

Department for Work and Pensions

Consultation

The draft Financial Assistance Scheme and Incapacity Benefit (Miscellaneous Amendments) Regulations 2009

Our address Department for
Work and Pensions
3rd Floor
The Adelphi
1-11 John Adam Street
London
WC2N 6HT

Website www.dwp.gov.uk/fas

Date 5th November 2008

Dear Sir or Madam

Consultation on draft regulations - The Financial Assistance Scheme and Incapacity Benefit (Miscellaneous Amendments) Regulations 2009

This consultation document seeks views on the draft Financial Assistance Scheme and Incapacity Benefit (Miscellaneous Amendments) Regulations 2009 which are being introduced to extend the Financial Assistance Scheme (FAS).

These draft Regulations follow on from changes made by the Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/1903). Those Regulations (made following the December 2007 announcement by Peter Hain, the then Secretary of State for Work and Pensions) provided for early access on an actuarially reduced basis for those within five years of normal retirement age who are unable to work due to ill health and likely to remain so until that age. Today the Department is consulting on draft Regulations which provide for early unreduced payment of assistance for qualifying members who are aged 55 or over, who are not terminally ill, but who have a significantly shortened life expectancy.

Target audience

This consultation is primarily aimed at pension industry professionals and others with an interest in defined benefit occupational pension schemes and the assessment of ill-health. These draft Regulations have been prepared following discussions and informal consultation with affected schemes, trustees, other pension professionals and affected scheme members and their families.

Where can I find the consultation document?

The consultation document is available via the FAS website:

<http://www.dwp.gov.uk/fas>.

How can people respond to this consultation?

The consultation period begins on 5 November 2008 and runs until 3 December 2008. Where proposals have been stimulated by previous consultation or debate, Cabinet Office guidance provides that a shorter consultation period may be more appropriate than the standard 12 weeks.

We have been in regular contact with stakeholders concerning the provisions in these regulations. Stakeholders are aware of the timing, content and aims behind the regulations. There have been meetings with the Pensions Action Group, trade unions representing pension scheme members, and trustees where we have discussed the issues in the package which relate to each group.

Taking account of these factors, and the wish to bring to provide early unreduced assistance payments for members with reduced life expectancy, Ministers believe that a consultation period of four weeks will ensure there is adequate consultation and ensure the changes happen in good time.

We would be grateful for your comments on any of the points covered by the draft Regulations. Please ensure that your response reaches us by the closing date.

Please send consultation responses to:

Financial Assistance Scheme Consultation
Department for Work and Pensions
Private Pensions Policy
3rd Floor
Adelphi
1-11 John Adam Street
London
WC2N 6HT
E-mail - fas-responses@dwp.gsi.gov.uk

This consultation applies best practice from the Cabinet Office Code of Practice on consultation.

Whilst it is Government policy that Regulations which have an impact, however minor, on the private sector should, wherever possible, come into force on just two agreed dates (6th April and 1st October) Ministers believe that it is in the public interest to implement these Regulations quickly to help ensure that those affected can receive assistance as soon as possible.

If you have questions about the draft Regulations, please write or e-mail them to the above addresses.

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation please make it clear who the organisation represents and (where applicable) how the views of members were assembled.

A list of those to whom this document has been sent is attached. If you have any suggestions of others who may wish to be involved in this process, please contact us.

All information contained in your response, including personal information, may be subject to publication or disclosure if requested under the Freedom of Information Act 2000. By providing personal information for the purpose of the public consultation exercise, it is understood that you consent to its disclosure and publication. If this is not the case, you should limit any personal information which is provided, or remove it completely. If you want the information in your response to the consultation to be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this. We cannot guarantee confidentiality of electronic responses even if your IT system claims it automatically.

If you want to find out more about the general principles of Freedom of Information and how it is applied within DWP, please contact:

Charles Cushing
Department for Work and Pensions, Adjudication and Constitutional Issues,
Information Policy Division,
Freedom of Information Unit,
1-11 John Adam Street,
London
WC2N 6HT
Phone: 0207 962 8581
Email: charles.cushing@dwp.gsi.gov.uk or carol.smith14@dwp.gsi.gov.uk
More information about the Freedom of Information Act can be found on the website of the Ministry of Justice.

The consultation criteria

The consultation is being conducted in line with the Code of Practice on Consultation. The six consultation criteria are as follows, and the full version can be accessed at the Cabinet Office website:

- Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- Be clear about who may be affected, what questions are being asked, and the timescale for responses.
- Ensure that your consultation is clear, concise and widely accessible.

- Give feedback regarding the responses received and how the consultation process influenced the policy.
- Monitor your department's effectiveness at consultation, including through the use of a designated Consultation Co-ordinator.
- Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

What will we do after the consultation?

The Government's response to the consultation (including the next steps to be taken) will be published online (and linked from the same FAS web page as above) when we lay the final Regulations before Parliament. Paper copies will be available on request.

