Northern LGPS
Greater Manchester, Merseyside and West Yorkshire
Pension Funds working together

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PRIVATE AND CONFIDENTIAL
Rishi Sunak MP
Ministry of Housing, Communities &
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19 March 2019

Dear Minister,

Local Government Pension Scheme: LGPS (Management and Investment of Funds) Regulations 2016 (the "Regulations"). Draft Statutory Guidance on Asset Pooling

Further to our request of the 8 February 2019 seeking to meet you to discuss our concerns and in light of pressing time, we set out the initial response of the Northern LGPS (formerly Northern Pool) to the informal consultation on the draft statutory guidance on Asset Pooling in the LGPS issued on 3 January.

We had hoped to be able to meet you to discuss our concerns and express how we wanted to work with you to achieve the desired outcomes, however, we realise that has not been possible owing to pressing national business.

Accordingly, in the interests of expediency we set out herewith an initial response from Northern LGPS as we are awaiting legal opinion from Jason Coppel QC on a number of related matters, which we expand upon further below.

We will finalise our consultation response once this advice has been received and considered, but wanted to ensure you had early indication of our concerns.

Firstly, we would like to reiterate once again that Northern LGPS is, and has always been, very supportive of the objectives set out in the November 2015 Investment Reform Criteria and Guidance (the '2015 Guidance'), what the Minister is seeking to achieve, and we believe Government deserves great credit for the progress to date.

The 2015 Guidance set out a broad framework, which would help all LGPS funds achieve the economies of scale and opportunities available to the larger LGPS funds, such as those that have developed the Northern LGPS, where each of the Funds in the Pool is of significant size in its own right.

Prior to Government's announcement of its pooling objectives in 2015, the Northern LGPS funds were already well progressed along the collaboration journey. The Pool's direct infrastructure investment vehicle GLIL and the Invest 4 Growth initiative – all predate pooling. Since the 2015 guidance was released we have further expanded GLIL alongside the LPP pool and GLIL remains open to other LGPS pools (or other institutional investors). We would argue that

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Northern LGPS' progress on this criterion far exceeds Government's realistic expectations from 2015.

Other key achievements of the Pool to date are the procurement of a FCA regulated pool custodian with a vastly increased scope to the previous individual fund arrangements and the implementation of a pool-wide responsible investment strategy, which includes the public disclosure of Pool voting records.

Whilst the Northern LGPS funds are three of the largest pension funds in the UK, following the release of the 2015 Guidance each of the funds acknowledged that there were still asset classes where they could increase scale and resources and lower costs in order to improve net investment returns. The most compelling case was for private equity and last summer the Northern LGPS established the Northern Private Equity Pool ('NPEP') to make collective private equity investments. To date £325m of fund commitments have been made with a target of £1bn by June 2020. This collective approach is expected to generate costs savings in excess of £10m p.a.

Throughout the pooling process Northern LGPS has undertaken regular performance and cost benchmarking against global comparators using the CEM Benchmarking service. The most recent report covering the year ending 31 March 2018 indicates that the Northern LGPS has costs which are materially below the global peer group average (both before and after controlling for differences in asset allocation).

We have been clear with Government throughout this process that the Northern LGPS' mandates for listed assets are already at scale (three pool mandates are in excess of £7bn each) and based on each Fund's current asset allocation, no further synergies are available.

Further, we have demonstrated via the operation of GLIL, NPEP and other shared initiatives that a small number of well-resourced LGPS funds can invest on a joint basis whilst remaining fully compliant with all relevant financial services legislation.

The November 2015 guidance was clear that it was up to administering authorities to work together to develop pooling arrangements, which would enable each of them to meet the outcome based criteria set by Government.

We are extremely disappointed that the recent draft guidance appears to have completely lost sight of the desired outcomes and instead seeks to mandate a one-size fits all approach, which given the Northern LGPS's existing scale and achievements to date is clearly sub-optimal for the Northern LGPS funds and their members, employers and local taxpayers.

