

EXPLANATORY MEMORANDUM TO

THE FINANCIAL ASSISTANCE SCHEME (MISCELLANEOUS PROVISIONS) REGULATIONS 2009

[2009] No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Financial Assistance Scheme provides financial assistance to members of certain occupational pension schemes who have lost part or all of their pensions as a consequence of their scheme ending without having enough money to pay full pension benefits. These Regulations will make certain changes to the structure of the financial assistance paid by the Financial Assistance Scheme and confer responsibility for the management of the Financial Assistance Scheme on the Board of the Pension Protection Fund.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 In December 2007 the Government announced a significant extension to the structure of the financial assistance offered by the Financial Assistance Scheme. The Government also announced that it would take in all the available residual assets in the affected schemes in order to help fund the enhanced assistance payments. It was subsequently announced that these changes would be implemented by a series of amending regulations. Some of these changes have already been made through two sets of regulations: The Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2008 and The Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008.

4.2 These Regulations will make the final changes required to payments to those qualifying members who are not members of a scheme which will be transferring its assets to government. In addition they will confer responsibility for managing and operating the Financial Assistance Scheme on the Board of the Pension Protection Fund. The Regulations will also make some administrative changes which the operation of the Scheme has shown would be desirable.

4.3 It is intended that a further set of regulations will be laid before Parliament at the end of 2009 to deal with the final parts of the December 2007 announcement, including the transfer of remaining pension scheme assets to government.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State, Lord McKenzie of Luton has made the following statement regarding Human Rights:

In my view the provisions of the Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2009 are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 It was announced on 14 May 2004 that the Government proposed to establish a Financial Assistance Scheme to help members of defined benefit occupational pension schemes where their scheme had wound up significantly underfunded because of employer insolvency and, as a result, those members had lost part or all of their accrued rights.

7.2 The Financial Assistance Scheme operates as a top-up system: the schemes discharge their liability to the member (by buying an annuity or otherwise with the remaining assets) and the Financial Assistance Scheme tops up that amount to a specified limit. At the outset the Scheme was limited to schemes that started winding up between 1 January 1997 and 5 April 2005 and assistance was paid from age 65 and only to those who were within three years of their normal retirement age on 14 May 2004. The Scheme has been extensively revised on a number of occasions since 2004, increasing the number of individuals who can be paid and the level and type of payments provided.

7.3 In November 2004 the Parliamentary Ombudsman began an investigation into complaints that the Department for Work and Pensions had misled people as to the security of their pension schemes. The Ombudsman laid a report before Parliament in March 2006. The Public Administration Select Committee considered this Report, taking evidence in May and June 2006. The Committee's report was published on 30 July 2006.

7.4 In April 2007, a review was set up to consider whether an alternative treatment of the residual funds in affected pension schemes could supplement the committed Government funding of the Financial Assistance Scheme. The results of this review were published in December 2007.

7.5 Acting on the recommendations of that report the then Secretary of State for Work and Pensions announced, on 17 December 2007, that government would take in all the available residual assets in the affected schemes and make associated payments as they fall due. A range of enhancements was also announced to the scheme. These Regulations are part of the ongoing programme of legislation to implement in full the changes announced in December 2007.

- *The changes*

Indexation

7.6 At present assistance is flat rate. These Regulations will allow for assistance to be indexed (ie. increased in payment) annually. The increases will be paid on that part

of the assistance which relates to service in the qualifying pension scheme from 6 April 1997. The amount of the increase will be the lower of the level of the Retail Prices Index and 2.5 per cent. Increases will apply from 1 January each year after assistance payments begin. Should the Retail Prices Index fall below 0%, there will be no increase in that year, but the assistance in payment will not reduce. Initial payments (paid to beneficiaries before final assistance payments can be calculated, usually because the scheme is still winding-up) will receive similar indexation under these Regulations.

