guidance on transfers in and out is that issued in September 1995 as updated in March 2004 and October 2006. The

March 2004 guidance made it clear that the conversion factors should be based on the earlier of the 85 year rule and the NRD and a letter from GAD dated 18th October 2006 updated paragraphs 1 and 2 of Appendix 4 to the September 1995 guidance to confirm that the new actuarial reduction factors issued by GAD in October 2006 are to be applied to all transfers where the relevant date is on or after 1st October 2006. The old actuarial reduction factors should still be applied to transfers where the relevant date falls before 1st October 2006.

Regulations 14 and 16: Credited periods for transferring members with mis-sold pension rights

This amends regulation 122A(1) of "the Principal Regulations" by adding at the end of the regulation "(and regulation 122(6C) does not apply to a transfer value credited under this regulation)".

Comment:

1. The intention is to ensure that membership derived from reinstatement of a mis-sold personal pension should count as pre 1st April 2008 membership. However, the cross reference to regulation 122(6C) appears to be erroneous and should be a cross reference to regulation 122(6D).

Regulation 15: Councillor members

This amends Schedule 8 of "the Principal Regulations" so that councillor members whose benefits become payable on or after 6th April 2006 can elect, in writing to the appropriate administering authority, before the benefits become payable, to increase the amount of their tax free lump sum retirement grant by commuting some of their pension. For each £1 of pension given up, the member will receive £12 additional lump sum.

"The Amendment Regulations" make it clear that :

- councillor members may take some or all of their accrued AVCs as a lump sum (subject to the limit mentioned below), but see the information and comments on regulation 5 above; and
- the maximum lump sum that may be taken, by way of retirement grant (including any extra sum derived from commutation) and any lump sum

received from an in house Additional Voluntary Contribution arrangement, must not exceed 25% of the capital value of the councillor member's accrued rights in the LGPS (in England and Wales), calculated as shown in guidance issued by the Government Actuary, and including the value of any Additional Voluntary Contributions made by the member to the LGPS AVC arrangement.

Comments:

1. Paragraph 20(2A) of Schedule 8 to "the Principal Regulations" requires that those councillor members whose benefits become payable on or after 6th April 2006 who wish to increase the amount of their tax free lump sum retirement grant by commuting some of their pension have to do so by electing, in writing to the appropriate administering authority, before **any** benefits become payable. The use of the word "any" should be taken to mean "any benefits in relation to that benefit crystallisation event".

2. Paragraph 20(2A) of Schedule 8 refers to "the retirement grant payable under paragraph (3)". This is an error and should refer to "the retirement grant payable under paragraph (2)".

3. Paragraph 20(2B) of Schedule 8 refers to "an election under paragraph (3A)". This is an error and should refer to "an election under paragraph (2A)".

Regulation 17: Transitional provisions and savings

This makes amendments to the Schedule contained in the Local Government Pension Scheme (Amendment) Regulations 2006 [SI 2006/966] by extending the transitional protections from the removal of the 85 year rule (see Annex 2 for full details).

Regulation 18: Right to opt out

This contains a provision allowing members to opt out of the changes being introduced by "the Amendment Regulations" provided:

a) they ceased active membership before 1st April 2006 where they want to opt out of the changes made by regulation 5 of "the Amendment Regulations"

b) they ceased active membership before 6th April 2006 where they want to opt out of the changes made by regulations 3, 4, 6, 7, 8, 9, 10, 15, 17 and 18 of "the Amendment Regulations",
c) they ceased active membership before 1st October 2006 where they want to opt out of the changes made by regulations 11, 12, 13 and 14 of "the Amendment Regulations", and
d) they make such an option before 1st April 2007.

Other matters

Added years contracts

As from 6th April 2006 regulation 55 of "the Principal Regulations" was amended to restrict the maximum membership that could be purchased by an added years election made on or after that date to 6 years 243 days (pro rated for part timers). If a member makes more than one election, the total period of membership under the elections can only be increased by 6 years 243 days in aggregate. The LGPC Secretariat is aware that some scheme members are arguing that as the words "in aggregate" do not appear in the Regulations they should be able to enter into a contract for 6 years 243 days and then, subsequently, be able to enter into further contracts to purchase additional membership. This is not the policy intention. The policy intention is to restrict the total additional membership being purchased to a maximum of 6 years 243 days (pro rata for part timers) in order to limit the potential liability on the Fund e.g. if a member was able to take out multiple successive contracts to purchase, say, a total of 20 years service and then either died in service or retired on health grounds the whole period would be deemed to be paid for. The 6 years 243 days limit is designed to protect Funds from such a large potential liability. If the member's view was correct i.e. that they should be able to take out a new contract every year for another 6 2/3rd years, there would have been no point in including any limit in regulation 55.

A further issue that has arisen is whether a member who

- elects to purchase 6 years 243 days membership,
- leaves having only completed half the purchase (i.e. 3 years 122 days) and
- subsequently rejoins the scheme

should be allowed to enter into a new contract to purchase the outstanding 3 years 121 days.

Technically the member will already have taken out a contract "to make additional contributions to the Scheme to increase his total membership by an additional period" for 6 2/3rd years. As the contract was for the maximum of 6 2/3rd years he would not be able to take out a subsequent contract if he ceased the initial contract for 6 2/3rd years before its due completion date. Morally, however, it is difficult to see why a person who has only managed to purchase, say, 3 1/3rd years of the initial 6 2/3rd years contract should not subsequently be able to take out a new contract for the remaining 3 1/3rd years as the maximum Fund liability would still be constrained.

Regulation 55(10) of "the Principal Regulations" provides that a member paying additional contributions to purchase added years of membership under that regulation can only count the full period being purchased if the member continues paying the additional contributions until Normal Retirement Date. For contracts entered into on or after 1st October 2006 the NRD is age 65. If the member does not complete payment of the additional contributions the provisions of regulation 83 of "the Principal Regulations" will come into play i.e.

- the contract will be deemed to have been completed if the member dies in service or is retired on the grounds of permanent ill health
- in all other cases the member will be credited with a proportion of the number of added years being bought calculated as follows:

  number of added years being purchased x (period contributions have been paid for divided by the period the contributions should have been paid for i.e. to age 65).

  However, a member being retired on the grounds of redundancy / efficiency more than 12 months after making an election to purchase added years can elect within 3 months of leaving, or such longer period as the administering authority allows, to make a capital payment to complete the purchase of the added years.

Paragraph 5 of the Schedule to SI 2006/966 as amended by "the Amendment Regulations" (i.e. as amended by SI 2006/2008) protects the position of those who were active members [immediately] before 1st October 2006 and who **elected** before 1st October 2006 to make additional contributions to purchase added years (even if the additional contributions did not start until the member's next birthday which could fall on or after 1st October 2006). The intention is that added years purchased under such contracts that were due to finish at age 65 should be treated as pre 1st April 2008 membership. The contract should continue to be dealt with as if "the Principal Regulations" had not been amended i.e.

- the contract would be taken out to pay additional contributions until the birthday before the member's NRD, or to the member's NRD where his / her birthday falls on his / her NRD (as defined in regulation 25(3A) before its deletion by SI 2006/966)
- the contract will be deemed to have been completed if the member dies in service or is retired on the grounds of permanent ill health
- in all other cases the member will be credited with a proportion of the number of added years being bought calculated as follows:

  number of added years being purchased x (period contributions have been paid for divided by the period the contributions should have been paid for i.e. to the birthday immediately before or coincident with the member's NRD).

  However, a member being retired on the grounds of redundancy / efficiency more than 12 months after making an election to purchase added years can elect within 3 months of leaving, or such longer period as the administering authority allows, to make a capital payment to complete the purchase of the added years.

Whilst this is the intention behind paragraph 5 of the Schedule to SI 2006/966 as amended by "the Amendment Regulations", a strict interpretation of the wording might suggest that the intention has not been entirely met.

In order for the added years purchased under a contract entered into before 1st October 2006 (which was due to finish before age 65) to be treated as membership prior to 1st April 2008, the member must complete making payments (because paragraph 5(3) of SI 2006/966 stipulates that for the

added years to be treated as pre 1st April 2008 membership, all the conditions of paragraph 5 must be satisfied – and one of the conditions is that payment of the additional contributions under the contract must be completed). If the payments are not completed, paragraph 5 does not stipulate how the membership derived from the added years should be treated (e.g. as pre or post 1st April 2008 membership).

Nevertheless, despite the above concern, and despite the lack of a saving provision so that the references to NRD in regulation 83 of "the Principal Regulations" continue to be a reference to the NRD under regulation 25(3A) (before its deletion by SI 2006/966) for any members who have made an election for an added years contract prior to 1st October 2006, it is felt that administering authorities should honour the intention of the Regulations.

GAD guidance for calculating the cost of added years contracts entered into on or after 1st October 2006 was issued under cover of a DCLG letter dated 18th January 2007.

Finally, it should be noted that members who had a Normal Retirement Date earlier than age 65 by virtue of regulation 25(3A) of "the Principal Regulations" and who were prevented from purchasing added years because they had attained their NRD will, following the deletion of regulation 25(3A) on 1st October 2006 by SI 2006/96, now be able to make an election to purchase added years under regulation 55 of "the Principal Regulations" (provided the election is made before age 64).

Continuing in service post age 65

As from 6th April 2006 "the Principal Regulations" were amended so that employees aged 65 or over could join / remain in membership of the LGPS. Regulation 20(4A) of "the Principal Regulations" provides that benefits drawn after a member's 65th birthday shall be increased to take account of payment after the normal retirement age of 65. The increase is to be calculated in accordance with guidance to be issued by the Government Actuary.