Some more specific aspects of our concern include:

- The removal of the Value For Money criterion from the latest draft guidance – surely this is the whole point of LGPS investment reform
- The assertion that individual funds should be prepared to suffer an increase in their costs in order to benefit other funds in the pool or the wider LGPS. This is clearly at odds with authorities' fiduciary duty in managing their fund

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- In the same vein, the assertion that elected members owe duties to parties other than their own funds and relevant stakeholders (employers and members) is also contrary to their fiduciary duties
- The requirement for all pools to have a FCA regulated company. We view this as unnecessarily prescriptive and believe the guidance should instead make clear that FCA regulated activities should not be carried out without either authorisation or an appropriate exemption from authorisation; and
- More generally, there is no evidence given in the consultation as to why the prescriptive requirements of the new guidance are beneficial to stakeholders

Based on our research in this area, we estimate that establishing an FCA regulated company would increase Northern LGPS' costs by approximately £10m - £15m p.a., which in accordance with the New Burdens doctrine, we would expect Government to meet as there is no foreseeable basis we would be able to recover in the short or medium term.

We also have serious concerns regarding the appropriateness of the process which Government has followed. Our concerns are set out in detail in the appendix to this response and this is the area which is the focus of the forthcoming legal advice.

In summary, we do not believe that this consultation meets the consultation principles published by the Cabinet Office and there are many inconsistencies between the LGPS Investment Regulations and the draft guidance. In particular Regulation 9(1) of the Investment Regulations appears to give an authority the ability, but not a requirement, to appoint one or more investment managers to manage and invest fund money. However, the draft guidance appears to compel authorities to appoint a pool company to manage the vast majority of fund money and that pool company would then have the power to select fund managers or manage the assets itself.

It is clear to us that what Government is attempting to achieve via statutory guidance actually requires a change to the Regulations, with the Parliamentary scrutiny, which that would entail.

To conclude, we would once again like to reiterate the Northern LGPS' support for the objectives of the 2015 guidance and sincerely hope that Government listens to our concerns that implementing the new guidance as currently drafted would be a backward step for the Northern LGPS Funds and clearly not in the best interests of stakeholders.

We would be delighted to meet with the Minister to discuss any of the issues highlighted in this response and would be more than happy to travel to your constituency office if more convenient.

Yours sincerely,

Cllr Paul Doughty
Chair of LGPS Northern & Merseyside Pension Fund

Cllr Brenda Warrington
Chair of Greater Manchester Pension Fund

Cllr Andrew Thornton
Chair of West Yorkshire Pension Fund

APPENDIX
DETAILED RESPONSE TO CONSULTATION

Policy objectives and consultation protocols

We have serious concerns both about the manner in which the Local Government Pension Scheme Statutory guidance on asset pooling ("**Draft Guidance**") was presented for consultation and its contents. We also believe that the original policy objectives behind asset pooling have been either overlooked or disregarded in the Draft Guidance; they certainly do not feature formally in the Draft Guidance and we are not aware that the Government has changed those objectives.

We are mindful that the Government has been challenged in respect of the Local Government Pension Scheme: Investment Reform Criteria and Guidance (the "**November 2015 Guidance**") which the Draft Guidance seeks to replace and that significant legal costs have been incurred already by the Ministry of Housing, Communities & Local Government ("**MHCLG**") with more Supreme Court costs to come.

Judicial authorities on the application of statutory guidance

The Government will no doubt be aware that in various fields of the law, judicial review proceedings have been brought to challenge the exercise of executive powers where the courts have determined that consultation exercises have been procedurally unfair to the extent that they have been unlawful. For example, in *Devon County Council and Norfolk County Council v Secretary of State for Communities and Local Government [2010] EWHC 1456*, the claimant authorities succeeded in quashing orders made by the then Secretary of State under the Local Government and Public Involvement in Health Act 2007, which would have determined that the City Councils of Exeter and Norwich should become unitary authorities rather than District Councils. In that case, the Government had announced a consultation based on certain very clear criteria against which proposals to convert to unitary status would be assessed.

The judge stated that the Secretary of State "set out repeatedly the basis on which he would refuse proposals [to convert councils into unitary authorities], and without any warning adopted a

wholly different approach and reached decisions which, on the original approach, he would not have reached" (Paragraph 101).