We value your feedback on how well we consult. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact our Consultation Coordinator:

Roger Pugh
Department for Work and Pensions' Consultation Coordinator,
Room 2A,
Britannia House,
2 Ferensway,
Hull
HU2 8NF
Phone: 01482 609571
Email: roger.pugh@dwp.gsi.gov.uk

Yours faithfully

Julian Barker

Financial Assistance Scheme Policy

Copied to:

Age Concern
Amicus
Association of British Insurers
Association of Consulting Actuaries
Association of Pension Lawyers
Auditing Practices Board
British Medical Association
Board for Actuarial Standards
British Chambers of Commerce
Community the Union
Confederation of British Industry
Department for Business,
Enterprise & Regulatory Reform
Department of Health
Engineering Employers' Federation
Federation of Small Businesses
Financial Services Authority
GMB Union
Help the Aged
HM Treasury (MOCOP)
Independent Pensions Research
Group
HM Revenue & Customs
Independent Trustee Services
Institute of Chartered Accountants in
England and Wales
Institute of Chartered Accountants in
Scotland
Institute of Directors
Institute of Payroll Professionals
Investment Management Association
National Association of Pension Funds
National Consumer Council
National Pensioners' Convention
Office of Fair Trading
The Pensions Advisory Service
Pensions Action Group
Pensions Ombudsman
Pension Protection Fund

Pensions Regulator
R3, the Association of Business
Recovery Professionals

The Royal College of Physicians
The Royal College of Physicians of
Edinburgh
The Royal College of Surgeons of
Edinburgh
The Royal College of Surgeons of
England
The Royal College of General
Practitioners
The Royal Society of Medicine
Better Regulation Executive
SAGA
Social Security Policy and Legislation
Division, DSD, Northern Ireland
Small Business Service
T&G Union
The Association of Corporate Trustees
The Faculty of Actuaries
The Insolvency Service
The Institute of Actuaries
The Law Society
The Law Society of Scotland
The Pensions Management Institute
The Scottish Executive
The Society of Pension Consultants
The Welsh Assembly
Trades Union Congress
UNISON
Which?
We have also sent copies of the
consultation document to private
individuals who have expressed an
interest in participating in the
consultation exercise.

THE FINANCIAL ASSISTANCE SCHEME AND INCAPACITY BENEFIT (MISCELLANEOUS AMENDMENTS) REGULATIONS 2009

CONTENTS

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- Section Two - Commentary on the draft Regulations
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SECTION ONE - POLICY AND LEGISLATIVE BACKGROUND

The original scheme

1. The Financial Assistance Scheme (FAS) was announced on 14 May 2004 as a means to help those closest to retirement who had suffered significant losses to their accrued pension rights as a consequence of employer insolvency. Under the original scheme the Government committed £400 million in cash terms over 20 years to help an estimated 15,000 people.
2. Since 2004, the FAS has been significantly extended¹. The most recent extension was announced by the then Secretary of State for Work and Pensions in December 2007. Key aspects of that extension have already been implemented, including, providing for people who are unable to work due to ill health to apply for FAS payments up to five years before normal retirement age (NRA). This provision came into force on 17 July 2008. These payments are actuarially reduced for early payment so that the overall value of the amounts they will receive over their expected lifetime is maintained. The test for ill health is that the member is unable to work due to ill health, and is likely to remain unable to work due to ill health until they reach their NRA. The threshold is intended to include those people who are working when they apply (perhaps due to their lower-than-expected pension) but have been advised by their doctor not to work due to their health.
3. The rules of many occupational pension schemes allow members to take their benefits early where they are in ill health (sometimes without actuarial reduction)

¹ Details of the extensions can be found at:
[Hwww.dwp.gov.uk/lifeevent/penret/penreform/fas/news.asp#consultation](http://www.dwp.gov.uk/lifeevent/penret/penreform/fas/news.asp#consultation)

or for general early retirement (usually with actuarial reduction). These options typically fall away once a scheme has started to wind-up.

4. Where payments are made early with an actuarial reduction to take account of the earlier payment, there is no overall increase in costs of the FAS, but there is a bringing forward of those costs. This is not an issue where the costs are funded (the loss of future investment growth being one of the factors which can be taken into account in calculating the appropriate actuarial reduction). But it can be a significant factor where payments are paid on the “pay-as-you-go” basis which applies to payments of FAS assistance. So in determining what is affordable within the overall costs of the extension of the FAS, the Government has to take account of the need to manage any consequent increase in short-term costs.
5. FAS can also be accessed early, without reduction, where a person is terminally ill. However, these provisions only apply where a person has a progressive disease from which death may reasonably be expected in the following six months.
6. Representations were received that a small number of people with ill health leading to significantly reduced life expectancy could be excluded from early access to FAS because they were not within five years of NRA and not terminally ill within the definition in legislation. There were also representations that the actuarial reduction in payments under the ill-health provisions were inappropriate where a person was likely to have a significantly shorter life expectancy due to their ill-health.
7. The Government acknowledges these concerns and therefore proposes a further extension to FAS to enable some people, with significantly reduced life expectancy, who do not qualify under the terminal illness provisions, to access FAS early without an actuarial reduction.

The proposed change

8. The intention is that alongside the existing provisions for ill health and terminal illness there should be additional provision without actuarial reduction for eligible scheme members over 55 who have a significantly reduced life expectancy as a result of ill health and are not already in receipt of FAS payments.
9. Only qualifying members who satisfy the same test of being unable to work as applies for ill-health payments will be able to be entitled as the intention is that early access should be concentrated on those people unable to work. Survivors and qualifying members who are regarded as qualifying members as a result of regulation 15(5) of the FAS Regulations (that is, those, normally survivors of members who died before wind up commenced, who at wind up have a right to payments from the scheme, but otherwise than through their own pensionable service,) will not be able to get their payments at age 55 on the grounds of the new test.