For those existing employees who decided not rejoin the scheme from 6th April 2006 when given the opportunity to do so, benefits are calculated on the Final Pay for the year ending with the day before age 65 and the

Pensions Increase date is the 65th birthday, but the benefits are not payable until the employee finally leaves, or from age 75 if earlier[12] (see regulations 35(1) and (2) of "the Principal Regulations").

For those existing employees who did rejoin the scheme the period of membership to age 65 should automatically be aggregated with the current period of membership (i.e. the period of membership from the date of rejoining). Regulation 32 of "the Principal Regulations" does not apply (option to aggregate where a deferred member rejoins) because the member was not a "deferred member". The person was also not a "pensioner member". This only leaves "active member". This view is backed up by regulation 9(1A) of "the Principal Regulations", before its deletion by SI 2006/966, which treated such members as active members for certain purposes. So, in effect, the employee was an active member throughout, but was just not accruing any membership during the period between age 65 and the date of rejoining the scheme. Turning to the question of how benefits should be increased when the combined benefits are eventually drawn, it would be logical if both the pre and post age 65 benefits were calculated on the final pay up to the actual date of retirement and for both the benefits accrued up to age 65 and the benefits accrued post 65 to be actuarially increased (because the payment of both elements has been delayed). However, it should be noted that the DCLG consultation on a new look LGPS asks whether benefits accrued post age 65 should be actuarially increased (suggesting that that they are not increased at present, although regulation 20(4A) as presently worded would signify that benefits accrued both pre and post age 65 should be actuarially increased). The Pensions Increase date should be the day after retirement / flexible retirement (or the day before age 75 if the member continues in employment beyond age 75, assuming they have not taken flexible retirement before then). The foregoing, however, is merely the logical view but there is presently no updated GAD guidance to back this up.

The extant GAD guidance, dated 28th June 2000, in relation to benefits accrued up to age 65 says "these benefits, before they are increased, would normally be calculated as though the member had retired on his 65th birthday, and the period for which payment of these benefits is delayed

[12] Or from any age between 65 and 75, if the employee reduces their hours or grade and the employer agrees to payment of benefits under the flexible retirement provisions of regulation 35(1A)

would normally be that between the 65th birthday and the date the member retires from service or dies in service".

The guidance goes on to say "Pensions increases should then be added to the benefits, as increased under regulation 20(4A), as though the date of leaving service were the beginning of the period during which payment of benefits was delayed, rather than the actual date of leaving service".

Clearly, the extant GAD guidance was written with the old situation in mind i.e. where the person ceased paying into the scheme / accruing extra membership at 65. One can argue that as the first part of the GAD guidance quoted above uses the words "normally be calculated as though the member had retired on his 65th birthday", we can stretch a point and say that in the new scenario both the pre and post age 65 benefits will be calculated on final pay at actual retirement. However, it is difficult to ignore the fact that the GAD guidance says that the Pensions Increase date is, in effect, age 65 and not the date of leaving.

In a note dated 7th June 2006, DCLG stated "The current guidance on regulation 20(4A) can still be used in cases of Late Retirement. Only benefits accrued up to NRA65 are to be uplifted. Uplift of benefits accrued after NRA65 to be considered for the new-look scheme". However, due to the difficulties outlined above, the LGPC Secretariat has asked DCLG to obtain updated guidance from GAD. Pending that guidance, if administering authorities have an urgent case we would advise the following practical approach in the case of a retirement or death in service

a) calculate both the pre and post age 65 benefits on final pay at the date of retirement*
b) use a Pensions Increase date of
- the day following retirement / flexible retirement (or the day before age 75 if the member continues in employment beyond age 75 and has not taken flexible retirement before then), or
- the day following death in service
c) only increase the benefits accrued up to age 65 (based on final pay at the date of retirement*) by the factors in the current GAD guidance i.e. increase the member's pension (and the contingent long term spouse's, civil partner's or child's pension) by 0.02% for each day beyond age 65 and the lump sum retirement grant (and any death in service grant under regulation 38(5A)(b) where the 3/80ths service related death grant is greater than two times pay) by 0.01% for each day beyond age 65.

* where a person rejoins the scheme for, say, 99 days before retiring, having been out of the Scheme for 165 days between age 65 and the date of rejoining, the final pay should be the pay for those 99 days plus the pay for 101 days up to age 65 x 365/200. Regulation 21(1) of "the Principal Regulations" says that a member's final pay is his pay for as much of the final pay period as he is entitled to count as active membership. Whilst the person may have been an active member throughout, he did not have membership during the period between age 65 and the date of rejoining. Regulation 21(2) says that a member's final pay period is the year ending with the day on which he stops being an active member but regulation 21(9) qualifies this by saying that if the member is only entitled to count part of the year specified in regulation 21(2) as a period of active membership, his final pay is his pay during that part multiplied by 365 and divided by the number of days in that part.

As far as any GMP is concerned, regulation 35 of "the Principal Regulations" says that where a person carries on in employment beyond State Pension Age (SPA) the GMP is not payable until the person leaves that employment. However, if the member carries on in the same employment for 5 years after SPA and doesn't then leave he is entitled to payment of the GMP 5 years after SPA unless he consents to a postponement, until age 75 at the latest. Thus, unless the member consents to a postponement, the GMP would be payable, at the latest, at age 65 for a female and age 70 for a male. This would constitute a Benefit Crystallisation Event (BCE) and so, in such cases, no actuarial increase for deferment of payment of the rest of the benefits beyond age 65 could be paid, since regulation 20(4A) of "the Principal Regulations" only permits an actuarial increase where no BCE has occurred before the day after a member's 65th birthday. Clearly this is somewhat unfair. Until GAD issue updated guidance on increasing benefits after age 65 (and, possibly, there is an amendment to regulation 20(4A)) the position will remain unsatisfactory[13].

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[13] In fact the situation is somewhat worse in that if a member has ever had a BCE in the Scheme they cannot have an actuarial increase. Regulation 20(4A), as presently worded, says that "where no benefit crystallisation event has occurred [on or after 6th April 2006 and] before the day after a member's 65th birthday in respect of any benefits payable under the Scheme, those benefits shall be increased at such rate as is shown as appropriate in guidance issued by the Government Actuary". The use of the words "no" and "any" could be taken to mean that if any benefit crystallisation event has occurred

Can a member attaining age 65 choose to draw benefits accrued up to that age whilst continuing in employment? The answer is no. Just because a member reaches age 65 does not mean benefits can be drawn under regulation 25 of "the Principal Regulations". There are two reasons for this. Firstly, in order to be entitled to draw a benefit under regulation 25 the member must, by reason of regulation 25(1), have retired from a local government employment. An employee carrying on in employment will not have "retired". Secondly, regulation 35(1) of "the Principal Regulations" confirms that benefits under "this Chapter" (which includes benefits under regulation 25) "may not be paid to a person before he has retired from the employment in which he was a member." However, if the member reduces their hours or grade the accrued benefits can, with their employer's consent, be paid under the flexible retirement provisions of regulation 35(1A) of "the Principal Regulations".

Finally, it should be noted that if an employee works beyond age 65 and then retires, the employee does not have the choice to defer payment of those benefits. This is because regulation 93(2)(b) of "the Principal Regulations" only provides the option for deferred members to defer payment of benefits that would otherwise be payable at NRD under regulation 31. If an employee remains in the scheme as an active member beyond age 65 their benefits would not be payable under regulation 31 but would, instead, be payable immediately on leaving in accordance with regulation 25A.

Deferring payment of a deferred benefit beyond age 65

Although deferred benefit are, by virtue of regulation 31(7) of "the Principal Regulations", and subject to regulation 31(7A) [see next section below], payable from a member's Normal Retirement Date if he / she has not elected for them to be paid earlier, regulation 93(2)(b) of "the Principal Regulations" permits a deferred beneficiary to elect to defer payment beyond his / her Normal Retirement Date (but the benefits must be paid by no later than the day before age 75).

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before age 65 (e.g. the member is already drawing a pension from any LGPS Fund in England and Wales, say as a result of an earlier voluntary, flexible, ill health, redundancy or efficiency retirement) then the benefits from a current employment which are not paid until after age 65 cannot be actuarially increased. This is unlikely to be intended and it would be helpful if this regulation was amended by the DCLG.

Comments:

1. "The Principal Regulations" are inconsistent i.e.

   Regulation 93(2)(b) says that deferred benefits must be paid no later than the day before age 75 but:

   - regulation 6(3) says a member (other than a Coroner) can be in the Scheme on the day before age 75;
   - regulation 25A(2) says benefits must be paid on the day before age 75 i.e. on the same day that, according to regulation 6(3), the person can still be contributing to the Scheme; and
   - regulation 35(2) says benefits must be paid at age 75, whereas regulation 25A(2) says that benefits must be paid the day before age 75

2. Although regulation 93(2)(b) of "the Principal Regulations" specifies that a deferred beneficiary may elect to defer payment beyond his / her Normal Retirement Date (but the benefits must be paid by no later than the day before age 75), it does not specify to whom the election should be made. It is clearly intended, however, that the election should be made to the appropriate administering authority.

3. The ability for a deferred beneficiary to delay payment of their benefits beyond their NRD provides a facility that is not available to members retiring under regulations 25 (i.e. member's retiring at their NRD), 25A (i.e. members retiring after age 65), 26 (i.e. members retiring on redundancy or efficiency grounds) and 27 (member's retiring on ill health grounds). In all the latter cases, members must draw their benefits immediately and cannot choose to delay payment to a date of their choice (but no later than the day before age 75).