The judge also stated (at paragraph 75) that once the Secretary of State had chosen “to set specific criteria of his own devising and chose to use them, not as guides but as the keys to the gateway through which each proposal had to pass". It was not for him to vary the criteria; furthermore, "at no time did he suggest in the consultation process, or in statutory guidance or letters to "partners and stakeholders", or anywhere in public that he might approve a proposal were it, say, to fail one criterion narrowly and pass others with flying colours".

In another High Court judgment, this time involving the Home Office *(Medical Justice and Others v Secretary of State for the Home Department [2017] EWHC 2461),* the Government was censured for its inconsistent application of principles set out in legislation and statutory guidance. This case concerned statutory guidance and policies issued in relation to the prevention of harm to those who might be eligible to enter into immigration detention or be removed from it unless there were sufficiently strong countervailing reasons, and turned on the definition of "torture" in both case law and the United Nations Convention Against Torture. While the facts are clearly far-removed from the LGPS, the court commented in relation to the interpretation of statutory instruments by the Home Office that:

"it is not open to the [Secretary of State] by issuing policy statements to alter the meaning of a statutory instrument, whether expressly or by necessary implication. The AARSG [the relevant statutory guidance (Adults At Risk in Immigration Detention)] is but guidance, so described by statute. It is not a form of delegated legislation albeit issued pursuant to a statutory duty and with formal expression of Parliamentary approval. It is no more capable of altering delegated legislation, than delegated legislation is capable of altering primary legislation, without a specific primary legislative power to do so." [Paragraph 126].

We mention these cases because of our concerns that the Draft Guidance seeks to undermine the established law (i.e. the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (the **“2016 Regulations**”) and the fiduciary position of elected members in ways that are outside the powers of such guidance.

1 GENERAL PROCEDURAL AND CONSTITUTIONAL LAW ISSUES

Cabinet Office Principles 2018 (the "Principles")

1.1 As you will be aware, the Cabinet Office has established a number of principles that all Government departments should follow when issuing consultation documents. These Principles appear to have been ignored in many significant respects.

1.2 Paragraph (B) of the Principles states that a department should not "ask questions about issues on which you [i.e. here, MHCLG] already have a final view". In fact, the Draft Guidance asks no questions[1] as such, but it very strongly suggests that the Government does have "final views" on various issues, in particular the requirement that "pool members must appoint a pool company (i.e. an FCA regulated company) or companies to implement their investment strategies" (paragraph 3.2). This gives rise to the implication that either the consultation exercise is empty or that the Government is suggesting that it has the power to prescribe how administering authorities must implement their "approach to pooling investments" (which is the formal requirement at issue under Regulation 7(2)(d) of the 2016 Regulations).

We suggest that either conclusion would be unpalatable. In the first instance this would leave the Government open to challenge that it had been acting unreasonably in issuing the Draft Guidance without the usual formalities that accompany important consultations (see below). On the second count, it would appear that the Government is seeking to oust the power of Parliament to determine how authorities exercise the power of investment that is vested in them under the 2016 Regulations by using the Draft Guidance to achieve an end that could only be achieved by legislation. We comment further on this issue in relation to the wider legislative framework for the LGPS and in relevant case law.

We note, however, that paragraph 3.5 of the Draft Guidance also acknowledges the need for authorities to assess value for money in deciding between the use of procured or

[1] Liam Robson's cover email on behalf of Teresa Clay of 3 January 2019 simply requests "views on the attached draft Guidance".

shared services and the use of pooled companies. This appears to contradict the statement in paragraph 3.2 that authorities must appoint a pool company or companies regardless of value for money criteria (unlike Criterion C of the 2015 Guidance).

1.3 Paragraph (C) of the Principles states that consultations should contain the "validated impact assessment of the costs and benefits of the *options* being considered". The first point to make is that the Draft Guidance appears to contain no structural options, but is rather prescriptive about the structural end that we assume Government is seeking to impose i.e. an FCA authorised Pool company. Second, the foreword in the Draft Guidance refers to the forecasted savings of up to £2 billion by 2033. This is the only figure mentioned in the Draft Guidance. The costs of implementation which have been and would be caused by (a) the mandatory establishment of Pool companies, and (b) the transition of assets across the LGPS appear not to have been quantified, contrary to the Principles.