10. This should in most regards follow the same principles as existing ill health provision as far as eligibility, determination and calculation of payments and access to review and appeal is concerned.
11. The age of 55 will apply to ensure consistency with changes to the tax rules in the Finance Act 2005 which means that from 2010 early retirement will not normally be available before age 55².

The Test for Reduced Life Expectancy

12. The Government has considered a number of options for a test to identify the people with reduced life expectancy. Any test needs to be:
 - Focused on the people in most need of early access to assistance;
 - Clear, so decision-makers know how to apply the test and members know when they should apply for these payments; and
 - In a form that would enable medical advisors to express informed opinions.
13. Our conclusion is that a test in the form 'the member can reasonably be expected to die within five years' achieves this best. Some of the other wider options we have considered are set out in Annex A.
14. We intend that the test would be applied by the FAS scheme manager following medical advice. The test is intended to give entitlement to only a very small number of people.
15. A member will satisfy the test where the FAS scheme manager is satisfied that a qualifying member has a progressive disease from which death within five years can reasonably be expected.
16. This wording does not mean that a doctor would have to believe that the prognosis for a person was shorter than five years in order for that person to satisfy the test; rather, that the medical condition of the person is such that five years or less would be among the reasonable prognoses that a doctor could give for someone in their situation.
17. The Government recognises that the uncertainty surrounding prognosis means that there will always be significant numbers of people who die earlier or later than expected. Experience of the operation of the six-month terminal illness test in benefits such as Attendance Allowance and Disability Living Allowance is that applying a test of this nature does not create a hard cut-off point but instead is effective at identifying those people with serious life threatening illnesses. The Government therefore concludes that there is precedent for a test of this nature succeeding in identifying the appropriate group of people.

Five years or ten years?

² Regulations are planned to be introduced in 2009 so that the earliest age for early access to Pension Protection Fund compensation will also be 55 from April 2010.

18. In reaching this test the Government has considered whether five years is an appropriate period to look at when considering whether a person has a significantly reduced life expectancy for these purposes.
19. Arguments have been put that a test looking at the likelihood of a person living up to ten years would be more appropriate for the following reasons -
 - Many people aged in their late 50s who this proposal is aimed at would normally have a life expectancy reaching into their 80s. A test looking at the next five years might therefore be too restrictive.
 - There is some evidence from studies which would allow decisions on ten year longevity to be made, and;
 - It would be easier for a doctor to make a decision over a ten year period as they would not need to have the same certainty that a person's life expectancy would be very short.
20. Consequently, the Government has considered whether a test of "unlikely to live longer than ten years" or "death can be reasonably expected within ten years" would be appropriate to capture the target group. Consideration has also been given to combining elements of these tests and the five year test set out in the draft regulations, for example, "death may be reasonably be expected in the next five to ten years", or "the person is unlikely to live longer than five to ten years".
21. The Government recognises that it is important that the test correctly identifies the type of people who are intended to qualify and has spent considerable time discussing different approaches with stakeholders. However, the Government has concluded that a test based round a reasonable expectation of death in the next five years is preferable, for several reasons:
 - Data on five-year survival rates from various diagnoses and procedures is much better documented than over any longer period, which means that such a test can be applied more quickly, and more consistently.
 - Experience shows that all prognostication involves error, with significant numbers of people living longer than predicted. While this is clearly welcome for the people in question, it would mean that this new provision would be open to a much wider range of people than the Government is seeking to target, with consequent significant cost impacts.
 - A test looking further into the future would require medical practitioners to take account of a much larger range of factors including lifestyle and the likelihood of changes in medicine, and they may therefore be reluctant to provide an opinion on the question.
22. Whilst all these issues arise whenever considering prognosis for any period, the Government believes a test focused over the following five years minimises the impacts of these difficulties while capturing a group of people with severely impaired life expectancy. Nevertheless, the Government is keen to hear views on whether the test proposed is appropriate, and whether there are other approaches which would be preferable.

Question – The Government welcomes views on the approach it has taken and whether a test of “having a progressive disease from which death within five years can reasonably be expected” is appropriate for identifying those people unlikely to die of a terminal illness in the next six months, but who have a significantly reduced life expectancy?

Question – The Government also welcomes views on the alternative approaches mentioned above, for example, whether a test of ten year’s life expectancy should form part of the test, and invites views on alternative approaches which would be appropriate.

People covered by the test

23. The intention is that this test would be satisfied by people who had a condition or combination of conditions, such as Parkinson’s Disease or advanced arterial disease, that had led to a series of strokes or heart attacks, but would not be satisfied by a person who had mental health problems or musculo-skeletal problems which would not necessarily lead to a significant impact on life expectancy.
24. To allow the test to be applied the applicant would be expected to provide the information needed to demonstrate that they are unable to work. This will be the same requirement as the existing provisions require, for example:
 - a GP’s medical certificate, which may for example have been supplied for other reasons such as a claim for benefits or Social Security credits,
 - a letter from a consultant or occupational therapist,
 - other details of medical treatment such as hospital appointments, or
 - receipt of an ill health related scheme pension or relevant state benefit.
25. In addition further medical information on diagnosis and treatment may be required to establish whether a person satisfies the further test of whether death in consequence of their illness can reasonably be expected within five years. This may require the member to provide further evidence from their GP or consultant if required by the FAS scheme manager, but for the majority of cases we anticipate the Department for Work and Pensions will already hold information in connection with claims for benefits such as Disability Living Allowance or Employment and Support Allowance to limit the other information we might need. The intention is that as where possible, to avoid unnecessary delay and inconvenience, the decision will be made on existing available information.
26. The intention is that this new provision for reduced life expectancy will sit alongside the existing rules for early access through ill-health and terminal illness. The tests for entitlement are intended to operate so that when payment commences, people are able to access FAS through the most beneficial route, for example to make sure they can get unreduced payment where appropriate.
27. However, subject to transitional provisions described below, once payment has started on whatever basis, it will continue on that basis regardless of changes of circumstances. For example, it will not be possible to move from actuarially

reduced to unreduced payments because a person's health has deteriorated.

