

PENSIONS

Government response to the consultation on

**THE OCCUPATIONAL, PERSONAL AND STAKEHOLDER
PENSIONS (MISCELLANEOUS AMENDMENT) REGULATIONS
2009**

April 2009

DWP Department for
Work and Pensions

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INTRODUCTION

The Occupational, Personal and Stakeholder Pensions (Miscellaneous Amendments) Regulations 2009 (2009/615)

- 1 The consultation on these regulations began on 8th December 2008 and ended on 30th January 2009.
- 2 35 responses to the consultation were received. A list of the respondents is at Annex A. The Department is very grateful to all who contributed to the consultation.
- 3 The Occupational, Personal and Stakeholder Pensions (Miscellaneous Amendments) Regulations 2009 come into effect on 6 April 2009.
- 4 The regulations will be available on OPSI's website at http://www.opsi.gov.uk/si/si2009/uksi_20090615_en_1
- 5 This document is available on the Department's website at <http://www.dwp.gov.uk/consultations/2008/>
- 6 A paper copy of this document can be obtained from:

Andy Sly
3rd Floor, Department for Work and Pensions
The Adelphi
1-11 John Adam Street
London WC2N 6HT
Email: andy.sly@dwp.gsi.gov.uk
- 7 This document describes the policy underpinning the changes being made. Comments on the legislation should not however be taken as an authoritative interpretation of the law. Such an interpretation can only be provided by a court.

RESPONSES TO CONSULTATION

This section summarises the main points made by respondents to the consultation and sets out the Government's response.

Consultation questions

We asked specific questions on two aspects of the draft regulations:

Regulations 3 and 7 (statutory overrides)

We said:

We would be grateful for your views whether there are any types of schemes where it would be inappropriate for the trustees to be able to make use of the power to modify provided by the draft regulations.

Your response:

No-one identified any types of schemes where it would be inappropriate for the trustees to be able to make use of the power to modify.

The Government Response

As none were identified in the course of the consultation, the Government does not propose to explore this issue further.

Regulation 19 (amendments to the Investment Regulations)

We said:

There are clearly other institutions that are, like the Bank of England, exempt from needing authorisation under FSMA 2000 to accept deposits, or which are exempt from requiring authorisation to carry out regulated activity under FSMA 2000 altogether. We need to know, therefore, whether you believe that any of these institutions should also be covered in Regulation 13(3) of the Investment Regulations.

Your response:

Five organisations commented on the proposal to exempt the Bank of England from needing authorisation under FSMA 2000. None of these organisations identified any private sector institutions which they believed should be covered by regulation 13(3).

The Government Response

As the consultation did not result in the identification of any private sector institutions requiring similar exemption to that proposed for the Bank of England, the Government does not intend to explore this issue further.

We said:

The effect of the proposed changes to the Investment Regulations will (with certain exceptions) require the trustees or managers of schemes with employer-related investments in excess of the 5 per cent limit, to instruct their investment managers to liquidate the excess employer stock and use the proceeds to purchase alternative assets. The scheme will bear the one-off cost of the transaction process. We expect the aggregate cost of the removal of the transitional provisions to be the sum of the per-scheme transaction cost across all the affected schemes. Overall, we expect this to be very small as we believe the transaction costs will be low and that only a small number of schemes will be affected. We would be grateful to know if you share this view.

Your response:

A number of respondents considered that there may be potentially significant valuation costs attached to disinvesting in the current economic climate.

The Government's response

A number of other issues were raised in respect of this part of the regulations, and the Government accepts there are complex issues arising from the removal of the current exemptions and the impact that this could have on certain schemes.

The Government has decided to remove these provisions from the Miscellaneous Regulations. This is in order to give the issues raised full and careful consideration and to consider what, if anything, can be done to address them within the scope of the Institutions for Occupational Retirement Provision (IORP) Directive.

The policy proposals

1 - Statutory overrides

Your responses

Eleven organisations commented on the statutory override provisions in regulations 3 and 7.

A number of the respondents expressed concern that:

- the provisions could be used retrospectively;
- there is no requirement for employer consent to any exercise of the modification power;
- the Regulations allowed the potential for **increases** in the rates of indexation or revaluation.

The Government's response

The Government agrees the power to modify a scheme should not be applied retrospectively. The regulations have been amended to expressly provide that modifications can only apply to pension benefits that arise after the modification.

The draft Regulations did not include provision for employer consent on the assumption that trustees would be unlikely to consider reducing the levels of revaluation or indexation unless the employer requested such a change. However, given concerns expressed by a number of respondents, the Government agrees that trustees should only be able to modify scheme rules using this modification power where employers' consent has been obtained. The regulations have been amended accordingly.