New Burdens Doctrine

1.4 In that connection, we would also draw your attention to the "New Burdens Doctrine" guidance issued by Department for Communities and Local Government in June 2011. As the Department will be aware, the New Burdens Doctrine applies where Central Government requires or exhorts authorities to do something new or additional to their current statutory duties (paragraph 2.7). The principle behind the doctrine is that not only should costs of new statutory burdens be quantified, but they should be met by the department which seeks to impose them on local government. New Burdens result not only from new legislation but they can also arise from authorities "being asked to exercise existing powers and functions in new ways, e.g. in new guidance" (paragraph 3.2). We note that paragraph 5.14 of the New Burdens Doctrine states that government "departments cannot argue that short-term costs will be offset against long-term savings …only specific identified cost savings (rather than vague, non-specific or unquantifiable savings) can be offset against identified costs and this should be on a year by year basis (so longer term cost savings could reduce a New Burden over time)."

1.5 We have not seen, either in the context of the 2015 Guidance or the Draft Guidance, any New Burdens assessment in respect of pooling of investments within the LGPS. We note that even if one was prepared originally in relation to the 2015 Guidance, paragraph 5.31 would require an update to that assessment. Has the New Burdens Doctrine been considered by the Department?

1.6 The Northern LGPS partner funds have incurred significant costs in the various steps we have taken, in good faith, to act upon the November 2015 Guidance. We justified those costs on the grounds that we accepted that there were net savings to be made from closer collaboration between ourselves in keeping with the requirements of the 2016 Regulations. The Draft Guidance would not just undermine the rationale behind some of the costs we have incurred, but would also greatly increase the overall costs of pooling in a way that our respective elected members would find inconsistent with their statutory and fiduciary duties to taxpayers and their other stakeholders (a point which we discuss in more detail in paragraphs 2.9 to 2.12 below).

1.7 The consultation on the Draft Guidance has not taken place publicly, which appears to contradict paragraph (F) of the Principles, which suggests that the full range of people who are affected by the policy should be consulted. Given the size of membership of the LGPS (5 million members, over 10,000 employers) and the significance of the trade unions in that membership, we find the informality of the consultation very surprising, especially given the volume of responses to the consultation on revoking and replacing the LGPS (Management and Investment of Funds Regulations 2009 published in September 2016[2]). There are of course service providers as well as pensions professionals who should have not been excluded from the consultation.

1.8 Finally, we note that paragraph (H) of the Principles states that consultations should be published on the Governments website www.Gov.uk. This has not been done.

[2] There were 23,516 responses.

Separately we were concerned to learn that the Draft Guidance was prepared by leading individuals within the Local Government Association, who are of course representatives of the administering authorities. Surely, that represents a conflict of interest for the LGA?

2 DETAILED TECHNICAL COMMENTS ON THE DRAFT GUIDANCE

Introduction

2.1 Paragraph 1.2 operates so as to replace the November 2015 Guidance. We are extremely surprised at the Government's intention here, since this would at a stroke remove the value for money criterion (Criterion C, paragraph 3.43 to 3.57) and the need to demonstrate economies of scale (Criterion A paragraphs 3.3 to 3.21) that have supported the work done by all authorities in order to comply with the Government's policy objectives. This also includes the very clear policy statement made at paragraph 1.3 of the 2015 Guidance that: “it will be for authorities to suggest how their pooling arrangements will be constituted and will operate”. We submit that if the Department felt that technical questions had arisen as to the interpretation of the 2015 Guidance, then it would have been open to it to address those either by letters or by supplementary guidance.

Definitions

2.2 We note that the proposed definitions are not in alphabetical order. More importantly, there appear to be some inconsistencies between the definitions (e.g. "Pooled Asset" is defined different in section 8.3 (using the CIPFA definition)).

