Pension Pointers

Firefighters' Pension Investment Fund Transfers First Tranche of Article 4 Fund Investments Amidst Lawsuit

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On October 1, 2021, the first tranche of Article 4 assets transferred to Firefighters' Pension Investment Fund ("FPIF"). Originally, ninety Article 4 funds were scheduled for asset transfer on that date. However, due to delays in executing documents as the result of issues such as lack of quorums to conduct board meetings or need to update signers on fund accounts, about a dozen funds did not transfer on that date. Other funds declined to sign documents to effectuate the transfer, awaiting the result of the pending litigation (see below). Those funds have been moved to a fifth tranche in February 2022.

If your fund's investment assets have not yet been consolidated, here's what you can expect in the coming months:

Letters of Direction:

As of the end of September 2021, every Article 4 fund in the first three tranches should have already signed and submitted its Letter of Direction to its custodian(s) and FPIF. The Letter of Direction authorizes the fund's current asset custodian(s) to provide information to FPIF and its professional advisors, as well as cooperate in the transfer of assets. The Letter of Direction also provides direction on which assets to transfer from specifically what account(s) to the fund's new account with Northern Trust, the FPIF custodian. The fund's Authorized Agents are empowered to execute the Letter of Direction; however, it is important that the individuals signing the letter are *Authorized Signers* on the fund's custodial account. It is recommended that the board take action to approve the Letter of Direction at a board meeting wherever possible.

Certified Investment Assets Lists:

Between thirty to sixty days prior to each tranche's transfer date, FPIF will send each Article 4 fund scheduled for that tranche information regarding an auditor assignment. Those audits will result in a "Certified Investment Audit List" and a "Non-Transferable Asset List" (if applicable) that will be delivered to each Article 4 fund approximately ten business days prior to their transfer date. Notably, the Non-Transferable Asset List may contain local checking account balances and/or cash balances in custodial accounts that have been earmarked to stay in place and not transfer to FPIF, in addition to assets (such as annuities) that are actually "non-transferable."

Upon receipt of the Certified Investment Audit List and Non-Transferable Asset List (if applicable), the Article 4 funds are to be frozen; in other words, no more trades should occur on the fund's investment accounts. It is therefore important to immediately forward the Certified Investment Audit and Non-Transferable Asset lists to fund's custodian and all investment managers/consultants who have fiduciary control over the fund's assets.

Thereafter, Article 4 funds will be frozen for about ten business days until the transfer. However, because the audits are based on the status of funds' assets about a week prior to issuance on the "freeze date," FPIF has been issuing a second set of Certified Investment Audit and Non-Transferable Asset lists, which will reflect any changes that have occurred after the initial lists were promulgated in the week leading up to the freeze date. It is important that pension trustees review the lists carefully as they are issued and raise any concerns if the information seems inaccurate.

Global Cash Movement (GCM) and Passport Portals:

In mid-September, FPIF issued guidance on the new online Global Cash Movement (GCM) Portal that has been established by FPIF's custodian, Northern Trust, to facilitate the transfer of cash to and from FPIF. Every Article 4 fund must complete a fillable GCM New Setup Authorization Form. Before the form is completed, however, each pension board should meet to discuss how to complete it and act through board resolution to approve who will have access through the GCM portal to input requests for money and approve such requests. In addition, FPIF is providing webinars to train trustees on the GCM and Passport portals. All trustees should take time to view these webinars, even if they are not assigned responsibilities as Authorized Agents or Account Representatives in connection with these portals.

Additional Logistical Issues:

In this last quarter of 2021, Article 4 boards may want to review and confirm several logistical issues:

- Identification of its **Cash Flow Projections**, showing cash on hand at the beginning of each month, with cash received and cash paid

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out over the year. This chart should be prepared with the assistance of the funds' outside accountants or municipal finance department. After the transition of assets, pension boards will need to have cash flow projections and cash needs on the agenda for review and action at every meeting.

- Identification of **Transition Cash Retention** for the 60 to 90-day period following the **Transfer Date**, based on the amount of benefits and expenses anticipated for the immediate period after transition and any cash anticipated to be received in the same time frame, using the **Cash Flow Projections**. When making this decision, make sure it is clear where the excess cash will be held during the transition period.
- Identification of interest-earning **Local Account(s)** for purposes of maintaining the initial 60 to 90-days' worth of cash during transition and for future cash flows of contributions and benefit/expense payments. This might include both the funds' current custodial account and current checking account. Discussion should include whether the accounts are properly collateralized, and if necessary, collateralization agreements should be obtained and approved by the board.
- Determination of whether **large inflows of tax proceeds or other cash** (due to proceeds from an annuity, for example) that were unexpected should be transferred to FPIF. FPIF has indicated that during the sixty-day period when Article 4 funds are unable to request cash from FPIF, FPIF may be able to take additional cash from an Article 4 during that period so that Article 4 funds can get it invested sooner. This can be facilitated even if the GCM Portal has not yet been established for the Article 4 fund.
- Determination of **Amendments to Investment Professionals and Custodial Agreements** and future fee arrangements for post-consolidation services after the transition, as well as timing of **Termination Notices** of such agreements thereafter.

***About the Author**: **Carolyn Welch Clifford** is a partner with Ottosen DiNolfo Hasenbalg & Castaldo, Ltd. in Naperville, Illinois. Ms. Clifford concentrates her practice in the representation of Illinois firefighter and police pension funds, as well as fire and police commissions and fire protection districts. She currently serves as the Chair of the Public Safety Affinity Group for the National Association of Public Pension Attorneys (NAPPA). She is a frequent speaker at fire service and public pension conferences in Illinois and nationally and contributes regularly to several publications. Ms. Clifford earned her B.S. and J.D. degrees from the University of Illinois in Urbana-Champaign. You can contact her at cclifford@ottosenlaw.com.*

Pending Litigation:

The lawsuit challenging the consolidation's constitutionality, *Arlington Heights PPF et al. v. Pritzker et al.*, 21-CH-000055, remains pending in the Kane County Circuit Court. In late June 2021, the defendants filed motions to dismiss and the plaintiffs filed their own dispositive motion. Additionally, the Plaintiffs filed a motion for an early injunction with the goal of pausing all further action relating to consolidation until a final ruling could be made. The court denied this motion, as FPIF moved the one Plaintiff pension fund to the fifth tranche and did not face imminent asset consolidation.

The court then heard further oral argument on the pending motions to dismiss. The court ultimately dismissed the pension funds as plaintiffs but denied the remainder of the motion to dismiss. The court also ordered the parties to advance a new round of motions that will tee up a final ruling. The parties are set to return for additional argument on November 10, 2021.

Interestingly, none of the parties have yet argued that the Tier 2 benefit improvements are severable from the consolidation law. Thus, it remains unclear whether the Tier 2 benefit improvements will also be struck down along with the challenged portions of the consolidation law if the Plaintiffs prevail. ■