Maximum limit

7.7 Assistance is 90 per cent of a qualifying member's accrued pension as at the date the scheme began to wind-up, revalued to the date of entitlement to assistance, less any amount payable by the pension scheme. However, where 90 per cent is higher than an amount specified in legislation (currently £26,000) the amount payable is limited to that specified amount. These Regulations will increase the maximum level of assistance payable from 1 April 2007 from £26,000 to £26,936 per annum. They will also allow for this amount to be increased annually in the April of each subsequent year by the level of any increase in the Retail Prices Index. Should the Retail Prices Index fall below 0%, there will be no increase in that year, but the maximum limit will not reduce.

Scheme pension rights accrued in respect of different retirement dates

7.8 Except where assistance is accessed early on the grounds of ill-health, entitlement to assistance begins on a qualifying member's normal retirement age - the age recorded in the scheme rules at which the member would normally retire, subject to a lower limit of age 60 and an upper limit of age 65. Some qualifying members may have accrued rights in their pension scheme based on a different age, possibly because the scheme changed its normal retirement age while the person was still an active member of that scheme. Whilst assistance will continue to be paid from a single date, these Regulations will allow for accruals at different ages to be treated in a different way than the current calculation. Assistance will be increased where part of a scheme pension has been accrued to an age earlier than the normal retirement age; assistance will be reduced where part of a scheme pension has been accrued to an age later than the normal retirement age. Both increases and decreases will be calculated on an actuarial basis to ensure that assistance is based on the full value of qualifying members' accrued rights.

Step downs

7.9 A small number of qualifying schemes have scheme rules which reduce the rate of expected pension at some point after it is put into payment. The most common example is where a man has a scheme retirement age of 60, but the amount paid from that age goes down when his state retirement pension becomes due at age 65. Where the scheme buys an annuity for these members during wind-up, that annuity may follow this pattern or smooth out the changes across the lifetime of the annuity.

7.10 These Regulations will allow assistance to follow the pattern of the annuity when calculating the assistance due as a top-up. Where that annuity has had the step smoothed across the qualifying member's expected lifetime, his assistance will also be calculated in this manner. Where the annuity goes down at some point after payment begins, his assistance will follow that pattern.

Assistance payments to survivors and surviving dependants

7.11 Where a person who qualifies (or would have qualified) for financial assistance dies, payments are currently made to a surviving spouse or civil partner. These Regulations extend the categories of people who can receive survivor payments.

7.12 They provide for payments to be made to:

(a) a surviving partner (a person who is not married to, or in a civil partnership with, the member, but who was living with the member as if they were husband and wife or as if they were civil partners), who was living with the member at the date of the member's death, where the scheme allowed for payments to such a partner and either-

(i) the member nominated that partner, or

(ii) if there has been no nomination, and there is no surviving spouse or civil partner, the surviving partner was financially dependent on the deceased member.

7.13 Payments can also be made to surviving dependants. A surviving dependant is any child of the deceased member's family who was financially dependent on the deceased member and who is either under the age of 18, or over 18 and under 23 and still on a relevant full-time educational or vocational course or unable to work full-time as a result of a disability.

7.14 Payments to the spouse, civil partner or surviving partner will be one half of 90 per cent of the qualifying member's gross assistance (that is, the qualifying member's accrued pension at the date the scheme began to wind-up, revalued to the date of entitlement to assistance) subject to the maximum limit, less any scheme payments made to the survivor. There is currently a distinction in the way survivor payments are made depending on whether the member dies before or after the scheme has discharged its liability to them. The revised standard approach will prevent anomalies arising as a result of the point at which the member dies.

7.15 Payments to surviving dependants are calculated by reference to 90 per cent of the qualifying member's expected pension (subject to the maximum limit) and will depend on the number of surviving dependants and whether a payment is also being made to a spouse, civil partner or surviving partner.