4. It would seem logical that the benefits of a deferred beneficiary who, under regulation 93(2)(b), defers drawing the deferred benefits until after age 65 should receive an actuarial increase for the period of deferment under regulation 20(4A). However, the current GAD guidance only permits an increase to be paid where a member remains in **service** beyond age 65. Clearly, the GAD guidance was written to reflect the

position that applied prior to the introduction of regulation 93(2)(b) and needs to be updated to clarify whether an increase should or should not be paid in these circumstances (see, also, comment 6 below). In a note attached to a letter dated 24th October 2006 the DCLG stated "We are looking further at the approach to be taken in cases where deferred benefits are not drawn down on or before a member's 65th birthday, in order to ensure there is consistency of approach between such members and continuing active members who choose not to take their pension".

5. Where a member leaves before NRD, regulation 31(7) provides that the deferred pension and grant is payable from NRD if the member does not make an election for earlier payment under regulation 31(1). Regulation 93(2)(b) is slightly flawed in that it talks about deferment of the retirement pension beyond NRD but not about deferment of the retirement grant as well. Thus, the combination of regulations 31(7) and 93(2)(b) would apparently require the payment of the lump sum grant at NRD but payment of the pension could be deferred beyond NRD. This cannot be correct as this is not possible under HMRC rules. Furthermore, regulation 20(4A) makes it clear that "benefits" that are not taken at age 65 are subject to an actuarial increase. The intention of regulation 93(2)(b) is that payment of both the pension and lump sum would be deferred where the member elects to defer payment beyond NRD.

6. Where a member elects under regulation 93(2)(b) to defer drawing the deferred pension, the GMP would be payable from age 60(woman) / 65 (man). This would constitute a Benefit Crystallisation Event (BCE) and so no actuarial increase for deferment of the rest of the deferred pension and the lump sum beyond age 65 could be paid (as regulation 20(4A) only permits an actuarial increase where no BCE has occurred before the day after a member's 65th birthday). Clearly this is somewhat unfair. Until GAD issue updated guidance on increasing benefits after age 65 (and, possibly, there is an amendment to regulation 20(4A)) the position will remain unsatisfactory.

7. Deferred beneficiaries who left between 1st April 1998 and 30th September 2006 will have an NRD under regulation 25(3A) (before its deletion by SI 2006/966). That NRD might, for example, be age 60. If such a person opts under regulation 93(2)(b) to defer drawing her

pension at NRD (i.e. age 60) and decides to take it at, say, age 67 there would, under the current regulations, be no actuarial increase (although there would be a PI increase) for deferment in the period between age 60 and age 65, nor any actuarial increase for deferment beyond age 65. Again, until GAD issue updated guidance on increasing benefits after age 65 (and, possibly, there is an amendment to regulation 20(4A)) the position will remain unsatisfactory.

Minimum membership requirements for benefits payable after age 65

If a member joined the Scheme before age 65, carries on in employment beyond that age and then fully retires or retires on the grounds of redundancy, efficiency or ill health, benefits would only be payable under regulation 25A of "the Principal Regulations" if the member has a minimum of 3 months membership in the LGPS or has transferred other pension rights into the LGPS. Regulation 19(2)(a) of "the Principal Regulations" which waives these requirements does **not** apply to benefits payable under regulation 25A. Thus, failure to meet either the minimum membership requirement or the transfer in requirement will mean that only a refund of contributions would be payable under regulation 87 of "the Principal Regulations".

If a member joins after age 65 and then subsequently voluntarily retires, the benefits will be payable under regulation 25 of "the Principal Regulations". Hence, regulation 19(2)(a) of "the Principal Regulations" applies and so retirement benefits will be payable even if the member has less than 3 months membership in the LGPS and has not transferred other pension rights into the LGPS.

If a member joins before or after age 65 and

a) wishes, with the employer's agreement, to take flexible retirement under regulation 35(1A) of "the Principal Regulations", or
b) is retired on redundancy or efficiency grounds under regulation 26 of "the Principal Regulations", or
c) is retired on the grounds of permanent ill health under regulation 27 of "the Principal Regulations"

the member must have a minimum of 3 months membership in the LGPS or have transferred other pension rights into the LGPS. Regulation

19(2)(a) of "the Principal Regulations" which waives these requirements does **not** apply to benefits payable under regulations 35(1A), 26 or 27. Thus, failure to meet either the minimum membership requirement or the transfer in requirement will mean that only a refund of contributions would be payable under regulation 87 of "the Principal Regulations".

Optants out

If a member opts out before, at or after age 65 it would appear the member would be entitled to a deferred benefit under regulation 31 of "the Principal Regulations". Optants out at or after age 65 would not be entitled to immediate benefits under regulations 25 or 25A of "the Principal Regulations" as benefits under those regulations are only payable when a member retires from employment. Regulation 31(1), in effect, deals with the award and payment of deferred benefits to members who leave a local government employment (or are treated as leaving a local government employment) before being entitled to the immediate payment of benefits under any other provision of "the Principal Regulations". Schedule 1 of "the Principal Regulations" defines a local government employment as employment by which the person is or has been a member of the LGPS. Obviously, in relation to an optant out, the person has (in the past) been a member of the LGPS in relation to their job. So, the member hasn't left a local government employment BUT regulation 31(1) also says "or is treated for these regulations as if he had done so". Where does it define in "the Principal Regulations" when someone is to be treated as if they had left? Unfortunately, there appears to be nothing in "the Principal Regulations" that helps to clarify this but regulation D4 of the LGPS Regulations 1995 said that an optant out was to be treated as if they had ceased to hold a local government employment. It seems therefore that it could be argued that the person should be treated for the purposes of the regulations as if he had ceased to hold a local government employment and thus be awarded a deferred benefit. Regulation 31(7A) of "the Principal Regulations" says that members who opt out of the Scheme should not be able to access their pension benefits at their NRD whilst they continue in employment unless they obtain their employer's permission to the release of their benefits. However, there are a number of inconsistencies i.e.

1. Regulation 31(7A), as presently worded, debars optants out from starting to draw their benefits from their NRD without obtaining their employer's consent. However, only those employed by an employer listed

in Schedule 2 of "the Principal Regulations" need to obtain employer consent. Those employed by admitted bodies, resolution bodies, and certain non-scheme employers (see Chapter I of Part V of "the Principal Regulations") would not have to obtain such consent. However, see points 4 and 5 below.

2. Regulation 31(7A), as presently worded, would permit optants out to draw their benefits at an actuarially reduced rate before their Normal Retirement Date without the need for employer consent. This seems inconsistent with 1 above. However, see points 4 and 5 below.

3. The use of the words "A member who continues to be employed" in regulation 31(7A) would apparently debar members who cease one employment but carry on in a concurrent employment with a Schedule 2 employer from receiving their pension benefits from the terminated employment at or after their NRD unless they receive employer consent.

4. Although regulation 31(7A) would appear to allow optants out to;

   - draw reduced benefits before NRD, or
   - draw benefits at NRD if not employed by a Schedule 2 employer, or
   - draw benefits at NRD if employed by a Schedule 2 employer and that employer gives consent to the release of the benefits

   regulation 35(1) says that benefits cannot be paid until the member has retired from the employment in which he was a member.

5. Further clarificatory amendments are needed by DCLG but, in the meantime, the LGPC Secretariat is of the view that the safest approach would be to comply with regulation 35(1) and not pay benefits to optants out until they have retired from the employment in which they were a member (unless they decide to defer payment beyond then under the provisions of regulation 93(2)(b) of "the Principal Regulations"). When the benefits become payable upon retirement (or age 75 if earlier) the benefits would be actuarially increased in accordance with guidance issued by GAD under regulation 20(4A) of "the Principal Regulations".

6. An optant out whose employment is terminated, when aged 50 or over, on the grounds of redundancy or efficiency would not be entitled to

immediate benefits under regulation 26 of "the Principal Regulations" as that regulation only covers active members (in consequence of regulation 2 of "the Principal Regulations"). Similarly, an optant out whose employment is terminated on the grounds of ill health would not be entitled to the immediate award of an enhanced pension under regulations 27 and 28 of "the Principal Regulations" (again due to of regulation 2 of "the Principal Regulations") but could seek immediate payment of the deferred pension (unenhanced) under regulation 31(6) of "the Principal Regulations".

Annex 2

Effect of removal of the 85 year rule

1. The age at which an unreduced pension can be taken has been standardised at age 65 for all members of the Scheme. This has been achieved:

   a) by removing, as from 1st October 2006, a 'protected' Normal Retirement Date enjoyed by some members who joined the Scheme before 1st April 1998[14]; and

   b) by removing the '85-year rule'[15] in respect of benefits accruing in the Scheme after 30th September 2006.

2. However, the Local Government Pension Scheme (Amendment) Regulations 2006 [SI 2006/96] as amended by the Local Government Pension Scheme (Amendment) (No. 2) Regulations 2006 [SI 2006/2008] give Transitional Protections for existing scheme members by:

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[14] The 'protected' Normal Retirement Date only applied to employees who joined the Scheme before 1st April 1998. Such members could draw unreduced benefits on or after age 60 and before age 65 if, on the date the benefits were drawn, the member would have had 25 years membership.

[15] The 85 year rule is a rule which allowed employees retiring on or after age 60 and before age 65 or, with the employer's consent, on or after age 50 and before age 60, (or who were, with their employer's consent, taking flexible retirement on or after age 50 and before age 65) to receive an unreduced pension if, when their benefits were drawn, their combined age and Scheme membership (both in whole years) added up to 85 years.