2.3 In relation to the definition of "Pool Company" we note that emphasis is laid on the services which are provided to Pool Members rather than on the authorisation status by the FCA. We would have thought that it would have been more appropriate in the Draft Guidance to explain when a Pool Company needs to be FCA authorised, i.e. where an activity which requires authorisation under the Financial Services and Markets Act 2000 is carried on by way of business.

2.4 The definition of "Pool Fund", by referencing the fact that the fund structure must be "regulated" and operated by a "regulated" Pool Company presumably has the consequence that any other vehicle, which is not so regulated, will not qualify as a Pool Fund. The reference to such a fund needing to be unitised also raises the risk that a limited partnership, which will not be unitised but have partnership interests, will not meet the definition.

Mandatory use of a "Pool Company"

2.5 **Para 3.1:** this paragraph is predicated on the fact that there will be "benefits of scale and collaboration", in the use of a Pool company, the first of which is "reduced investment costs without affecting gross risk adjusted returns". As we have previously explained to MHCLG, the Northern LGPS has already delivered reduced costs for example, for custody and, through the establishment of Northern Pool Private Equity L.P. ("NPEP") which will deliver further savings.

2.6 Based on the experience of other pools and discussions with FCA regulated fund managers, we estimate that the additional cost of incorporating and running an FCA authorised pool company for the Northern LGPS could be as much as £15m per annum, which represents an increase of 3 bps on our collective cost base. Please see our comments above regarding the New Burdens Doctrine and the removal of the 2015 Guidance and the value for money Criterion C.

2.7 Para 3.2 illustrates another way in which the Draft Guidance appears to create powers that ordinarily would sit within the 2016 Regulations. Currently, Regulation 9(1) permits administering authorities to carry on internal investment management; indeed that is the default position:

"Instead of managing and investing fund money itself, an authority may appoint one or more investment managers to manage and invest fund money…"

Paragraph 3.2 seeks to override that position by instead requiring authorities to appoint a Pool company to appoint investment managers. The drafting is also somewhat confusing, but we take "internal" to refer to the Pool company's management (i.e in-

house) rather than for a Pool company to determine that the authority could continue to manage its own investments. In the light of Regulation 9(1), what is the Government's position?

2.8 **Paragraph 3.6:** the Draft Guidance does not indicate what the Ministry would regard as a "reasonable period" for assessing the merits of passive over active management. If you are seeking meaningful benchmark data, this should be prescribed. We assume that it is up to authorities to determine the appropriate benchmark for market performance for similar risk profiles.

Governance, Fiduciary Duties and IORP II issues

Fiduciary Duties of Elected Members

2.9 **Paragraphs 4.3 and 4.4**: Although we agree that elected members have a quasi-fiduciary status with regard to the assets under their authorities' control, we have serious concerns that paragraphs 4.3 and 4.4 misstate the law.

2.10 As the November 2015 Consultation on the revocation of the predecessor regulations to the 2016 Regulations noted, the House of Lords established in Roberts v Hopwood[3] that "a body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than members of that body owes, in my view, a duty to those latter persons to conduct that administration in a fairly business-like manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of others". It follows that the administering authority can only owe duties to the parties who have paid contributions to its pension fund i.e. its members, employers and local council taxpayers and rate payers who have indirectly funded such benefits. That cannot be extended to mean that authorities or their elected members have duties to persons outside the remit of being

[3] Roberts v Hopwood HL 578 [1925]

such contributors as paragraph 4.4 implies (i.e. either across the pool or for the LGPS as a whole).

2.11 We also take issue with the implication that those responsibilities can be divorced from the benefits due to members, as the last sentence of paragraph 4.3 suggests. We are surprised both at the need for such a statement to be made in the Draft Guidance (which is not concerned at all with benefits but only given statutory force by reference to Regulation 7(1)) and that the Government has apparently ignored the opinion of leading Counsel that was obtained by the Scheme Advisory Board on this subject in September 2014 (http://lgpsboard.org/images/PDF/Publications/QCOpinionJan2015.pdf). That opinion came to a very different conclusion; see the commentary on pages 6-9 and in particular Counsel's comment that the "whole concept of a segregated fund tends to suggest that it is from the fund that the relevant payments are to be made". He went on to opine that the [LGPS] 2013 Regulations should be interpreted as meaning that "the administering authority has to manage the fund by paying out of it the benefits to which members are entitled, but not as imposing an obligation to pay those benefits by other means". The connections between power of investment given to authorities in the 2016 Regulations, the funds held by administering authorities and their payment obligations are therefore inextricable, see Regulation 4(4): "an authority must pay any benefits to which any person is entitled… from its pension fund".

