

Report for: Pensions Committee and Board 14 September 2017

Item number: 11

Title: Implementation of the Markets in Financial Instruments Directive (MiFID II) – Electing for Professional Client Status

Report authorised by: Clive Heaphy, CFO and S151 Officer

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Ward(s) affected: N/A

Report for Key/Non Key Decision: Non Key decision

1. Describe the issue under consideration

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

2. Cabinet Member Introduction

- 2.1. Not applicable.

3. Recommendations

That the Committee and Board:

- 3.1. Notes the potential impact on investment strategy of becoming a retail client with effect from 3 January 2018.
- 3.2. Agrees to the immediate commencement of applications for elected professional client status with all relevant institutions in order to ensure it can continue to implement an effective investment strategy.
- 3.3. In electing for professional client status the Committee and Board acknowledges and agrees to forgo the protections available to retail clients attached as Appendix 1.

- 3.4. Agrees to approve delegated responsibility to the Chief Finance Officer (S151 Officer) for the purposes of completing the applications and determining the basis of the application as either full or single service.

4. Reason for Decision

- 4.1. Haringey will be classified as a 'retail' investor from 3 January 2018 unless the Committee and Board agrees to apply for elected professional client status through delegating authority to the CFO. As a 'retail' investor, the fund's current investment strategy would not be possible.

5. Other options considered

- 5.1. None.

6. Background information

Context

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

Potential impact

- 6.4. A move to retail client status would mean that all financial services firms like banks, brokers, advisers and fund managers will have to treat local

authorities the same way they do non-professional individuals and small businesses. That includes a raft of protections ensuring that investment products are suitable for the customer's needs, and that all the risks and features have been fully explained. This provides a higher standard of protection for the client but it also involves more work and potential cost for both the firm and the client, for the purpose of proving to the regulator that all such requirements have been met.

- 6.5. Such protections would come at the price of local authorities not being able to access the wide range of assets needed to implement an effective, diversified investment strategy. Retail status would significantly restrict the range of financial institutions and instruments available to authorities. Many institutions currently servicing the LGPS are not authorised to deal with retail clients and may not wish to undergo the required changes to resources and permissions in order to do so.
- 6.6. Even if the institution secures the ability to deal with retail clients, the range of instruments it can make available to the client will be limited to those defined under Financial Conduct Authority (FCA) rules as 'non-complex' which would exclude many of the asset classes currently included in LGPS fund portfolios. In many cases managers will no longer be able to even discuss ('promote') certain asset classes and vehicles with the authority as a retail client.

Election for professional client status

- 6.7. MiFID II allows for retail clients which meet certain conditions to elect to be treated as professional clients (to 'opt up'). There are two tests which must be met by the client when being assessed by the financial institution: the quantitative and the qualitative test.
- 6.8. The Local Government Pension Scheme Advisory Board (SAB) and the Local Government Association (LGA) along with the Department of Communities and Local Government (DCLG) and the Investment Association (IA) have successfully lobbied the FCA to make the test better fitted to the unique situation of local authorities.
- 6.9. The new tests recognise the status of LGPS administering authorities as providing a 'pass' for the quantitative test while the qualitative test can now be performed on the authority as a collective rather than an individual. A summary of and extracts from the FCA policy statement which set out these new tests is attached as Appendix 2.
- 6.10. The election to professional status must be completed with all financial institutions prior to the change of status on 3 January 2018. Failure to do so by local authorities would result in the financial institution having to take 'appropriate action' which could include a termination of the relationship at a significant financial risk to the authority.