- providing protection for all **existing contributors** at 30th September 2006 on the benefits they accrue on service up to 31st March 2008 i.e. protection up to the introduction of the new look LGPS
- extending transitional protection from 31st March 2013 to 31st March 2016 for those **existing contributors** at 30th September 2006 who will be 60 or over by 31st March 2016
- extending transitional protection from 1st April 2016 to 31st March 2020 for those **existing contributors** at 30th September 2006 who will be 60 or over between 1st April 2016 and 31st March 2020 and who will meet the 85 year rule by 31st March 2020, using tapering reduction factors, i.e. full protection for membership to 31st March 2008, but tapered protection on membership between 1st April 2008 and 31st March 2020. The date of 2020 ties in with the increase in the state retirement age for women which increases to 65 in 2020

3. This is explained in more detail below.

New joiners after 30th September 2006

4. The Scheme's Normal Retirement Date for people who were not active scheme members on 30th September 2006 is age 65.

Retirement at or after age 65

5. Any benefits payable at or after age 65 will be paid in full.

Voluntary or Flexible Retirement before age 65

6. Any benefits payable following ill health retirement (at any age) or following retirement on redundancy or efficiency grounds when aged 50 or over will be paid in full.

7. Any benefits payable following voluntary retirement on or after age 60 and before age 65 or, with the employer's consent, on or after age 50 and before age 60, will be paid at an actuarially reduced rate to

take account of early payment (unless the employer agrees to waive the reduction on compassionate grounds).

8. Any benefits payable with the employer's consent upon flexible retirement on or after age 50 and before age 65 will be paid at an actuarially reduced rate to take account of early payment (unless the employer agrees to waive the reduction in whole or in part).

9. The reduction to benefits under paragraphs 7 and 8 will be based on the period between the date the benefits come into payment and age 65.

Existing contributors at 30th September 2006

10. The Scheme's Normal Retirement Date for people who were active scheme members on 30th September 2006 is age 65.

Retirement at or after age 65

11. Any benefits payable at or after age 65 will be paid in full.

Retirement before age 65

12. Any benefits payable following ill health retirement (at any age) or following retirement on redundancy or efficiency grounds when aged 50[16] or over will be paid in full.

13. Any benefits payable following voluntary retirement on or after age 60 and before age 65 or, with the employer's consent, on or after age 50[16] and before age 60, will be paid at an actuarially reduced rate to take account of early payment (unless the employer agrees to waive the reduction on compassionate grounds).

14. Any benefits payable with the employer's consent upon flexible retirement on or after age 50[16] and before age 65 will be paid at an actuarially reduced rate to take account of early payment (unless the employer agrees to waive the reduction in whole or in part).

[16] Rising to age 55 by 2010.

15. However, benefits accrued up to 31st March 2008, or up to 31st March 2016 for those who will be aged 60 or over by 31st March 2016, will be protected as if the change in the Scheme rules had not occurred, as detailed, respectively, in paragraphs 18 and 16 below. For those who will be 60 between 1st April 2016 and 31st March 2020 and who will meet the 85 year rule (or the 'protected' Normal Retirement Date[17]) by 31st March 2020, benefits accrued up to 31st March 2008 will be protected as if the change in the Scheme rules had not occurred and the benefits that accrue between 1st April 2008 and 31st March 2020 will be reduced according to a tapered reduction, rather than a full reduction, as detailed in paragraph 17 below.

16. For members contributing to the LGPS on 30th September 2006 who will be **age 60 or over by 31st March 2016:**

- in respect of the benefits the member accrues up to 31st March 2016 (or the date of leaving if earlier) the Scheme rules will be unaltered i.e.

  - the benefits, if paid at or after age 65, will be paid in full;
  - benefits drawn before age 65, upon either voluntary or flexible retirement, will be paid in full if the member's combined age and service (each in whole years) is 85 years or more on the date the benefits commence or, if applicable, the member has attained the former 'protected' Normal Retirement Date[17] on the date the benefits commence;
  - if drawn before age 65, upon either voluntary or flexible retirement, and the member does not meet the '85 year rule' on the date the benefits commence or, where applicable, the member has not attained an earlier 'protected' Normal Retirement Date[17] on the date the benefits commence, the

[17] The 'protected' Normal Retirement Date only applied to employees who joined the Scheme before 1st April 1998. Such members could draw unreduced benefits on or after age 60 and before age 65 if, on the date the benefits were drawn, the member would have had 25 years membership. Although the LGPS (Amendment) (No.2) Regulations 2006 only refer to those who will meet the 85 year rule by 31st March 2020, the GAD guidance provides cover for anyone who will be 60 between 1st April 2016 and 31st March 2020 and meet the 85 rule or the 'protected' NRD by 31st March 2020.

benefits will be paid at an actuarially reduced rate to take account of early payment (unless, in the case of voluntary retirement, the employer agrees to waive the reduction on compassionate grounds or, in the case of flexible retirement, the employer agrees to waive the reduction in whole or in part). The reduction will be based on the period between the date the benefits commence and the earlier of:

d) the former 'protected' Normal Retirement Date[19] (where it applies), or
e) the date the '85 year rule' would have been met, or
f) age 65.

- in respect of benefits accruing from membership after 31st March 2016, the Scheme's Normal Retirement Date will be age 65. If benefits in respect of the post 31st March 2016 Scheme membership are drawn at age 65 they will be paid in full; but if they are drawn before age 65, upon either voluntary or flexible retirement, the benefits will be paid at an actuarially reduced rate to take account of early payment (unless, in the case of voluntary retirement, the employer agrees to waive the reduction on compassionate grounds or, in the case of flexible retirement, the employer agrees to waive the reduction in whole or in part). The reduction will be based on the period between the date the benefits come into payment and age 65.

17. For members contributing to the LGPS on 30th September 2006 who will attain[18] **age 60 between 1st April 2016 and 31st March 2020** (both

[18] It is interesting that paragraph 6 of Schedule 2 to SI 2006/966 as inserted by SI 2006/2008 refers to the tapering protection applying to "a member who **retires**, having reached the age of 60, on or after 1st April 2016 and before 1st April 2020, and who **would** …. **have** satisfied the 85 year rule before the latter date." It is to be assumed that a member who retires having reached the age of 60, on or after 1st April 2016 and before 1st April 2020, and who **has** (rather than who **would have**) satisfied the 85 year rule before the latter date is covered by the tapered protection; it is also to be assumed (and the GAD guidance would appear to corroborate this view) that a member who leaves before 1St April 2016 with a **deferred benefit** but who will attain age 60 on or after 1st April 2016 and before 1st April 2020, and who **would …. have** satisfied the 85 year rule before the latter date, will nevertheless be covered by the tapered protection.

dates inclusive) and who will satisfy the 85 year rule or meet the 'protected' Normal Retirement Date[19] before 1st April 2020:

- in respect of the benefits the member accrues up to 31st March 2008 the Scheme rules will be unaltered i.e.

  - the benefits, if paid at or after age 65, will be paid in full;
  - benefits drawn before age 65, upon either voluntary or flexible retirement, will be paid in full if the member's combined age and service (each in whole years) is 85 years or more on the date the benefits commence or, if applicable, the member has attained the former 'protected' Normal Retirement Date[19] on the date the benefits commence;
  - if drawn before age 65, upon either voluntary or flexible retirement, and the member does not meet the '85 year rule' on the date the benefits commence or, where applicable, the member has not attained an earlier 'protected' Normal Retirement Date[19] on the date the benefits commence, the benefits will be paid at an actuarially reduced rate to take account of early payment (unless, in the case of voluntary retirement, the employer agrees to waive the reduction on compassionate grounds or, in the case of flexible retirement, the employer agrees to waive the reduction in whole or in part). The reduction will be based on the period between the date the benefits commence and the earlier of:

    a) the former 'protected' Normal Retirement Date[19] (where it applies), or
    b) the date the '85 year rule' would have been met, or
    c) age 65.

- in respect of the benefits the member accrues between 1st April 2008 and 31st March 2020:

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[19] The 'protected' Normal Retirement Date only applied to employees who joined the Scheme before 1st April 1998. Such members could draw unreduced benefits on or after age 60 and before age 65 if, on the date the benefits were drawn, the member would have had 25 years membership. Although the LGPS (Amendment) (No.2) Regulations 2006 only refer to those who will meet the 85 year rule by 31st March 2020, the GAD guidance provides cover for anyone who will be 60 between 1st April 2016 and 31st March 2020 and meet the 85 rule or the 'protected' NRD by 31st March 2020.

- the benefits, if paid at or after age 65, will be paid in full;
- benefits drawn before age 65, upon either voluntary or flexible retirement, will be paid at an actuarially reduced rate to take account of early payment (unless, in the case of voluntary retirement, the employer agrees to waive the reduction on compassionate grounds or, in the case of flexible retirement, the employer agrees to waive the reduction in whole or in part). The reduction will, however, not be a full reduction but a tapered reduction.

- in respect of benefits accruing from membership after 31st March 2020, the Scheme's Normal Retirement Date will be age 65. If benefits in respect of the post 31st March 2020 membership are drawn at age 65 they will be paid in full; but if they are drawn before age 65, upon either voluntary or flexible retirement, the benefits will be paid at an actuarially reduced rate to take account of early payment (unless, in the case of voluntary retirement, the employer agrees to waive the reduction on compassionate grounds or, in the case of flexible retirement, the employer agrees to waive the reduction in whole or in part). The reduction will be based on the period between the date the benefits come into payment and age 65.

18. For members contributing to the LGPS on 30th September 2006 who will be **age 60 after 31st March 2020:**

- in respect of the benefits the member accrues up to 31st March 2008 the Scheme rules will be unaltered i.e.

  - the benefits, if paid at or after age 65, will be paid in full;
  - benefits drawn before age 65, upon either voluntary or flexible retirement, will be paid in full if the member's combined age and service (each in whole years) is 85 years or more on the date the benefits commence or, if applicable, the member has attained the former 'protected' Normal Retirement Date[19] on the date the benefits commence;
  - if drawn before age 65, upon either voluntary or flexible retirement, and the member does not meet the '85 year rule' on the date the benefits commence or, where applicable, the

member has not attained an earlier 'protected' Normal Retirement Date[19] on the date the benefits commence, the benefits will be paid at an actuarially reduced rate to take account of early payment (unless, in the case of voluntary retirement, the employer agrees to waive the reduction on compassionate grounds or, in the case of flexible retirement, the employer agrees to waive the reduction in whole or in part). The reduction will be based on the period between the date the benefits commence and the earlier of:

a) the former 'protected' Normal Retirement Date[19] (where it applies), or
b) the date the '85 year rule' would have been met, or
c) age 65.