7.15.1 where there is a survivor payment due to a spouse, civil partner or surviving partner:

(a) one surviving dependant is paid 25 per cent of the member's gross assistance (subject to the maximum limit) less any actual pension the surviving dependant is receiving from the pension scheme;

(b) two or more surviving dependants have an equal share of 50 per cent of the member's gross assistance (subject to the maximum limit) less the total amount of any pensions the surviving dependants are receiving from the pension scheme.

7.15.2 where no survivor payment is due to a spouse, civil partner or surviving partner:

- (a) one surviving dependant is paid 50 per cent of the member's gross assistance (subject to the maximum limit) less any actual pension the surviving dependant is receiving from the pension scheme;
- (b) two or more surviving dependants have an equal share of 100 per cent of the member's expected pension (subject to the maximum limit) less the total amount of any pensions the surviving dependants are receiving from the pension scheme.

7.16 Where a payment to a surviving dependant is being made and that surviving dependant subsequently ceases to be entitled (for instance, because the surviving dependant reaches the age of 18 or, where relevant, 23) the total payments due to the children are re-allocated, increasing the payments to the remaining eligible children.

7.17 The Regulations will also allow for the survivor payment due to a spouse to be shared between the spouses where the deceased member was a party to a legally recognised polygamous marriage.

Bringing annuities to account

7.18 The current calculation of financial assistance deducts the actual pension the member will get from 90 per cent of the expected pension. The amount of the actual pension is currently provided as at a particular date (the 'certification date') which can be a date before the member reaches retirement. There are two difficulties in relation to this approach:

- where the member has yet to retire, the actual pension quoted is likely to be a different amount to the pension the individual ends up actually receiving (for instance anomalies arise where the revaluation that applies to the actual pension is different from the revaluation that FAS applies to the expected pension as a result of different revaluation rates up to retirement); and
- the annuity might be indexed in payment, but this is not reflected in the assistance calculation.

7.19 The amendment in these Regulations allows for the actual amount paid to the member as at their normal retirement age to be brought to account in the assistance calculation. This ensures a more consistent treatment.

7.20 At present assistance is paid only as a top-up. If this top-up was increased without any regard to the annuity, the amount of indexation someone gets would be dependent on the proportion covered by the assistance. Two individuals could have had the same share of pension scheme assets, but end up with different outcomes, because one scheme chose to buy indexation in its annuities and the other did not. Therefore, these Regulations also allow for future increases in the amount of the annuity to be reflected in the assistance calculation.

Transitional protection

7.21 Some people are already in receipt of their final assistance entitlement calculated under the current Regulations. (Others receive initial or interim payments until the pension scheme has determined exactly how much of their entitlement can be paid). If the changes in these Regulations were applied to them, some beneficiaries could find that their entitlement would go down.

7.22 These Regulations make transitional provision where a beneficiary has received an instalment of the following final payments:

- an annual payment (including payments on the grounds of terminal illness or severe ill-health ;
- an ill-health payment; or
- a survivor payment

and that amount calculated under the current Regulations is higher than the amount which would be calculated under these Regulations.

7.23 No transitional provision is made for anyone in receipt of initial payments or interim ill-health payments (including interim ill-health payments and initial payments to survivors) with one exception (see below at paragraphs 7.27 and 7.28). Initial payments and interim ill-health payments are payments on account of final entitlement and as such are always subject to revision.

7.24 Where this transitional protection applies, the amount in payment at the day the Regulations come into force will remain in payment. Where the qualifying member is entitled to indexation on their entitlement (or some other increase) this will not be paid until their entitlement exceeds the amount transitionally protected.

7.25 Where a qualifying member, who is in receipt of payments to which the transitional provisions apply, dies before those transitional provisions have been fully eroded, their survivor and any surviving dependant will receive assistance based on a proportion of that protected amount and it will then erode in the same way as for the deceased qualifying member.

