

## Report of the Section 151 Officer

Pension Fund Committee - 14 September 2017

### Corporate Actions Monitoring Service

<b>Purpose:</b>	To monitor opportunities to recover losses as a result of violation of US Securities laws
<b>Policy Framework:</b>	LGPS Investment Management Regulations
<b>Consultation:</b>	Legal, Finance and Access to Services.
<b>Recommendation(s):</b>	It is recommended that:  BR&B are engaged as outlined in 4.1 i) and ii)
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## 1 Introduction

- 1.1 The City & County of Swansea invests over 60% of its assets in listed global equities. The world's largest market for listed equities is the United States. In the United States, over 150 cases alleging violations of the federal securities laws are brought each year. These cases are brought against companies whose shares trade on U.S. exchanges and allege that corporate fraud has taken place. Investors can suffer significant financial losses from fraudulent activity arising from fraudulent accounting or the deliberate failure by companies to disclose information that should have been disclosed to them as investors in the company. Some high profile corporate frauds have received worldwide media coverage, e.g. Enron and WorldCom, although not all frauds are so extreme as to cause the collapse of the entire company.
- 1.2 In addition to the cases brought in the United States, securities litigation is increasingly a global phenomenon as a result of corporate scandals arising in companies based outside of the United States. For example, securities cases have been brought in the U.K. against RBS and in Germany against Volkswagen.

## 2 Differences between Investor Cases in the US, the UK and other countries

- 2.1 There are some significant differences between the legal systems in the

United States and those in the U.K. and other countries, especially in cases where investors have suffered financial losses as a result of alleged fraudulent activity by companies in which they have invested.

- (a) Under U.S. law, investors, on behalf of themselves as well as other, similar investors, can take action through the U.S. courts to seek compensation for losses suffered in all such cases of corporate fraud.
- (b) In a U.S. class action, all investors, whether institutional or private, who have suffered losses as a result of corporate fraud are members of the 'class' of investors who have so suffered – hence the term class action. The investors who acquired a company's stock during the period when a fraud is alleged to have occurred are automatically included in the class action. They do not need to take any affirmative measures to join it.
- (c) In the U.K. and many other countries, there is no class action procedure. Some countries have "group" actions, but each individual investor must typically make an affirmative decision to engage counsel and join a group action. While a class member in a U.S. class action may be entitled to a pro rata share of any recovery that is achieved in a case, investors are precluded from sharing in any recovery in a non-U.S. group action unless they have joined in the litigation of the case.
- (d) One key difference between the legal system in the U.S. and those of the U.K. and some other countries is that if a class action is unsuccessful, the plaintiff investor is not liable for the legal costs incurred by the defendant company. Another key difference is that in the U.S., attorneys are permitted to litigate cases on a "contingent fee basis." This means that their attorneys' fees are paid out of any recovery achieved for the class and, if the case is unsuccessful, the plaintiffs have no responsibility to pay the attorneys' fees and costs. Thus, in a U.S. class action, the cases are typically funded by the plaintiffs' law firms themselves and there is no need to insure against possible liability for legal costs.

### **3 Current Participation in U.S. Class Actions**

- 3.1 (a) Class action claims can go back over a period of many years and U.K. institutional investors, such as the City & County of Swansea Pension Fund, who have suffered losses as a result of corporate fraud can benefit significantly from these class actions, but only if claims are filed.
- (b) Failure to file a claim can be costly. Compensation awarded by the Courts can only be shared out amongst those who file a claim at the end of the case. Any monies 'left on the table' are shared by those who do claim. The sums involved for a major institutional investor can amount to millions of U.S. dollars. It is therefore a fiduciary duty for institutional investors such as LGPS funds to ensure that all payments due to them under class actions in the U.S. are pursued.
- (c) Currently the City & County of Swansea Pension Fund, relies largely on its custodian bank, HSBC, and its Fund Managers (and partly on market

awareness) to ensure that U.S. class action claims and any other global claims are lodged where practicable. But, monitoring information sources and the media for these actions can be a time-consuming process. Recently, as a result of being alerted by one of its fund managers, the City & County of Swansea Pension Fund, joined a class action as a result of a class action against the Brazilian Oil company Petrobras, and after protracted legal proceedings, recovered \$125,000.