2.12 Furthermore, we see no contradiction between elected members taking a long term view of cost control and seeking to manage short term costs in the way that paragraph 4.4 seeks to distinguish. We are very surprised at the suggestion that administering authorities do not need to take into account costs, whenever incurred, in discharging their fiduciary duties. In addition to the duties of elected members who act as fiduciaries, under the rule in Associated Picture Houses v Wednesbury Corporation (1948) such public office-holders are required to take into account relevant factors in their decision-making. The public law reasonableness test would, we suggest, also be hard to square with the assertion that it is inappropriate "simply to minimise costs in the short term".

IORP Directive

2.13 We wonder whether the real purpose of this statement was really to allude to another legal issue that the Department has had to take into account in drafting the Guidance, but which is not mentioned in the Draft Guidance at all. This is whether the LGPS is subject to the IORP II Directive.[4]

2.14 As you will be aware, the Law Commission addressed this issue in its 2014 report on Fiduciary Duties of Investment Intermediaries. It concluded[5], as did Nigel Giffin Q.C. in his September 2014 opinion (see paragraphs 25 to 58) that the IORP Directive did apply to the LGPS.

2.15 The Government previously addressed the application of the IORP Directive in the November 2015 Guidance (which is ironically to be withdrawn by the Draft Guidance) in a very oblique way, by simply saying that "Ministers are satisfied that the Scheme [LGPS] is consistent with the national legislative framework governing the duties placed on those responsible for making investment decisions" (paragraph 2.22). The Government repeated this assertion in its response to consultation on the revocation of the predecessor to the 2016 Regulations in September 2016 on the basis that the benefits of the LGPS are guaranteed by a public body (despite Counsel's opinion, when he said: "turning to central government, in my view it is not in any direct way the guarantor of, or ultimately responsible for the payment of, LGPS benefits" (paragraph 18 of the September 2014 opinion quoted above)).

2.16 The relevance of this statement to the present context is, inter alia, that the IORP II Directive, which came into force on 13 January 2019, contains restrictions on regulation in Article 19:

(3) "Member states shall not require IORPs registered or authorised in their territory to invest in particular categories of assets.

[4] EU 2016/2341
[5] (see paragraphs 4.70 to 4.73 www.lawcom.gov.uk/project/fiduciary-duties-of-investment-intermediaries).

(4) Member States shall not subject the investment decisions of an IORP registered or authorised in their territory or its investment manager to any kind of prior approval or systematic notification requirements".

The proposals to require the use of a Pool company appear to us not to be in keeping with these provisions. We are also mindful of the commentary on this issue- albeit in a different context- in the ongoing action in Palestine Solidarity Campaign Limited v Secretary of State for Communities and Local Government.

2.17 **Para 4.5 and 4.6:** the references to local pension board members are also surprising. The reference to Regulation 106(1) of the 2013 Regulations also seems rather odd, since that Regulation refers to compliance with either the 2013 Regulations or any other *legislation* relating to the governance and administration of the Scheme and any requirements imposed by the Pensions Regulator. The Draft Guidance is not legislation and of course neither has it been published by the Pensions Regulator. While it is not a major point, the governance obligations apply to the authority, which appoints its own local pension board, rather than to the Pool (which of course is not referenced at all in the 2013 Regulations or indeed the 2016 Regulations).

We have no issue with the optional suggestion that local pension boards could provide resources to pool governance bodies but found it odd that the Government thought it necessary to offer guidance on the point.