- in respect of benefits accruing from membership after 31st March 2008, the Scheme's Normal Retirement Date will be age 65. If benefits in respect of the post 31st March 2008 membership are drawn at age 65 they will be paid in full; but if they are drawn before age 65, upon either voluntary or flexible retirement, the benefits will be paid at an actuarially reduced rate to take account of early payment (unless, in the case of voluntary retirement, the employer agrees to waive the reduction on compassionate grounds or, in the case of flexible retirement, the employer agrees to waive the reduction in whole or in part). The reduction will be based on the period between the date the benefits come into payment and age 65.

Summary

19. The actuarial reductions described in the above paragraphs can be summarised in the following table:

	Group 1	**Group 2**	**Group 3**	**Group 4**
Membership				
To 31.3.08.	CRA	CRA	CRA	65
1.4.08. to 31.3.16.	CRA	Taper	65	65
1.4.16. to 31.3.20.	65	Taper	65	65

From 1.4.20.	65	65	65	65

Where:

Group 1 = a member who was an active member immediately prior to 1st October 2006 and was born on 31st March 1956 or earlier

Group 2 = a member who was an active member immediately prior to 1st October 2006 and was born between 1st April 1956 and 31st March 1960 inclusive and who would reach their Critical Retirement Age by 31st March 2020

Group 3 = a member who was an active member immediately prior to 1st October 2006 and who doe not fall into Groups 1 or 2

Group 4 = a member who was not an active member immediately before 1st October 2006

CRA = the earlier of

a) the member's 'protected' Normal Retirement Date[19] which some members who joined the Scheme before 1st April 1998 had under regulation 25(3A) before its deletion by SI 2006/966
b) the earliest date at which the member would have satisfied the 85 year rule had the member remained in service
c) age 65

20. The overall effect of the changes to the 85 year rule are covered in the flowchart at Annex 3. The Government Actuary guidance issued on 27th September 2006 contains a number of worked examples.These have been supplemented at Annex 4 by some examples in respect of members whose retirement falls either side of the critical dates of 31st March 2016 and 31st March 2020 and by an example of a member who would reach age 60 between 1st April 2016 and 31st March 2020 but the employer agrees to the member's retirement, or to flexible retirement, prior to age 60.

21. It should be noted that Scheme members who could **not** have met the 85 year rule before age 65 (and who did not have a 'protected' Normal Retirement Date[19] falling before age 65) will not be affected by the removal of the 85 year rule. The actuarial

reduction that will be applied to their benefits if they choose to draw them, either upon voluntary of flexible retirement, will be same under the new rules as it would have been under the old rules.

Changes to the actuarial reduction factors

22. As scheme members are on average living longer, the actuarial reduction factors that apply to benefits voluntarily drawn earlier than normal retirement age have been lowered[20] as from 1st October 2006. The new factors are shown in Annex 5.

23. The effect is that the reduction for voluntarily drawing benefits before age 65 is now smaller than that which applied prior to 1st October 2006 (but see below re factors for pre 1st April 1998 deferred beneficiaries).

Actuarial reduction factors for pre 1st April 1998 deferred beneficiaries

24. Deferred beneficiaries who ceased pensionable employment before 1st April 1998 are, by virtue of regulation 4 of the Local Government Pension Scheme (Transitional Provisions) Regulations 1997, subject to the "saved provisions" and to the "common provisions". Part II (except regulations 49 and 50) and Parts III and V of the LGPS Regulations 1997 shall not apply (except so far as they affect the "common provisions").

25. The effect of the above is that:

[20] Reducing the actuarial reduction factors because members are living longer initially appears to be counter-intuitive. However, a simple way of looking at this is to start from the assumption that the scheme funding is based on benefits only being drawn in full at 65. If the cost of paying the benefits 5 years early at age 60 is, say, £5,000 then, assuming a life expectancy of 17 years, the Fund had 17 years to recover that money from the member. Thus, an actuarial reduction was applied to get £5,000 back over those 17 years (i.e. to get back £294 per year). If life expectancy rises to 22 years, the cost of paying out the benefits 5 years early at age 60 is still £5,000 but the period available to recover that cost is now 22 years. Hence the actuarial reduction goes down as the Fund now only needs to get £227 per year back over 22 years in order to recover the £5,000.

a) Part II of the LGPS Regulations 1997, which contains regulation 31 (dealing with actuarial reductions on early payment of benefits) does not apply to pre 1st April 1998 deferred beneficiaries, and

b) the "saved provisions" do apply.

26. The "saved provisions" are basically the LGPS Regulations 1995 other than the "replaced provisions". The "replaced provisions" do not include regulation D13 and hence regulation D13 (which deals with the actuarial reductions on early payment of benefits) is a "saved provision" and still applies to pre 1st April 1998 deferred beneficiaries.

27. Regulation D13 does not refer to GAD guidance but instead sets out the actuarial reduction factors within the regulation. Unless / until regulation D13 is amended to change the factors currently set out therein or to cross refer instead to GAD guidance then it would appear that the reduction factors set out in regulation D13 should continue to be applied to pre 1st April 1998 deferred benefits being brought into payment. In their letter of 24th October 2006 the DCLG state that it "does not seem to be appropriate where [a pre 1st April 1998 deferred benefit comes into payment] on or after 1st October 2006 for actuarial reduction factors other than those contained in the current GAD guidance to be used (and not those set out in regulation D13 of the LGPS Regulations 1995). Further advice is being sought on this issue and if it is felt necessary amendments will be considered to the LGPS Regulations to ensure consistency of approach and delivery of the policy intention that the current factors (i.e. post 30th September 2006 factors) should be used in the case of all early releases of retirement pension where this first occurs on and after 1st October 2006." If regulation D13 is amended, any pre 1st April 1998 leaver would be able to opt out of the change. However, as the new reduction factors are virtually all less than the 1995 Regulation factors it is highly unlikely that anyone would wish to opt out of the change. **Note:** At the time of writing this Circular, the LGPC Secretariat was awaiting clarification from DCLG as to how, in the absence of any specific regulatory change to regulation D13 of the LGPS Regulations 1995, the current actuarial reduction factors can be applied to pre 1st April 1998 deferred beneficiaries whose benefits come into payment post 30th September 2006.

28. It should be noted, however, that Part K of the 1995 Regulations (which deals with transfers out) are a "replaced provision" and so the 1997 Regulations apply to transfers out, even for pre 1st April 1998 leavers. Therefore, the current GAD actuarial reduction factors (i.e. the post 30th September 2006 factors) will apply to transfers out for both pre and post 1st April 1998 leavers where the relevant date for the transfer is on or after 1st October 2006.

How membership counts - rejoining deferred members

29. Regulation 2 of "the Principal Regulations" says that references to members and to membership generally refer to active members and to active membership respectively. Thus, whilst this is the general rule of thumb, the context in which the words are used can indicate that they have a different meaning.

30. Bearing the above in mind it would appear from paragraphs 1 and 2 of the Schedule to SI 2006/966 (as amended by SI 2006/2008) that, in order for the 85 year rule transitional protection to apply, a member must have been an active member **immediately** before 1st October 2006.

31. Thus, a deferred member at, for example, 30th June 2006 who rejoined the Scheme prior to 1st October 2006 would fall within the extended transitional protection provided by the Schedule to SI 2006/966 (as amended) regardless of whether or not they chose to aggregate membership (albeit that any unaggregated membership would not count towards the 85 year rule in the new employment).

32. However, a deferred member at, for example, 30th June 2006 who rejoins the Scheme on or after 1st October 2006 and aggregates the two periods of membership will not be covered by the extended protection; indeed, if the member chooses to aggregate, the 85 year rule would even cease to apply to the membership accrued up to 30th June as, upon aggregation, the member's NRD would become 65 in respect of all the aggregated membership i.e. the member would, by aggregating, have transferred the earlier membership into the current scheme arrangements which have an NRD of 65 and no 85 year rule. Thus, if the member wished to retain the 85 year rule in respect of membership to 30th June 2006 he would have to retain

separate benefits. The member would, therefore, have to weigh up the advantages (e.g. all benefits based on new pay) and disadvantages (e.g. loss of the 85 year rule) before making a decision on whether or not to combine benefits.

33. If an active member at 30th September 2006 leaves after that date with a deferred benefit, rejoins, and aggregates the benefits, he will be covered by the extended transitional protection provided by the Schedule to SI 2006/966 (as amended). If, however, that member did not aggregate the benefits, the deferred benefit would remain subject to the extended transitional protection provided by the Schedule to SI 2006/966 (as amended) and so too, by virtue of paragraph 4 of that Schedule, would the membership in respect of the new employment (albeit that the period of unaggregated membership would not count towards the 85 year rule in the new employment).

How membership counts – transfers between England / Wales and Scotland (and vice versa)

34. As far as these transfers are concerned it would appear that a person transferring from Scotland to England / Wales who chooses to aggregate benefits will lose the extra transitional protection that applies in Scotland to 31st March 2020 (for those who will be 60 by then) i.e. the extra protection beyond that which applies in England and Wales. It would also seem that if the person was not an active member of the LGPS in England and Wales on 30th September 2006 and decides to aggregate, no membership (either for service in England / Wales or transferred in from Scotland) would be protected under the transitional protection provided by the Schedule to SI 2006/966. Indeed, the 85 year rule would even cease to apply to the transferred Scottish membership as, upon aggregation, the member's NRD would become age 65 in respect of all the aggregated membership. The Local Government Superannuation (England and Scotland) Regulations 1948, as amended by the Local Government Superannuation (England and Scotland) (Amendment) Regulations 1954, do not cover protection arrangements. They only say that the person is "entitled to reckon as contributing service, non-contributing service and qualifying service respectively under the English Act all service (other than added years) which in relation to

his Scottish employment he was entitled to reckon as contributing service, non-contributing service and qualifying service under the Scottish Act immediately before he ceased to hold that employment".