#### 4 Way Forward

- 4.1 (a) There are a small number of US law firms operating in the UK. Barrack Rodos & Bacine (BR&B), is a U.S. law firm that takes a risk managed approach to securities litigation. BR&B has a proprietary, patented monitoring system – Barrack’s Evaluation And Monitoring System (BEAMS®) – which tracks securities class actions in the US and globally, and identifies all those in which a fund may have a potential claim. BEAMS® monitors the progress of all claims until final settlement, which can take several years.
- (b) This service takes on the workload of monitoring the Fund’s entitlements from class actions globally and is provided entirely free of charge by BR&B.
- (c) 15 UK LGPS clients including Rhondda Cynon Taf (RCT), Strathclyde, ten English Counties and three London Boroughs currently use BEAMS®.
- (d) To secure the corporate fraud and class action monitoring service free of charge from BR&B the City & County of Swansea Pension Fund would be required to:
- i. Authorise the Fund’s global custodian to provide BR&B with electronic access to the Fund’s dealings, for the past five years (or for as many of those five years as can be made available), current holdings and all future dealings on a read-only basis.
  - ii. Sign a very short (2 page) letter of agreement with BR&B agreeing that if the City & County of Swansea Pension Fund suffers a loss as a result of fraudulent action by a company, and this fraud is the subject of a class action, the Fund will consider seeking appointment as lead plaintiff or co-lead plaintiff and consider selecting BR&B to represent the Fund as its counsel, on a contingent fee basis. (Any investor who has suffered losses can seek to be the lead plaintiff in such cases but under U.S. law courts usually appoint the investor with the largest financial interest amongst those seeking this leadership role. A U.S. securities class action can be lengthy, and may take several years to reach a court decision or a settlement out of court).
  - iii. Although the BEAMS service monitors all class actions globally to ensure that claims are made, BR&B will only ask clients to consider acting as a lead plaintiff where they have a significant loss and where the case is deemed to be ‘meritorious’ and of ‘institutional quality’.
  - iv. Should the Fund decide to actively participate in a class action in a

leadership role with BR&B as its counsel, and should the court appoint the Fund as a lead or co-lead plaintiff, with BR&B as lead counsel, BR&B will actively pursue the litigation on the Fund's behalf. If BR&B is successful in creating a fund for the benefit of injured investors, the Firm, after consulting with the Fund, will ask the court to be paid a fee from the fund created.

- v. If appointed as lead or co-lead plaintiff, The City & County of Swansea Pension Fund will have no financial obligation in connection with the prosecution of the lawsuit nor will it incur any expenses whatsoever - all costs are met by BR&B. (The contingent fee payable to BR&B for each case will be discussed with the client fund and awarded by the court).
- vi. The monitoring agreement with BR&B can be terminated by either party, without cause, by providing the other party with ten days written notice. The BEAMS monitoring service can therefore be in effect taken on trial.

## 5 Summary

- 5.1 (a) BR&B is a 'conservative' law firm – only seeking to be involved with the most meritorious cases. They were joint lead counsel in the *WorldCom* case – in which \$6.19 billion was recovered for investors. Many of the Firm's clients are U.S. state and municipal pension funds. In addition, fifteen UK LGPS funds currently use BEAMS® (including one of the largest UK local authority funds).
- (b) BEAMS® allows for better use of in-house resources and also ensures that the Fund will receive the benefit of the BR&B monitoring service for all class actions both in the US and globally.
- (c) Use of this service would help to ensure the Fund meets its fiduciary duty to attempt to recover all claimable sums from corporate fraud cases being pursued in the US Courts and elsewhere.
- (e) BEAMS® monitors all cases, not just those cases in which BR&B might be actively representing the Fund.

## 6 Recommendation

- 6.1 It is recommended that the BR&B are engaged as outlined in 4.1 i) and ii).

### Financial Implications

The financial implications of the report are outlined in 4.1 above.

### Legal Implications

There are no direct legal implications arising out of this report.

### Equality Impact Assessment Implications

An EIA Screening has been undertaken and no E & EI's have been

identified.

**Background Papers:** None.

**Appendices:** None.