28. The rules which apply to decisions of the FAS scheme manager relating to internal review and appeal to the Ombudsman will apply to these new ill-health payments in the same way as they apply to the FAS scheme manager's decisions relating to the existing ill-health payments.
29. The Government recognises that with any test involving questions of life expectancy it is important to ensure that the process of application, terminology and communications is handled sensitively so that the test itself does not deter people applying for assistance. We will therefore seek to ensure that these issues are minimised through careful application of the lessons learned from administering terminal illness payments in FAS and the welfare system.

Payment

30. The Government intends that the new payments made under the provisions introduced by these regulations will be calculated in the same way as payments under the terminal illness provisions. That is qualifying members will get payments based upon their scheme entitlements revalued up to the date that payment commences in the same way. And such payments will top-up any payments the member receives from their scheme or an insurer. In this way the further Ill Health provisions can be seen as an alternative route to getting the same payments as Terminal Illness. However, this alternative route will only be available for people aged 55 or over.
31. Subject to transitional provisions described below, payment will be effective from the point the scheme manager receives the person's application for payment, for life. Payments will be made as annual payments where the scheme manager has all relevant final information, most often because the scheme has wound up, and initial payments where the scheme manager cannot determine the final amounts because all information is not yet known. This is usually where the scheme has not yet completed winding up. Initial payments are made on account of annual payments and so where initial payments are replaced with annual payments, the reconciliation of payments against those already made will occur.

Payments for past periods

32. These new provisions will create new and, in some cases, increased entitlements to FAS assistance on top of the existing regime. The intention is that these new entitlements should be available to current FAS recipients where they would have been entitled to higher levels of payment for past periods, and that people should not be penalised for taking advantage of recent changes in FAS.
33. The Government also intends that people should be able to receive payments for past periods if they could have been disadvantaged by the absence of these provisions in the past. It is not intended that payments for past periods of ill-health will be a regular feature of the FAS scheme. The regulations therefore

provide for a period of one year during which people can identify themselves as someone who should be entitled to reduced life expectancy payments for a past period. During this time the Government will take steps to ensure that availability of this new provision is included in a range of leaflets and communications. This will ensure there is ample opportunity for scheme members to take advantage of this change.

34. The draft Regulations therefore provide for payments for past periods in the following circumstances –

35. Where a person is –

- not currently receiving FAS payments and,
- in the year following these regulations coming into force, provides evidence that satisfies the FAS scheme manager that they are entitled to reduced life expectancy payments, and,
- satisfies the FAS scheme manager that their condition at a point in the past, no earlier than 14 May 2004 when the FAS was announced, meant that it would have been reasonable to expect that their life expectancy at that point would be less than five years in consequence of a progressive disease and that they would have been entitled to reduced life expectancy payments at that time if the attached draft Regulations had applied,

they will be entitled to reduced life expectancy payments from the point in the past that the FAS scheme manager determines as being when reduced life expectancy payments could have commenced had the proposed Regulations applied at that time.

36. For example, a person is diagnosed with motor neurone disease in April 2006 at which time they were aged 56. They have not applied for ill-health payments despite being unable to work due to weakness and stiffness prior to the diagnosis. The FAS scheme manager accepts medical evidence that the person had the disease at that time, and following medical advice, concludes that in April 2006 the person had a progressive disease from which death could reasonably be expected within five years. As all the conditions of entitlement to reduced life expectancy payments were satisfied at that time, payments for the past period starting in April 2006 are made.

37. In line with existing case law on social security benefits, in applying the test in this way, the fact that a person had, in fact, lived longer than might reasonably have been expected would not necessarily debar them from this assistance. So, a person whose condition at 14 May 2004 was such that it would have been reasonable to expect death within five years may still be entitled to these payments.

38. Where a person is –

- currently receiving FAS ill-health payments and,

- would have been entitled to reduced life expectancy payments for that period, or for an earlier period beginning after 14 May 2004 had the reduced life expectancy payments been available at that time,

they may be entitled to reduced life expectancy payments from the point in the past that the FAS scheme manager determines as being when reduced life expectancy payments could have commenced had the proposed Regulations applied at that time. Any payments already made under the ill-health provisions will be offset against these payments for past periods to ensure the overall amount received is the same as if the person had received reduced life expectancy payments from the outset.

39. For example, a person aged 59 and has been receiving ill-health payments since August 2008 as they are unable to work due to the effects of a stroke. Upon the coming into force of these new provisions he submits medical evidence showing that he has in recent years suffered several strokes and a heart attack. The evidence shows that in June 2008 he was diagnosed with advanced arterial disease and that the likelihood of continuing and worsening strokes and heart attacks is very high. Following medical advice the FAS scheme manager is satisfied that as a result of the advanced stage of circulatory disease the person's death can reasonably be expected in the next five years from June 2008. Reduced life expectancy payments are made from June 2008, and these payments are reduced to take account of the amount of ill-health payments made since August 2008.