- 6.11. The SAB and the LGA have worked with industry representative bodies including the IA, the British Venture Capital Association (BVCA) and others to develop a standard opt-up process with letter and information templates. This process should enable a consistent approach to assessment and prevent authorities from having to submit a variety of information in different formats.
- 6.12. A flowchart of the process is attached as Appendix 3 and the letter and information templates are attached as Appendices 4 and 5.
- 6.13. Applications can be made in respect of either all of the services offered by the institution (even if not already being accessed) or a particular service only. A local authority may wish to do the latter where the institution offers a wide range of complex instruments which the authority does not currently use and there is no intention to use the institution again once the current relationship has come to an end, for example, if the next procurement is achieved via the LGPS pool. It is recommended that officers determine the most appropriate basis of the application, either via full or single service.
- 6.14. Authorities are not required to renew elections on a regular basis but will be required to review the information provided in the opt-up process and notify all institutions of any changes in circumstances which could affect their status, for example, if the membership of the committee changed significantly resulting in a loss of experience, or if the relationship with the authority's investment advisor was terminated.

LGPS pools

- 6.15. The London CIV (and other pools) will be professional investors in their own right so will not need to opt up with the external institutions they use. Local authorities will however need to opt up with their LGPS pool in order to access the full range of services and sub-funds on offer.
- 6.16. In some circumstances, in particular where the pool only offers access to fund structures such as ACS, the pool could use 'safe harbour' provisions resulting from local authorities continuing to be named as professional investors in both the Financial Promotion Order (the "FPO") or in the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order (the "PCISO"). These provisions would enable the promotion and potential sale of units in fund structures to local authorities as retail investors.
- 6.17. Elections to professional status will be needed for every financial institution that the authority uses outside of the pool, both existing and new, together with a continuing review of all elections. If all new purchases are made via fund structures within the pool then no new

elections will be required, only an ongoing review of the elections made with the pool and any legacy external institutions, the number of which would reduce as assets are liquidated and cash transferred.

Next steps

- 6.18. In order to continue to effectively implement the authority's investment strategy after 3rd January 2018, applications for election to be treated as a professional clients should be submitted to all financial institutions with whom the authority has an existing or potential relationship in relation to the investment of the pension fund.
- 6.19. This process should commence as soon as possible in order to ensure completion in good time and avoids the need for appropriate action to be taken by institutions in relation to the authority's pension fund investments.
- 6.20. The CFO should be granted the necessary delegation to make applications on the authority's behalf and to determine the nature of the application on either full or single service basis.

7. Contribution to Strategic Outcomes

- 7.1. None.

8. Statutory Officers comments (Chief Finance Officer (including procurement), Assistant Director of Corporate Governance, Equalities)

Finance and Procurement

- 8.1. In order to pursue Haringey's Pension Fund's current investment strategy, electing to opt up to professional status is necessary. A retail investor would only be able to pursue a fraction of the investment methods and techniques that a professional investor has access to. It would be inappropriate for Haringey Pension Fund, as an institutional investor, with over £1.3bn in assets to be classified as a retail investor, and would severely reduce the Fund's ability to improve its funding level to fully funded status.
- 8.2. It is expected that all London Boroughs and other Councils which are LGPS Administering Authorities will elect up to professional investor status.

Legal

8.3. This report outlines the impact of the implementation of the Markets in Financial Instrument Directive 2014/65 (MiFID II”) and seeks approval to apply for elected professional status. The relevant benefits and drawbacks of opting up to professional status are highlighted within the report.

8.4. In considering the recommendations in this report, members of the Pensions Committee and Board acting as Administering Authority for the Pension Fund and being responsible for the investment strategy, have a fiduciary duty to act prudently and for a proper purpose.

8.5. The administering authority’s power of investment must be exercised for investment purposes, and not for any wider or other purposes. Investment decisions must therefore be directed towards achieving a wide variety of suitable investments, and to what is best for the financial position of the fund (balancing risk and return in the normal way). These factors should be taken into account in considering the recommendations in this report.

Equalities

8.6. There are no equalities issues arising from this report.

9. Use of Appendices

- 9.1. Appendix 1 - Retail client protections
- 9.2. Appendix 2 – Summary of FCA policy statement
- 9.3. Appendix 3 – Opt up process flowchart
- 9.4. Appendix 4 – Opt up letter template
- 9.5. Appendix 5 – Opt up information template

10. Local Government (Access to Information) Act 1985

10.1. Not applicable.