The Government also agrees that trustees should not be able to use the modification power to increase revaluation or indexation rates. The regulations have been amended to this effect.

2 - The Contracting-out (Transfer and Transfer Payment) Regulations 1996

The amendment allows certain connected employer transfers and connected employer transfer payments to include a transfer from a scheme which was formerly a salary-related contracted-out scheme.

Your responses

Some respondents suggested that the amendment should be retrospective.

The Government's response

These amendments are made using the powers in section 20(1) of the Pension Schemes Act 1993. Section 20(4) provides that regulations made under subsection (1) shall have effect in relation to transfers whenever made unless they provide that they are only to have effect in relation to transfers which take place after they come into force. The regulations do not provide that they only have effect in relation to future transfers and therefore the amendment will apply to all transfers whenever they are made.

Your responses

Two respondents suggested transfers should also be permitted to a formerly salary related contracted out scheme.

The Government's response

If transfers were permitted to formerly salary related contracted out schemes the requirements imposed on section 9(2B) rights would no longer apply, whereas those rights which are still held in a salary related contracted out scheme would continue to be subject to these requirements. The Government therefore rejects this suggestion.

3 - Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997

Your responses

One respondent queried whether these regulations should be amended to allow assignment of pension credit benefit survivor's benefits and another respondent queried whether contingent dependent's pension could be commuted.

The Government's response

The comments are outside the scope of these regulations, but the Government will consider the issues further.

4 - Member Nominated Directors

Your responses

Three responses were received. One respondent simply welcomed the change and two suggested minor changes to the wording.

The Government's response

The suggested changes have been incorporated into the regulations.

5 - Occupational Pension Schemes (Investment) Regulations

Your responses

Twenty three consultation responses were received in relation to Regulation 19 which introduces changes to the Investment Regulations. Many of the respondents offered comments on how Article 18(1)(f) should be fully transposed into the investment regulations. The great majority of respondents were concerned about the way in which employer related investments in Collective Investment Schemes (CISs) were affected, and other responses were concerned with the impact the changes would have on schemes which had previously benefited from transitional provisions under the Regulations.

The Government's response

Given that the Directive does not have to be finally transposed until September 2010, some of the amendments relating to CISs and the particular transitional provision in question have been removed from these regulations. The Government will look to see if there is a better way of ensuring that the investment regulations fully comply with article 18 of IORP.

Your responses

One organisation believed that the regulations appeared to be erroneous as draft regulation 19(3)(c) deletes the Bank of England exemption inserted as regulation 13(3)(c) by draft regulation 19(3)(b).

The Government's response

Regulation 19 ensures that the current exemption in regulation 13 of the Investment Regulations is brought within the 5% limit required by Article 18(1)(f) by 2010. This exemption allows unlimited employer-related investment of resources in an account with a person who has permission to accept deposits. Paragraph (3)(b) adds the Bank of England to the current exemption and will come into force on 6 April 2009. The exemption in regulation 13 (including that for the Bank of England) will be brought in line with the requirements of 18(1)(f) of IORP when the other changes to the Investment Regulations made by regulation 19 come into force in September 2010.

The Government are content, therefore, that the draft regulations relating to the Bank of England achieve the policy intention.

Your responses

Other concerns were expressed over:

- The removal of the exemption for CISs and the consequential requirement for the trustees to look through the investment of such schemes in the sponsoring employer;
- The impact on Small Self-Administered Schemes;
- The disproportionate effect on schemes that had benefited from either donations or bequests of shares in the sponsoring employer and, consequently, well in excess of the 5% limit imposed by the Directive. It was suggested that shares acquired in this way should not count toward the limit;
- The effect of the changes on trustees using insurance policies issued by regulated insurance companies within the sponsoring employer's group;
- The timetable to which the Miscellaneous Regulations are working. A number of respondents suggested that the complex issues arising from the removal of the current exemptions warranted these provisions being removed and dealt with on a separate track.

The Government Response

The existing exemptions for Small Self-Administered Schemes are set out in regulation 12(1) of the Investment Regulations. This regulation is not being repealed which means that small schemes will continue to be exempt after September 2010.

For insurance companies, there is no intention to stop scheme trustees using insurance policies issued by companies within the employer group. Such policies are not Employer Related Investments under section 40 of the Pensions Act 1995 or under the Investment Regulations. It is only where the premiums paid into the policies are invested in Employer Related Investments that the 5% limit will apply. The objective is simply to ensure that the requirement in regulation 11(e) of the Investment Regulations applies to policies that are issued by an insurance company in the employer's group.