35. Conversely, a member transferring from England / Wales to Scotland could, if they joined the LGPS in Scotland and were an active member in Scotland on 30th November 2006, gain from the protections set out in the Schedule to Scottish SI 2006/514. It would also seem that if the person was not an active member of the LGPS in Scotland on 30th November 2006 and decides to aggregate, no membership (either for service in Scotland or transferred in from England / Wales) would be protected under the transitional protection provided by the Schedule to Scottish SI 2006/514. Indeed, the 85 year rule would even cease to apply to the membership transferred from England / Wales as, upon aggregation, the member's NRD would become age 65 in respect of all the aggregated membership.

How membership counts - added years, augmented membership, transfers in, membership purchased by AVCs

36. The following table sets out how the above types of membership count and whether they impact on the member's Critical Retirement Age (CRA).

Added years contract under regulation 55

Date of contract election was pre 1.10.06. and the person was an active member on 30.9.06. and the contract was due to cease before age 65	Added years membership purchased treated as pre 1.4.08. membership. Therefore, counts as protected pre 1.4.08. membership and shifts CRA for all protected membership.
Date of contract election was pre 1.10.06. and the person was an active member on 30.9.06. and the contract was due to cease at age 65	Added years membership purchased does not count as pre 1.4.08. membership. It is to be assumed that this is because if the member took out a contract to age 65 the member did not have a CRA earlier than that age. Thus there is no need to treat the purchased added years as protected pre 1.4.08.

	membership as it would only have been necessary to do so if the member would have satisfied the 85 year rule (i.e. would have had a CRA) prior to age 65. Note: this interpretation is based on paragraph 5(1) of the Schedule to SI 2006/966.
Date of contract election is post 30.9.06. and the person was an active member on 30.9.06.	Added years membership purchased does not count as pre 1.4.08. membership. As the contract was taken out post 30.9.06. (i.e. after the 85 year rule was removed) the added years purchased is not protected membership. It shifts the CRA of protected membership but the added years themselves have a CRA of 65.
Date of contract election is post 30.9.06. and the person was NOT an active member on 30.9.06.	There is no protected membership. All membership, including the added years membership, has a CRA of 65.
Date of contract election is post 31.3.08. and the person was an active member on 30.9.06.	Added years membership purchased does not count as pre 1.4.08. membership. As the contract was taken out post 31.3.08. the added years purchased is not protected membership. It shifts the CRA of protected membership but the added years themselves have a CRA of 65.
Date of contract election is post 31.3.08. and the person was NOT an active member on 30.9.06.	There is no protected membership. All membership, including the added years membership, has a CRA of 65.

Augmented membership under regulation 52

Augmented membership awarded pre 1.4.08. and the person was an	Counts as pre 1.4.08. protected membership and shifts CRA of all

active member on 30.9.06.	protected membership.
Augmented membership awarded pre 1.4.08. and the person was NOT an active member on 30.9.06.	There is no protected membership. All membership, including the augmented membership, has a CRA of 65.
Augmented membership awarded post 31.3.08. and the person was an active member on 30.9.06.	Augmented membership does not count as pre 1.4.08. membership. As the augmented membership was awarded post 33.3.08. the augmented membership is not protected membership. It shifts the CRA of protected membership but the augmented membership itself has a CRA of 65.
Augmented membership awarded post 31.3.08. and the person was NOT an active member on 30.9.06.	There is no protected membership. All membership, including the augmented membership, has a CRA of 65.

Transfers in - regulation 122

Active member on 31.3.08. and on 30.9.06.	Counts as pre 1.4.08. protected membership and shifts CRA of all protected membership.
Active member on 31.3.08. but NOT on 30.9.06.	There is no protected membership. All membership, including the transferred in membership, has a CRA of 65.
Becomes active member after 31.3.08.	There is no protected membership. All membership, including the transferred in membership, has a CRA of 65.

Notes:

1. Although paragraph 6 of the GAD guidance on the actuarial reductions to be applied under regulations 31 and 35 say that "Membership credited under Regulation 122 in respect of Group 1, 2 or 3 members should be treated as Part A membership if it was **credited** before 1st April 2008" this is incorrect as regulation 122(6C) of "the Principal Regulations says that it should be treated as pre 1st April 2008 membership (i.e. Part A

membership) where a person **was an active member** immediately before 1st April 2008 (even if the service credit was awarded on or after that date).

2. Paragraph 3 of the Schedule to SI 2006/966, as amended by SI 2006/2008, defines "the 85 year rule". It stipulates that a member satisfies the rule if the sum of the following is 85 years or more:

a) the member's age in whole years on the date active membership ended or, if later, the date he elects under regulation 31(1) to receive immediate payment of benefits; and

b) his total membership in whole years (excluding, by virtue of paragraph 4 of the Schedule to SI 2006/966, any unaggregated membership); and

c) in a case where the member elects after his active membership ends, the period between the end of that employment and the date of election; and

d) in the case of a person who was an active member immediately before 1st April 1998, any qualifying period counted by virtue of regulation 123 of "the Principal Regulations" which was awarded before 1st April 2008.

Comments:

It would have been appropriate if a further sub-paragraph (e) had been added to deal with optants out i.e. that the period between the date of opting out and leaving employment should also count towards the 85 year rule.

There are a number of points to make in relation to item (d) above:

i) Firstly, although paragraph 3(d) only refers to a member, this is taken to be a reference to an active member on 31st March 1998 (as per regulation 2(2) of "the Principal Regulations").

ii) Secondly, where a person was contributing to the Scheme on both 31st March 1998 and on 30th September 2006, and the period of service in the former occupational pension scheme exceeds the membership granted in the LGPS, the full period of service serviced in the former occupational pension scheme will count towards the 85 year rule provided the service credit was **awarded** before 1st April 2008. This differs from regulation 122(6C) which says that a credited period of membership arising from a request to accept a transfer value which is made by a person who is an active member immediately before 1st April 2008 is to be treated as a period of membership before that date (even if received on or after that date). So, where a person was contributing to the Scheme on both 31st March 1998 and on 30th September 2006 and the period of service in the former occupational pension scheme exceeds the membership granted in the LGPS:
- the "reckonable" membership and the "qualifying" membership will both count towards the 85 year rule if the transfer was awarded before 1st April 2008, but
- only the "reckonable" membership will count towards the 85 year rule if the transfer was awarded on or after 1st April 2008.

iii) Thirdly, paragraph 3(d) is an attempt to build in a non-worsening provision for those members who were active members of the Scheme before 1st April 1998 and who could therefore count towards their 'protected' NRD (before its removal by these Amendment Regulations) any qualifying service from a transfer in of pension rights from an occupational pension scheme to the LGPS (i.e. where the period of membership in the former scheme exceeded the period of membership credited in the LGPS). Such members will now be able to count the qualifying service when determining whether "the 85 year rule" is satisfied, provided the service credit was **awarded** before 1st April 2008[21]. The inclusion of such qualifying service in the definition of "the 85 year rule" would have no material effect on the calculation of such a member's eventual pension benefits PROVIDED it does not drag the date the 85 year rule is satisfied to a date earlier than when the former protected NRD would have been satisfied. There will be cases,

[21] Although qualifying service awarded before 1st April 1998 under regulation K14 of the LGPS Regulations 1995 was not awarded under regulation 123 of the LGPS Regulations 1997, it still meets the requirements of paragraph 3(d) because Part K of the LGPS Regulations 1995 is a replaced provision by virtue of regulation 2 of the LGPS (Transitional Provisions) Regulations 1997 and thus counts under regulation 123 of the LGPS Regulations 1997.

however, where the date the 85 year rule is satisfied may be dragged to a date earlier than when the former 'protected' NRD would have been satisfied, for example:

Position prior to the 1st October 2006 amendments
A member joined the LGPS at age 46. He was in a previous occupational scheme for 7 years and on transferring this to the LGPS he was credited with 1 year of membership.

The member would not have met the 85 year rule until age 65 i.e. 19 years in the LGPS + 1 year transferred + age 65 = 85 years.

However, the member would have met the former protected NRD at age 64 i.e. 18 years in the LGPS at age 64 + 1 year transferred + 6 years qualifying = 25 years. His earliest retirement date at which unreduced benefits could have been paid was therefore age 64.

Position after the 1st October 2006 amendments
The member will meet the new definition of the 85 year rule (contained in paragraph 3 of the Schedule to the Amendment Regulations) at age 62 i.e.
16 years in the LGPS at age 62 + 1 year transferred + 6 years qualifying + age 62 = 85 years.

Thus, the effect of the 1st October 2006 amendments in the above case is to drag forward the earliest retirement date by 2 years (from age 64 to age 62). This will mean that, due to the way in which the service credit from the original transfer in was calculated, the 1 year service credit originally awarded was greater than it should have been now that the earliest retirement age has come forward by 2 years.