40. Where a person is –

- currently receiving FAS Terminal Illness Payments and,
- would have been entitled to reduced life expectancy payments for an earlier period after 14 May 2004 had the reduced life expectancy payments been available at that time,

they may be entitled to reduced life expectancy payments from the point in the past that the FAS scheme manager determines as being when reduced life expectancy payments could have commenced had the proposed Regulations applied at that time. Any payments already made under the terminal illness provisions will be offset against these payments for past periods to ensure the overall amount received is the same as if the person had received reduced life expectancy payments from the outset.

41. For example, a person aged 58 with advanced mesothelioma has been receiving payments since September 2008 on the grounds that they have a progressive disease which means their death within six months is reasonably to be expected. The person produces evidence that their disease was diagnosed in April 2007 and they have not been able to work since before then due to breathlessness. The FAS scheme manager accepts medical evidence that the person had the disease at that time, and following medical advice, concludes that in April 2007 the person had a progressive disease from which death could reasonably be expected within five years. As all the conditions of entitlement to

42. To ensure that the person entitled receives the higher amount instead of any payments already received, any monies paid previously under the existing FAS provisions will be counted towards the amount due under the provisions introduced by these regulations and the balance will be paid. For example, where a member had received ill-health payments from August 2008 until February 2009 and then applied for unreduced payment on grounds of reduced life expectancy from January 2008, if the FAS scheme manager accepted there was evidence that the person was qualified from that date, entitlement from January 2008 would be calculated and payments for that past period, less the amounts already paid, would be due to the member.

Payments to survivors

43. Under FAS rules, widows, widowers and surviving civil partners are eligible for FAS assistance. The draft Regulations introduce provisions which provide for the survivors of members who had qualified for reduced life expectancy payments or initial payments for reduced life expectancy to receive assistance based on the member's early payment rate.
44. For example, survivors of members who were in receipt of final unreduced early payment under the reduced life expectancy provisions will simply receive one half of the payment which was payable to the member immediately before their death.

Numbers affected and estimated costs

45. There is considerable uncertainty around the numbers likely to apply for these unreduced payments which makes estimating the numbers affected and the costs difficult. It is possible that changes in the economic climate or in the length of time that someone has to be likely to die could increase the likelihood of someone applying for unreduced payments; however we do not have enough information to analyse this.
46. The number of people who have requested reduced payments has been much lower than was originally predicted (between 2,300 and 4,600 people) and, to date, there have been approximately 100 requests for reduced payments for ill health. This may suggest that there would be limited demand for the unreduced payments. However, given that 11% of men over 50 are in receipt of Incapacity Benefit, it is clear that there could be a larger pool of people who could apply.
47. If the 100 people who have so far applied for reduced payments for ill-health were to apply successfully for non-reduced payments, the extra costs would be approximately £15,000 a year in the short term. However, this would not represent the full cost, as the payments proposed in this consultation document would be available from an earlier age, and would be made in respect of past periods during the first year the payments were available.

Question – the Government would welcome views on the numbers of people that might qualify for the new payments under its proposals

Change to Incapacity Benefit

48. The draft regulations include amendments to the Incapacity Benefit regulations. This change does not form part of this consultation and has been scrutinised by the Social Security Advisory Committee who have indicated that they do not require the provision to be formally referred to them.

SECTION TWO – COMMENTARY ON THE DRAFT REGULATIONS

49. Draft regulation 1 specifies the commencement date of these Regulations.
50. Draft regulation 2 amends the Social Security (Incapacity Benefit) Regulations 1994, which is not part of this consultation.
51. Draft regulation 4 amends Regulation 17 of the Financial Assistance Scheme Regulations 2005 (S.I. 2005/1986) by inserting new paragraphs (3C) to (3E) and making consequential amendments. These are the substantive provisions which create the new test around annual payments for restricted life expectancy, and the rights to early access which depend upon it.
52. Paragraph (3C) allows a qualifying member who applies for it, to be eligible to receive annual payments where they are not currently receiving FAS payments (or are only receiving payments as a survivor) and the FAS scheme manager is satisfied that they meet the conditions relating to restricted life expectancy set out in paragraph (3D).
53. Paragraph (3D) sets out the four conditions a qualifying member must, in the opinion of the scheme manager, satisfy. These relate to the member's age, when they are likely to die, their ability to work and whether they fall within another part of the Regulations.
54. Paragraph (3E) provides that the date entitlement to payments commences under (3C) is the date the FAS scheme manager receives the relevant written request.
55. Draft regulations 5 and 6 make amendments to the provisions relating to ill health which are consequential upon the amendments to regulation 17.
56. Draft Regulation 7 inserts a new regulation 17C into the Financial Assistance Scheme Regulations 2005 (S.I. 2005/1986) which provides for special arrangements during the year following the commencement of these regulations. This largely mirrors the provisions inserted by draft regulation 4, but provides for payments to commence before the date of application where certain conditions are satisfied. It also allows a person who currently receives other payments of FAS, for example, ill-health payments under regulation 17A, to switch to restricted life expectancy payments instead.
57. Draft regulation 8 amends regulation 18 so that the scheme manager can make an initial restricted life expectancy payments.
58. Draft regulation 9 inserts a new paragraph into Schedule 2 which provides for certain past payments of FAS to be counted towards an entitlement to FAS arising from regulation 17C. This ensures that where there is entitlement under regulation 17C the person does not receive duplicate payments of FAS.