7.26 The FAS will be paying surviving partners as well as surviving spouses and civil partners. It is possible that, once these Regulations come into force, a surviving partner will qualify for a payment where the FAS is already paying a surviving spouse or civil partner. Where this occurs, the surviving spouse or civil partner will continue to be entitled under transitional arrangements. In this case, because the Regulations are protecting entitlement, not the amount of the payment, amounts may increase, for instance, where indexation is applicable.

7.27 On 4 June 2008 amendments to the FAS Regulations came into force which moved the date of entitlement from age 65 to the member's normal retirement age. Where a qualifying member had a normal retirement age earlier than age 65, their entitlement was re-assessed to the earlier date. This would have meant that the expected pension was revalued over a shorter period (to the NRA, instead of age 65) which could have meant, in turn, that the amount of the payment due to the qualifying member decreased, albeit now payable from an earlier date.

7.28 Where this occurred and where, because of the operation of the other FAS changes made at that time, no arrears were payable, the amount in payment at the time those amendments came into force - both annual and initial payments - was protected. These Regulations maintain that protection.

Reconciliation of interim and initial payments

7.29 When a qualifying member reaches his retirement age before the pension scheme has calculated exactly how much it can pay him, the pension scheme normally makes pension payments on account of entitlement - interim pensions. The FAS can, where necessary, also make payments on account of assistance entitlement - initial

payments. Once a qualifying member's exact entitlement from the scheme and/or the FAS can be calculated, there is a need to reconcile past payments with this entitlement, to ensure that all qualifying members receive the correct amount of assistance throughout the period of their entitlement taken as a whole.

7.30 These Regulations will allow the FAS scheme manager to take into account the amount of pension scheme interim payments made to the member when calculating the amount of actual pension to be deducted from the final assistance payments so that, over the individual's lifetime, the correct level of payments will have been made.

Payment periods

7.31 Currently assistance must be paid in monthly instalments and is paid three weeks in arrears and one week in advance on the 21st of each month. These Regulations will allow the FAS scheme manager to make payments for other instalment periods, but at least annually, and will allow for payments in advance or in arrears, where this would appear to be sensible.

Payments when entitlement ceases

7.32 Where a person ceases to be entitled on, for instance, the 23rd of the month an overpayment is inevitable, because the FAS cannot be notified in time for the payment to be stopped. This occurs mostly where entitlement ends on the death of the qualifying member.

7.33 These Regulations allow for an individual to be entitled to the whole instalment, where entitlement ceases within a particular payment period, thus preventing an overpayment arising. In cases where entitlement ends because of the death of the member, this will stop the FAS scheme manager from having to decide whether to recover a small overpayment from the deceased member's estate.

Managing the Financial Assistance Scheme

7.34 Currently the Financial Assistance Scheme is managed and operated by the Department for Work and Pensions from an Operational Unit based in York. The changes announced in December 2007 are to be funded, in part, by taking into government the assets remaining in the schemes which qualify for the Financial Assistance Scheme. This has implications for the way the Scheme operates, as this is not an area with which the current staff in the Operational Unit are familiar.

7.35 As a consequence, these Regulations confer management responsibility for the Financial Assistance Scheme, including the administration of the assistance payments, on the Board of the Pension Protection Fund, who are experienced in the range of skills needed to run the enhanced Scheme. The Board will become the Financial Assistance Scheme's scheme manager.

7.36 The Regulations also cover certain issues consequent on this decision. These include:

- 7.36.1 allowing the Board to delegate its functions as FAS scheme manager to its staff and, in respect of certain functions, to a third party provider of services; and allowing the Board, as the FAS scheme manager, to access social security and

7.36.2 FAS information held by the DWP where it is needed to administer the FAS effectively and, if the Board uses a third party to administer part of the FAS, to allow that third party access to the same DWP information, provided it is relevant and necessary for their work.

Information requirements

7.37 These Regulations also make changes to the type of information schemes must provide to the FAS, so that the changes described above can be implemented. They also allow for the FAS scheme manager to obtain other information needed to prepare for the transfer of the remaining assets in qualifying schemes to government. The Regulations also determine when this information should be provided to the FAS scheme manager.