The Government accept there are complex issues arising from the removal of the exemption relating to CISs. Given the sheer weight of the response this has generated and the fact that the changes do not need to come into force until September 2010, the Government has decided to put the removal of the existing exemption for CISs on a separate track. It has also decided to do the same with the transitional provision for schemes with employer-related investments in excess of five per cent and to which regulation 5(2)(d) of the 1992 Regulations applied immediately before 6 April 1997. These provisions were therefore removed from these Miscellaneous Regulations.

This is in order to give the issues raised full and careful consideration and to consider what, if anything, can be done to address them within the scope of the IORP Directive. It should not, though, be taken as an indication that the exemptions are to remain indefinitely, and further changes to remove them may be included in a separate Instrument.

6 - The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006

Your responses

Whilst some respondents voiced support for the introduction of a civil penalty for employers who fail to comply with the requirements to consult about changes to pension schemes, some concerns were also expressed.

In particular, concern was expressed about the perceived lack of clarity in determining when and how a penalty might be applied and in what circumstances.

A number of comments were received about the employer consultation requirement that fall outside the scope of the consultation. DWP will respond to these comments separately.

The Government's response

Deciding what action to take in the event of a report of non-compliance with the consultation requirement is the responsibility of the Pensions Regulator (tPR). tPR is a responsive and risk based regulator that works with the pensions industry and employers to help them comply with their statutory obligations. Their emphasis is on putting things right, and they consider that civil penalties are a last resort used only where it is necessary to emphasise the importance and value of compliance in protecting members' benefits, and to deter future non-compliance.

The application of a civil penalty is subject to a rigorous process. The final decision is made by a Determinations Panel which is separate from the regulator. It has a separately appointed membership and separate legal and administrative support. Its procedures are designed to ensure the panel makes determinations in a totally fair manner by considering all the evidence, showing no bias or prejudice to or against any party, and giving a fair hearing to all parties including the opportunity to state their case and comment on the case put forward by others.

Any determination can be appealed to the Pensions Regulator tribunal. The Pensions Regulator tribunal is the independent body set up to hear appeals on determinations. A party can appeal against the tribunal's decision to the Court of Appeal (or in Scotland, the Court of Session) on a point of law.

The Government's view is that the availability of a civil penalty for breaches of pensions legislation is a well established principle that dates back to the recommendation of the Pensions Law Review Committee in 1993 that "every breach should carry a sanction". The omission of a civil penalty from the original regulations was an oversight that this amendment corrects. Ministers stated publicly during the passage of the Pensions Act 2004 that a civil penalty would be available. The Government has decided to proceed with the introduction of a penalty for failure to comply with the employer consultation requirements.

7 - The Occupational Pension Schemes (Scheme Funding) Regulations 2005

Your Responses

Some responses suggested the draft amendment did not fully address the concerns which had been raised with the current provision as it did not cover the situation where the actuary only set some of the contribution rates under scheme rules.

The Government's response

The draft provision was amended to address these comments.

Other Issues

Registered Pension Schemes (Authorised Payments) Regulations 2009

The consultation Regulations included provisions that are consequential on the Registered Pension Schemes (Authorised Payments) Regulations 2009. They were included on the basis that the Authorised Payments regulations would be finalised in time to ensure the consequential amendments incorporated in these regulations are correct.

As the regulations will not be ready in time all **references to the Registered Pension Schemes (Authorised Payments) Regulations 2009 from the draft Regulations have been removed**. Those provisions will be progressed as a separate Statutory Instrument.

Annex A

Respondents to the Consultation

A.J. Bell Group
ABI
The Actuarial Profession
AON Consulting
The Association of Consulting Actuaries
Association of Pension Lawyers
AXA UK Group Pension Scheme
Baker & McKenzie LLP
Barclays Pension Fund Trustees Ltd
CBI
Eversheds
Fidelity International
FIL Pensions Management
Freshfields Bruckhaus Deringer's
GMB
HBOS
Hewitt Associates Limited
HMRC
Investment Management Association
J W D Trythall
Lane Clark & Peacock LLP
Mercer
The Pensions Management Institute
Pensions Ombudsman
Pinsent Mason LLP
Prudential
Russell-Hurst Pension scheme
Sacker and Partners LLP
Society of Pensions Consultants
Slaughter & May
Travers Smith
TUC
Unite the Union
University & College Union
Watson Wyatt