59. Draft regulations 10 and 12 amend the Financial Assistance Scheme (Internal Review) Regulations 2005 (SI 2005/1994) and the Financial Assistance Scheme (Appeals) Regulations 2005 (SI 2005/3273) so that decisions as to whether a person is entitled to annual payments under the provisions introduced by these draft regulations or satisfies certain requirements for initial payments under the provisions introduced by these regulations are subject to the internal review process and can be appealed to the Ombudsman.
60. Draft regulation 11 makes amendments to the Financial Assistance Scheme (Provision of Information and Administration of Payments) Regulations 2005 (SI 2005/2189, relevant amendments made by SI 2005/3256). These amendments create duties for information relevant to the determination of a person's restricted life expectancy to be provided to the FAS scheme manager.

SECTION THREE – THE DRAFT REGULATIONS

Draft Regulations laid before Parliament under section 176(1)(a) of the Social Security Contributions and Benefits Act 1992 and section 316(2)(n) of the Pensions Act 2004, for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2009 No. [consultation draft]

PENSIONS

SOCIAL SECURITY

**The Financial Assistance Scheme and Incapacity Benefit
(Miscellaneous Amendments) Regulations 2009**

Made - - - -

Coming into force - -

XXX 2009

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by section 30DD(5)(c) and 175(3) of the Social Security Contributions and Benefits Act 1992(3) and sections 190(1)(a) and (2), 286, 315(2) and (4) and 318(1) of the Pensions Act 2004(4).

[In accordance with section 176(1)(a) of the Social Security Contributions and Benefits Act 1992 and section 316(2)(n) of the Pensions Act 2004, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.]

[The Secretary of State has consulted such persons as the Secretary of State considers appropriate in accordance with section 317(1) of the Pensions Act 2004.]

The proposed regulation 2 was scrutinised by the Social Security Advisory Committee under the provisions of section 173 of the Social Security Administration Act 1992(5). The Committee decided that it did not require the provision to be formally referred to it for the preparation of a report to the Secretary of State and, accordingly, it did not conduct a public consultation exercise upon the proposal.

Citation, commencement and application

1.—a. These Regulations may be cited as the Financial Assistance Scheme and Incapacity Benefit (Miscellaneous Amendments) Regulations 2009 and shall come into force on XXX 2009.

(1) Regulation 2 does not apply in relation to Northern Ireland.

(3) 1992 c.4. Section 30DD was inserted by section 63 of the Welfare Reform and Pensions Act 1999 (c.30) and amended by S.I.s 2006/343 and 745.
(4) 2004 c.35. Section 190 was modified by S.I. 2005/1986 and section 286 was amended by section 18(2) and (3) of the Pensions Act 2007 (c.22) and modified by S.I. 2005/441. Section 318(1) is cited because of the meanings it gives to “prescribed” and “regulations”.
(5) 1992 c.5.

Amendment of the Social Security (Incapacity Benefit) Regulations 1994

2. [Incapacity Benefit amendment.]

Amendment of the Financial Assistance Scheme Regulations 2005

3. The Financial Assistance Scheme Regulations 2005⁽⁶⁾ are amended in accordance with the following regulations.

4.—b. Regulation 17 (annual payments) is amended in accordance with this regulation.

(1) In paragraph (2)⁽⁷⁾, for “or (3A)” substitute “, (3A) or (3C) or regulation 17C”.

(2) In paragraph (3)⁽⁸⁾—

(a) after “qualifying member is receiving” insert “a payment under paragraph (3C) or”, and

(b) after “payment under regulation 17B(2)” insert “or an annual payment under regulation 17C”.

(3) After paragraph (3B)⁽⁹⁾, insert—

“(3C) Except where regulation 17C applies, a qualifying member is entitled to an annual payment determined in accordance with Schedule 2 where—

(a) he or she makes a written request for such a payment;

(b) he or she is receiving—

(i) no payments under these Regulations; or

(ii) only payments for a survivor by virtue of paragraph (4), regulation 17A(3), 17B(2)(b) or 18(4); and

(c) the scheme manager is satisfied that the qualifying member meets the conditions in paragraph (3D).

(3D) The conditions in this paragraph are that the qualifying member—

(a) has attained the age of 55;

(b) suffers from a progressive disease and as a consequence—

(i) cannot reasonably be expected to die within six months; and

(ii) can reasonably be expected to die within five years;

(c) is unable to work due to ill health and is likely to continue to be so unable to work until normal retirement age; and

(d) is not a qualifying member by virtue of regulation 15(5).

(3E) The date from which a qualifying member is entitled to an annual payment under paragraph (3C) is the date on which the scheme manager receives the written request mentioned in paragraph (3C)(a).”.

5.—c. Regulation 17A (ill health payments)⁽¹⁰⁾ is amended in accordance with this regulation.

(1) In paragraph (1), for “or (3)” substitute “, (3) or (3C) or 17C”.

(2) In paragraph (6), after “paragraph (7)” insert “and regulation 17C(7)”.

6.—d. Regulation 17B (interim ill health payments)⁽¹¹⁾ is amended in accordance with this regulation.

(1) In paragraph (2), for “The scheme manager” substitute “Except where regulation 17C(8)(b)(i) applies, the scheme manager”.

7. After regulation 17B, insert—

⁽⁶⁾ S.I. 2005/1986.

⁽⁷⁾ Paragraph (2) was amended by S.I.s 2008/1432 and 1903.