7.38 These new information requirements include a requirement for pension scheme trustees and others involved in the administration of FAS qualifying pension schemes to inform the scheme manager of any contemplated significant changes in the investment of the pension scheme's assets and any contemplated legal actions or proceedings.

7.39 The Board of the PPF has committed to ensuring that appropriate guidance will be available to trustees and others to whom these new requirements apply from the date these Regulations come into force. This guidance will also be available on the PPF website. The PPF are already working with FAS qualifying schemes through their current FAS-related functions and each scheme has, and will continue to have, a caseworker who will be an additional resource to help those to whom the obligation applies determine whether any change is, in the context of their individual scheme, a significant change. Whether or not a change is "significant" will depend on a range of factors including the nature of the change, the size of the pension scheme and the level of the scheme's residual assets. The caseworker will be available to assist any person on whom the obligation bites and who needs to consider whether a change could be considered a significant change, taking into account all the circumstances.

7.40 The caseworker maintains monthly contact with scheme trustees through face-to-face meetings, teleconferences and electronic communications. Caseworkers provide support to trustees and others who work with the FAS qualifying pension schemes through providing information and guidance, and have a monitoring role to ensure that trustees meet their obligations and provide the PPF with the right information at the right time.

7.41 In addition, the time period required for providing information in respect of contemplated changes or contemplated legal proceedings is the period of 28 days beginning on the day on which the appropriate person becomes aware of any such contemplated changes. As a result, the obligation to provide the information could not apply to a person who was not aware that changes were being contemplated. The PPF caseworkers will also be able to assist those who are unsure whether this obligation might apply to them at any time.

Reviews and appeals

7.42 The Financial Assistance Scheme (Internal Review) Regulations 2005 and the Financial Assistance Scheme (Appeals) Regulations 2005 have been amended to ensure that surviving dependants can seek an internal review and appeal of the amount of their assistance payments in the same way as other beneficiaries. Surviving partners will be

able to seek such an internal review and appeal without the need for an amendment (as a result of the definition of “survivor” in those Regulations). In addition, an amendment has also been made to give all survivors and surviving dependants the right to request an internal review, and subsequent appeal, of the determination made by the scheme manager in respect of their eligibility as a survivor or surviving dependant.

7.43 As the Regulations provide for assistance payments to surviving dependants, an amendment has been made to the Financial Assistance Scheme (Internal Review) Regulations 2005 to provide for the FAS scheme manager may to be able to treat a parent or a person with parental responsibility as the representative of a child aged less than 18 years.

- ***Consolidation***

7.44 This set of Regulations amends the Financial Assistance Scheme Regulations 2005. They also amend the Financial Assistance Scheme (Provision of Information and Administration of Payments) Regulations 2005 (S.I. 2005/2189, as amended), the Financial Assistance Scheme (Internal Review) Regulations 2005 (S.I. 2005/1994, as amended), the Financial Assistance Scheme (Appeals) Regulations (S.I. 2005/3273, as amended) and the Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2008 (S.I. 2008/1432) in relation to the financial assistance scheme (“the FAS”).

7.45 As the changes in this set of Regulations are extensive and complex a consolidated version of the principal set of Regulations – the Financial Assistance Scheme Regulations 2005 - incorporating the changes made by these Regulations, can be found at: <http://www.dwp.gov.uk/lifeevent/penret/penreform/fas> However, these Regulations (Parts 3 and 4) also make changes to the Regulations on review, appeals and information requirements which are not provided in a consolidated format. In addition, the transitional provisions (Parts 5 and 6) stand alone.

7.46 Consolidated versions of the all the Regulations amended by these Regulations will be available in the Law Relating to Social Security (Blue Volumes). These can be found at <http://www.dwp.gov.uk/advisers/docs/lawvols/bluevol/index.asp>. These are updated quarterly and are available on the internet at no cost to the public.