Purchased membership under regulation 66(8)

Active member on 30.9.06.	Regulations are not specific but, for the reasons below, treat as pre 1.4.08. membership which shifts CRA of all protected membership. Members covered by "old" regulation 66 can still elect to convert their AVCs into a period of Scheme

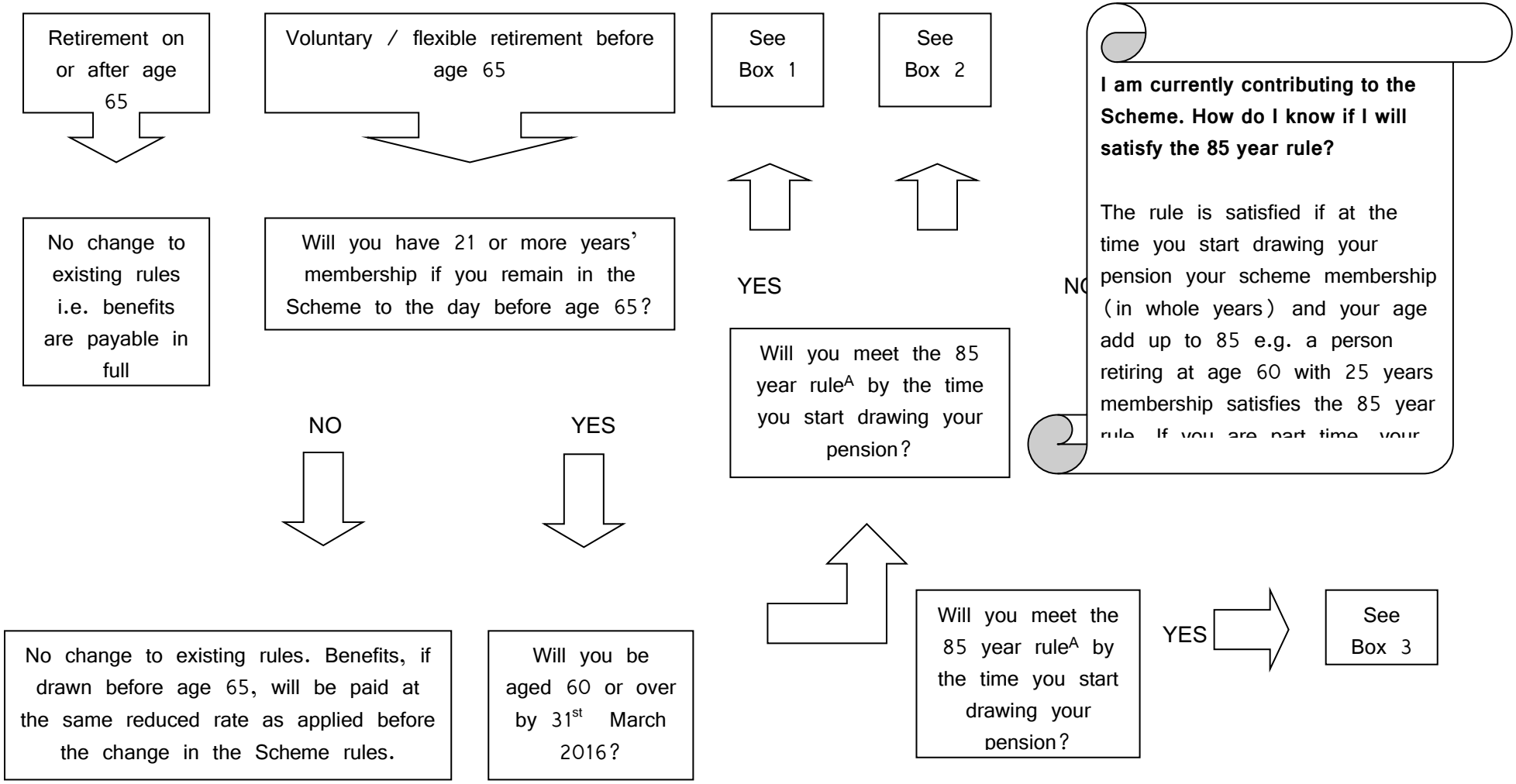
	membership. Where they do so, the membership should be treated as membership before 1.4.08. This honours the terms under which they took out the AVC contract and can be justified on the basis that "old" regulation 66(6) says that the transfer credits are to be calculated on the same basis as if a transfer value were being received under regulation 121. Regulation 122(6C) says that a credited period arising from a transfer received under regulation 121 shall be treated as pre 1.4.08. membership where the member was an active member before that date (and, of course, a member who took out an AVC contract before 13.11.01. must have been a member before 1.4.08.).

LGPS (Transitional Provisions) Regulations 1997

37. Despite the removal of the 85 year rule, the LGPC Secretariat believes that it is intended that former NHS scheme members covered by regulation 23 of the LGPS (Transitional Provisions) Regulations 1997 will still continue to be entitled to an unreduced pension at age 60.

How will the changes to the 85 year rule in the LGPS in England and Wales, which were made on 1st October 2006, affect me? **Annex 3**

By following the flowcharts below you will be able to see how the changes to the Scheme made on 1st October 2006 affect you if you were contributing to the Scheme on 30th September 2006 and you either voluntarily retire on or after age 60, or you voluntarily retire on or after 50 and before age 60 with your employer's consent, or you take flexible retirement with your employer's consent on or after age 50.



YES

NO

NO → See Box 4

Box 1

None of the benefits you accrue up to 31st March 2016 will be reduced.

However, any benefits you accrue after that date will be reduced to take account of the fact that the benefits are being drawn before age 65. The size of the reduction will depend on how many years before age 65 you draw your benefits.

Box 2

The benefits you accrue up to 31st March 2016 will be reduced but the calculation of the reduction will be the same as under the old rules (i.e. based on the number of years you are short of meeting the 85 year rule[B]).

The benefits you accrue after 31st March 2016 will be reduced but the calculation of the reduction will be higher than under the old rules to take account of the fact that the benefits are being drawn before age 65. The size of the reduction will depend on

Box 3

None of the benefits you accrue up to 31st March 2008 will be reduced.

However, any benefits you accrue after that date will be reduced to take account of the fact that the benefits are being drawn before age 65. The size of the reduction will depend on how many years before age 65 you draw your benefits.
If you will be aged 60 between 1st April 2016 and 31st March 2020 and meet the 85 year rule[A]

Box 4

The benefits you accrue up to 31st March 2008 will be reduced but the calculation of the reduction will be the same as under the old rules (i.e. based on the number of years you are short of meeting the 85 year rule[B]).

The benefits you accrue after 31st March 2008 will be reduced but the calculation of the reduction will be higher than under the old rules to take account of the fact that the benefits are being drawn before age 65. The size of the reduction will depend on how many years before age 65 you draw your benefits.
If you will be aged 60 between 1st April 2016 and 31st March 2020

Please note that no reduction will be applied to any of your benefits if you draw them on or after age 65

Notes:

A. Or meet an earlier Normal Retirement Date which some members who joined the Scheme before 1st April 1998 have under previous regulations

B. Or the shortfall to any earlier Normal Retirement Date which some members who joined the Scheme before 1st April 1998 may have had under previous regulations

C. If you will be aged 60 between 1st April 2016 and 31st March 2020 and meet the 85 year rule (or meet an earlier Normal Retirement Date which some members who joined the Scheme before 1st April 1998 have under previous regulations) by 31st March 2020, the benefits you build up between 1st April 2008 and 31st March 2020 will be reduced, but the reduction will not be the full amount.

Annex 4

Examples of how the October 2006 Scheme changes affect members

Example A – Group 2 member retiring on 31st March 2016

1. This example relates to a female employee:

- Date of Birth: 1st April 1956
- Date of commencement of service: 1st April 1978
- Last day of employment: 31st March 2016
- Effective date of election under Regulation 31(1) 1st April 2016
- Age at election 60

The member falls into Group 2. She satisfies the 85 year rule at the date of her election for immediate retirement benefits, was an active member on 30th September 2006 and was born between 1st April 1956 and 31st March 2020. Therefore, she should suffer no reduction on her benefits earned by Part A Membership (30 years) but will also suffer a **nil** reduction in respect of her Part B Membership (8 years).

The member will first satisfy the rule of 85 and be aged 60 or over on 1st April 2016 but as the conditions are met on a birthday, the taper period ends on the day before the birthday. As this falls before 1st April 2016 the taper period is nil.

Assuming that the member has Final Pay of £35,000, her early retirement pension and lump sum are calculated as follows:

$$ERPension \quad \text{....£ } 35{,}000 \times \frac{1}{80} \times \left(30 \times \left(1 - 0.00\right) + 8 \times (1 - 0.00)\right) = \text{£ } 16{,}625.00 \text{ p.a.}$$

$$ERCash \quad \text{.....£ } 35{,}000 \times \frac{3}{80} \times \left(30 \times \left(1 - 0.00\right) + 8 \times (1 - 0.00\right) = \text{£ } 49{,}875.00$$

2. If the above election was made under Regulation 35(1A) instead of 31(1) then the calculation of benefits would be the same. The 31st March 2016 would not be the last day of employment, but would instead be the last day of reckonable service for calculating benefits. Employer consent would be required.