⁽⁸⁾ Paragraph (3) was amended by S.I.s 2005/3256 and 2008/1903.

⁽⁹⁾ Paragraph (3B) was inserted by S.I. 2008/1432.

⁽¹⁰⁾ Regulation 17A was inserted by S.I. 2008/1903.

⁽¹¹⁾ Regulation 17B was inserted by S.I. 2008/1903.

“Annual payments for certain applications between [date these Regulations come into force] and [date these Regulations come into force + one year]

17C.—(1) A qualifying member is entitled to an annual payment determined in accordance with Schedule 2 where the conditions in paragraphs (2), (3) and (4) are met.

(2) The condition in this paragraph is that the qualifying member makes a written request for an annual payment—

- (a) on or after [date these Regulations come into force]; and
- (b) before [date these Regulations come into force + one year].

(3) The conditions in this paragraph are that the scheme manager is satisfied that the qualifying member—

- (a) has attained the age of 55;
- (b) suffers from a progressive disease and as a consequence can reasonably be expected to die within five years;
- (c) is unable to work due to ill health and is likely to continue to be so unable to work until normal retirement age; and
- (d) is not a qualifying member by virtue of regulation 15(5).

(4) The condition in this paragraph is that, on [date these Regulations come into force], the qualifying member is receiving—

- (a) no payments under these Regulations;
- (b) only payments for a survivor by virtue of regulation 17(4), 17A(3), 17B(2)(b) or 18(4);
- (c) an ill health payment under regulation 17A(1);
- (d) an interim ill health payment under regulation 17B(2);
- (e) an annual payment for terminal illness under regulation 17(3); or
- (f) an initial payment for terminal illness by virtue of regulation 18(1)(a)(ii).

(5) The date from which a qualifying member is entitled to an annual payment under this regulation is—

- (a) where the scheme manager is satisfied that the conditions in paragraph (3) were met before the date on which he or she receives the written request mentioned in paragraph (2), whichever is the later of—
 - (i) the date on which the scheme manager is satisfied that the conditions in paragraph (3) would first have been met; or
 - (ii) 14th May 2004; or
- (b) in all other cases, the date on which the scheme manager receives the written request mentioned in paragraph (2).

(6) Paragraphs (4) to (7) of regulation 17 apply to annual payments made under this regulation.

(7) Paragraph (8) applies where, on [date these Regulations come into force], the qualifying member is receiving a payment mentioned in paragraph (4)(c) to (f).

(8) Where this paragraph applies, from the date on which the first payment under this regulation is made—

- (a) the qualifying member is not entitled to—
 - (i) an annual payment for terminal illness under regulation 17(3); or
 - (ii) an ill health payment under regulation 17A(1); and
- (b) the scheme manager may not make—
 - (i) an interim ill health payment under regulation 17B(2); or
 - (ii) an initial payment for terminal illness by virtue of regulation 18(1)(a)(ii) and (4).”.

8.—e. Regulation 18 (initial payments)(12) is amended in accordance with this regulation.

(1) In paragraph (1), after sub-paragraph (aa) insert—

“(ab) the scheme manager—

- (i) has received an application under regulation 17(3C)(a) or 17C(2) from a qualifying member of that scheme; and
- (ii) is satisfied that the member is entitled to a payment under regulation 17(3C) or 17C; or”.

(2) In paragraph (4), for “The scheme manager” substitute “Except where regulation 17C(8)(b)(ii) applies, the scheme manager”.

9.—f. Schedule 2 (determination of annual and initial payments) is amended in accordance with this regulation.

(1) After paragraph 5 (survivors of qualifying members) insert—

“Payment for an entitlement under regulation 17C

5A.—(1) This paragraph applies where a qualifying member is entitled to an annual payment under regulation 17C for a period during which he or she has previously received a relevant payment.

(2) The annual payment payable to a qualifying member to whom this paragraph applies is determined in accordance with this Schedule.

(3) For any period in which an annual payment under regulation 17C is due to be paid and a relevant payment has previously been paid, the relevant payment is treated as a payment on account of the annual payment under regulation 17C.

(4) Where the amount of the relevant payment so treated equals the amount of the annual payment payable under paragraph (2), no further payment under regulation 17C is due to the qualifying member.

(5) In this paragraph, “relevant payment” means—

- (a) an ill health payment under regulation 17A(1);
- (b) an interim ill health payment under regulation 17B(2);
- (c) an annual payment for terminal illness under regulation 17(3);
- (d) an initial payment for terminal illness by virtue of regulation 18(1)(a)(ii).”.

Amendment of the Financial Assistance Scheme (Internal Review) Regulations 2005

10.—g. The Financial Assistance Scheme (Internal Review) Regulations 2005(13) are amended in accordance with this regulation.

(1) In regulation 2 (reviewable determinations)(14)—

(a) in paragraph (1)—

- (i) at the end of sub-paragraph (f), omit “and”, and
- (ii) at the end of sub-paragraph (g) insert—

“; or

(h) whether or not the scheme manager is satisfied that a qualifying member is entitled to an annual payment under regulation 17(3C) or 17C or—

- (i) is unable to work due to ill health;
- (ii) is likely to continue to be so unable to work until normal retirement age; and

(12) Relevant amending instruments are S.I.s 2005/3256, 2006/3370, 2007/3581 and 2008/1432.

(13) S.I. 2005/1994. Relevant amending instrument is S.I. 2006/3370.

(14) Regulation 2 was amended by S.I.s 2005/3256, 2006/3370 and 2008/1903.