8. Consultation outcome

8.1 As the Regulations were made more than six months after the coming into force of the provisions of the Pensions Act 2004 under which the Regulations are made, the Secretary of State was required to consult such persons as he considered appropriate before making them.

8.2 The consultation ran from 11 February 2009 to 25 March 2009: six weeks. This is a shorter period than 12 weeks normally required for consultation exercises. Since these Regulations form part of a suite implementing the extension to FAS announced in December 2007 on which there has been regular ongoing informal consultation with key stakeholders, the shorter period for formal written consultation was considered sufficient to allow for meaningful consultation.

8.3 A total of 148 responses to the consultation were received, of which 30 were from organisations involved in pensions. Not all the responses dealt with all of the proposals outlined in the consultation document.

8.4 All of those who commented agreed with the proposal that the Board of the Pension Protection Fund should manage the Financial Assistance Scheme, although with the caveat that there should be a clear separation of its responsibilities, particularly in relation to costs.

8.5 The majority of responses supported the extension of survivor benefits to partners and dependent children. Comments on the other proposals were more mixed with a significant proportion of the responses saying that the proposals did not go far enough to replace the benefits lost by members of underfunded schemes when those schemes began to wind-up. The Government reiterates that these Regulations are about implementing part of the proposals in the announcement made in December 2007. The Government believes that the current funding is appropriate and any increased costs in one area can only be funded through a decrease elsewhere.

8.6 A more detailed analysis of the consultation outcome has been published and is on the DWP website: <http://www.dwp.gov.uk/lifeevent/penret/penreform/fas/>. The Report details the reactions to the individual proposals and the Government's response.

9. Guidance

9.1 All staff who will be responsible for operating the changes to the Financial Assistance Scheme will be trained in the new provisions. The Financial Assistance Scheme's leaflets and website will be amended to reflect the new provisions. In addition, trustees of the relevant pension schemes will be informed through the Trustee Updates issued by the Financial Assistance Scheme. Guidance will also be provided for trustees and others involved in the administration of the relevant pension schemes on the new information and reporting requirements.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is negligible.

10.3 An impact assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to small business. In order for assistance to be paid to qualifying members of qualifying schemes, trustees of the pension schemes affected need to supply information on the pension scheme and its members. The requirements are the same for all schemes regardless of size.

12. Monitoring & review

12.1 Through the amendments made by these Regulations, the Board of the Pension Protection Fund will be required to provide a report to the Secretary of State for Work and Pensions at the end of each financial year on the operation of the Financial Assistance Scheme including the number of persons who have received payments under the Financial Assistance Scheme Regulations 2005 (as amended) and the total amount of those payments. The first report by the Board must be provided as soon as practicable after 31 March 2010 and annually thereafter. This report will be laid before Parliament when received by the Secretary of State.

12.2 Where any part of that Report raises concerns over the operation of the Financial Assistance Scheme, the Department for Work and Pensions will take the appropriate action, which could include flagging its concerns with the Board or adjusting targets.

12.3 The Government wants qualifying members and their survivors to get the appropriate level of payments at the appropriate time, without inappropriate delay. It will agree with the Board of the Pension Protection Fund appropriate targets to ensure this is achieved. The Board's performance will be monitored by the Department for Work and Pensions to satisfy Ministers that the changes specified in these Regulations are being implemented appropriately, that members and their families are getting the payments the Regulations provide for; and that the relevant elements of the December 2007 announcement are being delivered.

12.4 The Government is planning a further set of draft Regulations for the end of 2009, which will complete the implementation of the December 2007 announcement. When those Regulations are laid before Parliament, the Government will also set out how it will assess the success of implementing the December 2007 announcement.

13. Contact

Pam Bryson at the Department for Work and Pensions - Tel: 020 7712 2445 or email: Pam.Bryson@dwp.gsi.gov.uk - can answer any queries regarding the instrument.