2.18 **Paragraphs 5.2 and 5.3**: these paragraphs recognise that there is a potential for inter-authority payments to arise in relation to transitions to Pool vehicles. The Draft Guidance says that such payments are investment costs within the meaning of Regulation 4(5) of the 2016 Regulations. We can understand the notion that expenses incurred for the account of *one* LGPS fund in relation to its own investments could fall within Regulation 4(5), but we cannot understand the legal justification for cross-subsidies between authorities.

2.19 **Paragraphs 5.4 and 5.5**: while it is welcome to have the recognition that certain investments such as private equity (albeit not named as such) investments may not be

transitioned into the Pool without incurring penalties, the statement in the first sentence of paragraph 5.5 that the Pool company could "manage" such retained assets is rather odd. The management of legacy assets will surely remain with a general partner or delegated investment manager within such a limited partnership structure. All that a Pool company could do would be to *monitor* such retained assets and provide investment advice (subject of course to it being authorised for that purpose by the FCA). The reference to life insurance contracts which are used for passive portfolios should also be explained, so as to distinguish it from contracts which would incur significant penalties for early exit. We assume that the Government's point is that there would be significant tax charges in re-constructing a passive equity portfolio within a new pooled vehicle (not that there would be a contractual penalty in doing so) and that as such the cost of doing so would not represent value for money? In that connection, please see our general comments above about the appropriateness of restructuring investments within a Pool company where a value for money test is not met.

2.20 **Paragraph 5.6:** the recognition that assets may be retained outside of the Pool so long as they are regularly reviewed is welcome. However, we query the suggestion that authorities should be "working with the Pool company" in this assessment. Surely the latter has an obvious conflict of interest in such a review? This paragraph also refers to the need to take "account of the guidance on costs sharing". Is this a reference to paragraphs 4.4 and/or 5.2 to 5.3 (as to which see our comments above)?

2.21 **Paragraphs 6.1 and 6.4:** this sets a very high bar to the making of new investments outside of the Pool from 2020. To say that new investments outside of the Pool must be "essential" to deliver an investment strategy suggests that a single investment can deliver an investment strategy. It is also tantamount to asking the Pool company to concede that it cannot help to deliver that strategy.

2.22 For example, one can see how a move into liability driven investment would require a new external investment which a Pool company could not easily deliver without additional third party support. However, it is also questionable why the administering authority *must*

consult with the Pool company in these circumstances, especially if it is an external third party provider. If strategic asset allocation remains the responsibility of Pool members (see paragraph 4.2 of the Draft Guidance), there is no need for the authority to consult with a third party. The reference to the "*agreed*" asset allocation in the last sentence is misleading if only one party (the administering authority) sets the policy.

2.23 Finally, the use of the word "exemption" is unusual in statutory guidance (we would only expect to see such a concept enshrined in legislation).

2.24 **Paragraph 7.2:** this contains the statement that the Government expects Pool companies to provide capacity for infrastructure investment over time. As MHCLG and indeed other arms of Central Government do not have statutory powers over pool companies, this is rightly stated as an expectation, rather than something which could be enforceable. Is the reference to overseas funds of "comparable aggregate size" to be taken at an LGPS scheme level as a whole, or by reference to the pools or to individual authorities' pension funds?

2.25 **Paragraph 7.3:** again, there is a seeming contradiction here between the fact that asset allocation is elsewhere referred to as the preserve of the administering authorities (see paragraph 4.2 of the Draft Guidance), but here apparently the Pool company has the right to take allocation decisions. Presumably, this means “tactical” asset allocation decisions? At a fiduciary level, local investments should be assessed in the same way as any other investment decision by the administering authority on their own merits. It might be worth reiterating this principle in revised guidance.

2.26 **Paragraph 7.5:** we found the statement that "all residential properties included in this [CIPFA] definition of infrastructure” to be unjustified on a plain reading of the definition. Does the Draft Guidance therefore mean that authorities are to use the CIPFA definition and may be criticised if they adopt a different one?

Paragraph 8.3: the quotation from the CIPFA Guidance definition of a "pooled asset" here is odd, given that it is not the same as the definition stated on page 4 in paragraph 2.1. Why are they different?