(iii) suffers from a progressive disease and as a consequence can reasonably be expected to die within five years but, as appropriate, not within six months, for the purposes of an initial payment under regulation 18(1)(ab) (“reduced life expectancy eligibility”).”.

(b) in paragraph (2), after “member assessment” insert “, reduced life expectancy eligibility”.

(2) In—

- (a) regulation 3(1)(b),
- (b) regulation 5(1)(c)(ii),
- (c) regulation 6(1)(b),
- (d) regulation 11(2), and
- (e) regulation 16(1)(b) and (2)(b),

after “ill health eligibility”(15), insert “, reduced life expectancy eligibility”.

Amendment of the Financial Assistance Scheme (Provision of Information and Administration of Payments) Regulations 2005

11.—h. The Financial Assistance Scheme (Provision of Information and Administration of Payments) Regulations 2005(16) are amended in accordance with this regulation.

(1) In Schedule 1 (information to be provided by appropriate persons) in paragraph 1(2), after the fifth item of the table insert a sixth item containing—

- (a) in column 1, the words “The scheme manager”;
- (b) in column 2, the words “In relation to a written request under regulation 17(3C)(a) or 17C(2) of the FAS Regulations, medical evidence about the qualifying member’s reduced life expectancy.”; and
- (c) in column 3, the words “The period of 14 days beginning with the date on which the scheme manager requests the information.”.

(2) In Schedule 2 (information to be provided by beneficiaries and potential beneficiaries) in paragraph 1, after the eighth item of the table insert a ninth item containing—

- (a) in column 1, the words “Any qualifying member who makes a written request under regulation 17(3C)(a) or 17C(2) of the FAS Regulations”;
- (b) in column 2, the words “Medical evidence about the qualifying member’s reduced life expectancy for the purposes of that regulation”; and
- (c) in column 3, the words “The period of 14 days beginning with the date on which the scheme manager requests the information.”.

Amendment of the Financial Assistance Scheme (Appeals) Regulations 2005

12.—i. The Financial Assistance Scheme (Appeals) Regulations 2005(17) are amended in accordance with this regulation.

(1) In regulation 2(interpretation), after the definition of “qualifying pension scheme” insert—

““reduced life expectancy eligibility decision” means a review decision made by the scheme manager under the FAS Internal Review Regulations which relates to a determination as to whether or not the scheme manager is satisfied that a qualifying member is entitled to an annual payment under regulation 17(3C) or 17C of the FAS Regulations or—

- (i) is unable to work due to ill health;
- (ii) is likely to continue to be so unable to work until normal retirement age; and

(15) Each regulation referred to in this paragraph was amended by S.I.s 2005/3256, 2006/3370 and 2008/1903.

(16) S.I. 2005/2189. Relevant amending instrument is S.I. 2005/3256.

(17) S.I. 2005/3273. Relevant amending instruments are S.I.s 2006/3370 and 2008/1903.

(iii) suffers from a progressive disease and as a consequence can reasonably be expected to die within five years but, as appropriate, not within six months,

for the purposes of an initial payment under regulation 18(1)(ab) of those Regulations;”.

(2) In regulation 6(2)(b) (notice of appeal), after “a member eligibility decision” insert “, a reduced life expectancy eligibility decision”.

(3) In regulation 17(4)(a) (time and place of oral hearings), after “a member eligibility decision” insert “, a reduced life expectancy eligibility decision”.

Signed by authority of the Secretary of State for Work and Pensions.

Date

Name
Parliamentary Under-Secretary of State,
Department for Work and Pensions

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Social Security (Incapacity Benefit) Regulations 1994 (S.I. 1994/2946) and the Financial Assistance Scheme Regulations 2005 (S.I. 2005/1986) (“the FAS Regulations”) [...].

[...]

An impact assessment has not been published for this instrument as it has only a negligible impact on the private and voluntary sectors.

Annex A - Approaches considered for assessing reduced life expectancy

The intention of the test is to identify a small number of people who have a significantly reduced life expectancy as a result of a progressive disease.

In deciding on the approach to determining who would be entitled to reduced life expectancy payments we have considered a number of different approaches before settling on a test that a person's life expectancy is likely to be limited to five years or less. The following summarises the other approaches considered and rejected.

A – Bespoke actuarial adjustment

Currently early access to FAS on grounds of ill-health leads to actuarially reduced payments. We considered whether it was possible to adjust the factors to take into account the different life expectancies which people may have as a result of an illness that was likely to lead to a shorter life.

After considering how this could operate, and after consulting those who offer annuities on that basis, we concluded that it would be difficult and administratively complex to operate a legal framework and operational processes which would allow adjustments to the rate in payment based on an individual's life expectancy. It would be particularly difficult to do this fairly across the board and would require medical advisors to look far into the future to determine the likely impact on life expectancy.

B – Proportional impact on life expectancy

We considered whether we could frame a test of reduced life expectancy around the proportion of a person's life expectancy which they might expect to lose. For example if the test was that a person who had less than 50% of his normal life expectancy a man who was 59 and might normally expect to live to 82 was unlikely to live beyond 70 his life expectancy would be less than 50% of normal (11 years instead of 23) and he would qualify.

However, medical advice was that it would be extremely difficult, and very unreliable to look what in most cases would be more than 10 years into the future. We considered whether a percentage other than 50% was appropriate, for example 25%, however this leads to similar results to the preferred option but is much more complex to operate.