Hybrid Meeting – 11 November 2024

Item 8 – Paper F

Legal advice on fiduciary duty

Background

1. LGPS funds are having to deal with increasing levels and increasingly extreme forms of lobbying around how LGPS funds are invested. The intensity of lobbying around climate change has been building for some time and the humanitarian disaster in Gaza has taken it to unprecedented levels. It is increasingly difficult for LGPS funds to ignore these activities while carrying out their statutory functions.
2. It is within this context that the Board decided to get further advice on the relevant factors that those making investment decisions at LGPS funds should take into account. Advice has been sought in particular on whether there have been changes in the way the fiduciary duty is understood since 2014, when counsel advice was last taken on this question.
3. Around the same time as this advice was received, the Law Commission was asked by the Government to investigate how the law of fiduciary duties applies to investment intermediaries and to evaluate whether the law works in the interests of the ultimate beneficiaries. Their full report was issued in June 2014.
4. The Board has also noted some recent re-consideration of the fiduciary duty, mostly in relation to climate risk. A recent report from the Financial Markets Law Committee (FMLC) seeks to clarify a legal position on a pension fund trustee's fiduciary duty when considering sustainability and climate change. This suggested that a distinction between financial and non-financial factors is increasingly hard to maintain in this context. The report argues that the consequences of climate change (both physical and financial) are now better seen as material financial risks and not responsible investment concerns.
5. The Board is also mindful of increasing desire by different governments to set targets or ambitions for LGPS investments. This has led to some decision makers potentially facing a conflict between the twin aims of achieving these government targets, and investing in the best interests of beneficiaries. We have been repeatedly reassured by MHCLG officials that the setting of targets is not intended to conflict with the fiduciary duty, but some funds have expressed concern that this may still unintentionally have that outcome.

Local Government Association, 18 Smith Square, Westminster, London SW1P 3HZ
E SABSecretariat@local.gov.uk **W** www.lgpsboard.org

Recent developments

6. The Secretariat have commissioned Nigel Giffin KC to provide the updated advice that the Board has asked for.
7. The Board also sought Counsel's view of letters that a number of funds have received which allege that they are acting unlawfully by holding, and failing to divest from, investments in companies which have been linked to the ongoing situation in the Middle East. That legal advice has been received and is publicly available on the legal opinions and summaries page of the Board's website.
8. The fuller, revised general advice from Counsel is expected to be received by the time of the Board's next meeting on 25 November. At that meeting it will be agreed how to publicise the revised advice.

Recommendation – that the Committee notes this report.

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Scheme Advisory Board Secretariat
Local Government Association, 18 Smith Square, Westminster, London SW1P 3HZ
E SABSecretariat@local.gov.uk **W** www.lgpsboard.org