Example B - Group 2 member retiring on 1st April 2016

3. This example relates to a female employee:
   - Date of Birth: 2nd April 1956
   - Date of commencement of service: 1st April 1978
   - Last day of employment: 1st April 2016
   - Effective date of election under Regulation 31(1) 2nd April 2016
   - Age at election 60

4. The member falls into Group 2. She satisfies the 85 year rule at the date of her election for immediate retirement benefits, was an active member on 30th September 2006 and was born between 1st April 1956 and 31st March 2020. Therefore, she should suffer no reduction on her benefits earned by Part A Membership (30 years) but will suffer a tapered reduction in respect of her Part B and C Membership (8 years 1 day i.e. 8.003 years). In this case, the term for which the reductions apply to pre-2008 membership is 0.000 years. The term for which the reductions apply to the Part B and C Membership is 5.000 years (65 years less 60 years). The appropriate factors can be read from the table in Annex 5:

   - P_{CRA} 0%
   - LS_{CRA} 0%
   - P_{65} 23%
   - LS_{65} 12%

   The member will first satisfy the rule of 85 and be aged 60 or over on 2nd April 2016 but as the conditions are met on a birthday, the taper period ends on the day before the birthday. The date of election is 1st April 2016. So her taper period is 1 day (i.e. the period between 1st April 2016 and 1st April 2016), and the taper interpolation factor is 1/365 year divided by 4 years = 0.00068. Thus the tapered reduction factors are:

- P_{taper} = 0.00068 x 23% (P_{65}) + 0.00068 x 0% (P_{CRA}) = 0.0156%
- LS_{taper} = 0.00068 x 12% (LS_{65}) + 0.00068 x 0% (LS_{CRA}) = 0.0082%

Assuming that the member has Final Pay of £35,000, her early retirement pension and lump sum are calculated as follows:

$$ERPension \quad ....£35{,}000 \times \frac{1}{80} \times \left(30 \times (1 - 0.00) + 8.003 \times (1 - 0.000156)\right) = £16{,}625.76 \text{ p.a.}$$

$$ERCash \quad .....£35{,}000 \times \frac{3}{80} \times \left(30 \times (1 - 0.00) + 8.003 \times (1 - 0.000082)\right) = £49{,}878.07$$

5. If the above election was made under Regulation 35(1A) instead of 31(1) then the calculation of reduced benefits would be the same. The 1st April 2016 would not be the last day of employment, but would instead be the last day of reckonable service for calculating benefits. Employer consent would be required. The employer may waive all or part of the reduction and, if this were the case, the fund's actuary would advise on the payment required as a result of the waiver.

Example C – Group 2 member retiring on 31st March 2020

6. This example relates to a female employee:
   - Date of Birth: 31st March 1960
   - Date of commencement of service: 1st April 1978
   - Last day of employment: 30th March 2020
   - Effective date of election under Regulation 31(1) 31st March 2020
   - Age at election 60

7. The member falls into Group 2. She satisfies the 85 year rule at the date of her election for immediate retirement benefits, was an active member on 30th September 2006 and was born between 1st April 1956 and 31st March 1960. Therefore, she should suffer no reduction on her benefits earned by Part A Membership (30 years) but should suffer at tapered reduction in respect of her Part B and C Membership (11 years 364 days i.e. 11.997 years). In this case, the term for which the reductions apply to pre-2008 membership is 0.000 years. The term for which the reductions apply to the Part B and C Membership is 5.000 year (65 years less 60 years). The appropriate factors can be read from the table in Annex 5:

   - P_{CRA} 0%
   - LS_{CRA} 0%
   - P_{65} 23%
   - LS_{65} 12%

   The member will first satisfy the rule of 85 and be aged 60 or over on 31st March 2020 but as the conditions are met on a birthday, the taper period ends on the day before the birthday. The date of election is 31st March 2020. So her taper period is 3 years 364 days (i.e. the period between 1st April 2016 and 30th March 2020), and the taper interpolation factor is 3 years 364 days divided by 4 years = 0.999. Thus the tapered reduction factors are:
   - P_{taper} = 0.999 x 23% (P_{65}) + 1 x 0% (P_{CRA}) = 22.977%
   - LS_{taper} = 0.999 x 12% (LS_{65}) + 1 x 0% (LS_{CRA}) = 11.988%

   Assuming that the member has Final Pay of £35,000, her early retirement pension and lump sum are calculated as follows:

$$ERPension \quad ....£35,000 \times \frac{1}{80} \times \left(30 \times \left(1 - 0.00\right) + 11.997 \times \left(1 - 0.22977\right)\right) = £17,167.70 \text{ p.a.}$$

$$ERCash \quad .....£35,000 \times \frac{3}{80} \times \left(30 \times \left(1 - 0.00\right) + 11.997 \times \left(1 - 0.11988\right)\right) = £53,233.41$$

8. If the above election was made under Regulation 35(1A) instead of 31(1) then the calculation of reduced benefits would be the same. The 30th March 2020 would not be the last day of employment, but would instead be the last day of reckonable service for calculating benefits. Employer consent would be required. The employer may waive all or part of the reduction and, if this were the case, the fund's actuary would advise on the payment required as a result of the waiver.

Example D – Group 3 member retiring on 31st March 2020

9. This example relates to a female employee:

- Date of Birth: 1st April 1960
- Date of commencement of service: 1st April 1978
- Last day of employment: 31st March 2020
- Effective date of election under Regulation 31(1) 1st April 2020
- Age at election 60

10. The member falls into Group 3 since she was born after 31st March 1960 and was an active member on 30th September 2006. She satisfies the 85 year rule at the date of her election for immediate retirement benefits. Therefore, she should suffer no reduction on her benefits earned by Part A Membership (30 years) but should suffer a full reduction in respect of her Part B and C Membership (12 years). In this case, the term for which the reductions apply to pre-2008 membership is 0.000 years. The term for which the reductions apply to the Part B and C Membership is 5.000 year (65 years less 60 years). The appropriate factors can be read from the table in Annex 5:

- P_{CRA} 0%
- LS_{CRA} 0%
- P_{65} 23%
- LS_{65} 12%

Assuming that the member has Final Pay of £35,000, her early retirement pension and lump sum are calculated as follows:

$$ERPension \quad ....£35{,}000 \times \frac{1}{80} \times \left(30 \times (1 - 0.00) + 12 \times (1 - 0.23)\right) = £17{,}167.50 \text{ p.a.}$$

$$ERCash \quad .....£35{,}000 \times \frac{3}{80} \times \left(30 \times (1 - 0.00) + 12 \times (1 - 0.12)\right) = £53{,}235.00$$

11. If the above election was made under Regulation 35(1A) instead of 31(1) then the calculation of reduced benefits would be the same. The 31st March 2020 would not be the last day of employment, but would instead be the last day of reckonable service for calculating benefits. Employer consent would be required. The employer may waive all or part

of the reduction and, if this were the case, the fund's actuary would advise on the payment required as a result of the waiver.

Example E – Group 2 member retiring on 30th May 2015

1. This example relates to a female employee:
   - Date of Birth: 1st June 1957
   - Date of commencement of service: 1st June 1977
   - Last day of employment: 31st May 2015
   - Effective date of election with employer's consent under Regulation 31(1) 1st June 2015
   - Age at election 58

2. The member falls into Group 2. She satisfies the 85 year rule at the date of her election for immediate retirement benefits, was an active member on 30th September 2006 and was born between 1st April 1956 and 31st March 2020. Therefore, she should suffer no reduction on her benefits earned by Part A Membership (30 years 304 days i.e. 30.8329 years) but will suffer a tapered reduction in respect of her Part B and C Membership (7 years 61 days i.e. 7.1671 years). In this case, the term for which the reductions apply to pre-2008 membership is 0.000 years. The term for which the reductions apply to the Part B and C Membership is 7.000 years (65 years less 58 years). The appropriate factors can be read from the table in Annex 5:
   - P_{CRA} 0%
   - LS_{CRA} 0%
   - P_{65} 30%
   - LS_{65} 16%

   The member will first satisfy the rule of 85 and be aged 60 or over on 1st June 2017 but as the conditions are met on a birthday, the taper period ends on the day before the birthday. The date of election is 1st June 2015. So her taper period is 1 year 61 days (i.e. the period

between 1st April 2016 and 31st May 2017), and the taper interpolation factor is 1 61/365 year divided by 4 years = 0.29178. Thus the tapered reduction factors are:

- P_{taper} = 0.29178 x 30% (P_{65}) + 0.29178 x 0% (P_{CRA}) = 8.7534%
- LS_{taper} = 0.29178 x 16% (LS_{65}) + 0.29178 x 0% (LS_{CRA}) = 4.66848%

Assuming that the member has Final Pay of £35,000, her early retirement pension and lump sum are calculated as follows:

$$ERPension \quad ....£35{,}000 \times \frac{1}{80} \times \left(30.8329 \times (1 - 0.00) + 7.1671 \times (1 - 0.087534)\right) = £16{,}350.53 \text{ p.a.}$$

$$ERCash \quad .....£35{,}000 \times \frac{3}{80} \times \left(30.8329 \times (1 - 0.00) + 7.1671 \times (1 - 0.0466848)\right) = £49{,}435.84$$

If the above election was made under Regulation 35(1A) instead of 31(1) then the calculation of reduced benefits would be the same. The 31st May 2015 would not be the last day of employment, but would instead be the last day of reckonable service for calculating benefits. Employer consent would be required. The employer may waive all or part of the reduction and, if this were the case, the fund's actuary would advise on the payment required as a result of the waiver.

Annex 5

Reduction Factors in the LGPS

The current LGPS early retirement reduction factors for retirements at or over age 55 are as follows:

	Percentage Reduction		
Years Early	Retirement Pension		Lump Sum
	Men	Women	Both Sexes
0	0%	0%	0%
1	6%	5%	2%
2	11%	10%	5%
3	16%	15%	7%
4	20%	19%	9%
5	24%	23%	12%
6	28%	27%	14%
7	32%	30%	16%
8	35%	33%	18%
9	38%	36%	20%
10	41%	39%	22%
11	44%	42%	24%
12	47%	45%	26%
13	50%	47%	27%
14	52%	49%	29%
15	54%	51%	31%

Distribution sheet

Chief executives of local authorities
Pension managers (internal) of administering authorities
Pension managers (outsourced) and administering authority client managers
Officer advisory group
Local Government Pensions Committee
Trade unions
DCLG
COSLA
SPPA
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Disclaimer

LGPC
Local Government House
Smith Square
London
SW1P 3HZ

or email:terry.edwards@lge.gov.uk
tel 020 7187 7346
fax 020 7187 7367