

Pensions

Consultation on Draft Regulations

The Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005

August 2005

DWP Department for
Work and Pensions

Contents

- **Part One – Foreword**
 - **Introduction**
 - **Website**
 - **How to respond**
 - **Impact**
- **Part Two – The Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005**
 - **Background**
 - **Scope of the requirement**
 - **Commentary on the draft regulations**
- **Part Three – Draft regulations**
- **Annex A – List of those consulted**
- **Annex B - Wording of Article 17 of Directive 2003/41/EC**
- **Annex C - Articles 27 and 28 of Directive 2002/83/EC**

Part One – Foreword

Introduction

1. This consultation document seeks views on the draft Statutory Instruments for the Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005.
2. These regulations are to be made under section 2(2) of the European Communities Act 1972. This section provides for secondary legislation to implement EC Directives.
3. The purpose of this paper is to summarise these draft regulations and to seek your views. It should be especially noted that these regulations are work in progress and subject to change dependent on the responses we receive.

DWP website

4. The consultation document is available on the Department's website at:

<http://www.dwp.gov.uk/consultations/2005/>

5. Because of the technical nature of this document, and the deadlines involved, Ministers have decided that it is not appropriate to publish it under the provisions of the Cabinet Office Code of Practice on consultation. It does, however, apply best practice from the Code.

How to respond

6. The consultation period begins on **09 August**, and closes on **19 September 2005**. We would be grateful for your comments on any of the points covered by the regulations. Please ensure that your responses reach us by that date. Please send consultation responses to:

Ulele Mwenitete
Department for Work and Pensions
EU Pensions Policy
The Adelphi
3rd Floor
1-11 John Adam Street
London
WC2N 6HT

Tel: 020 7712 2106

or:

E-mail (ulele.mwenitete@dwp.gsi.gov.uk)

7. Because of the Freedom of Information Act (2000), all information contained in your response including personal information, may be subject to

publication or disclosure. By providing personal information for the purposes 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 be kept confidential, you should explain why as part of your response, although we cannot guarantee to do this. We cannot guarantee confidentiality even if your IT system claims it automatically. More information about the Freedom of Information Act can be found on the website of the Department for Constitutional Affairs - <http://www.dca.gov.uk/foi/guidance/exguide/index.htm>.

8. The Government aims to publish a response to the consultation during the autumn. The response will be on the Department for Work and Pensions' website at <http://www.dwp.gov.uk/consultations>

9. When responding please state whether you are responding as an individual or whether you are representing the views of an organisation. If you are 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.

10. A list of those consulted is attached at Annex A. If you have any suggestions of others who may wish to be involved in this process please contact us.

Impact

11. The Government is not aware of any schemes on which these requirements will impact. This view remains unchanged after the initial consultation on the Directive's requirements undertaken in November 2003, where views were sought on the subject. Therefore a separate Regulatory Impact Assessment on these regulations is not required. An initial assessment of the impact on business, charities or the voluntary sector of the entire Directive is included in the Regulatory Impact Assessment that accompanied the Pensions Act 2004. A copy of that assessment has been placed in the libraries of both Houses of Parliament. Copies may be obtained from the Department for Work and Pensions, Better Regulation Unit, 4th Floor, Adelphi, 1-11 John Adam Street, London WC2N 6HT.

12. The Department values feedback on how well it consults. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact the DWP consultation co-ordinator. In particular please tell us if you feel that the consultation does not satisfy these criteria. Please also make any suggestions as to how the process of consultation could be improved further. Please contact:

Geoff Ashton, DWP Consultation Co-ordinator
5th Floor East, Trevelyan Square, Leeds LS1 6EB
0113 23 27 107

Geoff.Ashton@dwp.gsi.gov.uk

Part 2 - The Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005

Background

13. On 13 May 2003 the European Council of Ministers adopted Directive 2003/41/EC on the Activities and Supervision of Institutions for Occupational Retirement Provision (commonly known as the 'IORP' or 'Occupational Pensions' Directive). This Directive provides a framework for the operation of and supervision of occupational pension schemes. Member States are required to have implemented the provisions of the Directive into national law before 23 September 2005.

14. Article 17 concerns the requirement for schemes to hold 'regulatory own funds' which will act as a buffer to protect pensions, where the institution for pension provision (and not the employer) 'underwrites the liability to cover biometric risk or guarantees a given investment performance or given level of benefits' (the wording of Article 17 is attached at Annex B).

Scope of the requirement

15. The Government understands from the Directive negotiations that this Article was aimed at institutions set up to provide defined pension benefits but where the sponsoring undertaking/employer would bear no liability for that defined benefit. Thus the liability of the employer ends once they pay the agreed contributions to the institution providing the pension, and it is the institution/scheme that underwrites the benefit guarantees and 'biometric risk'¹. Such institutions are most prevalent in the Netherlands.

16. The Government is not aware of any UK schemes which would currently be caught by this provision. However, the UK is still required to implement the provisions as it cannot rule out the possibility that these regulations may apply to some UK schemes, now or in the future.

17. In response to an invitation to comment on whether there were any areas to which the Article 17 requirements would apply in the UK, concern was expressed that the requirement might apply to pension schemes in wind up. It is not the Government's intention that schemes could **become** schemes covered by the requirement during their lifetime: schemes would need to be set up on this basis at the outset. The Government would argue that schemes winding up do not guarantee a given level of benefits, and so would not fall under the scope of these regulations.

Question 1: The Government welcomes further views regarding specific schemes or types of scheme to which these regulations might apply.

¹ Biometric risks are those linked to death, disability or longevity

Commentary on the Draft Regulations

18. This section does not cover all the regulations, but rather only where there is an additional point to make, outside those mentioned in the regulations themselves, and the explanatory note.

Regulation 1 – Citation and Commencement

19. This is a general regulation about the citation and commencement of the regulations. The Government is not yet in a position to provide a definite commencement date, but the legislation is expected to come into force during the last quarter of 2005.

Regulation 3 – Requirement for additional assets

20. Regulation 3 requires schemes where the scheme itself, and not **any** sponsoring undertaking, underwrites the liability to cover against liability for risks linked to death, disability or longevity, or guarantees a given investment performance or a given level of benefits, to hold on a permanent basis additional assets above the technical provisions to serve as a buffer.

21. The regulation also specifies the nature of these additional assets.

Regulation 4 - Calculation of additional assets requirement

22. Regulation 4 lays down the rules to apply for the purposes of calculating the minimum amount of additional assets to form the buffer. The rules are based on those laid down in Articles 27 and 28 of Directive 2002/83/EC (the wording of these Articles is attached at Annex C), as required by Article 17(2) of Directive 2003/41/EC.

Regulation 5 - Modification of Part 3 of the 2004 Act

23. Regulation 5 sets out modifications that change the manner in which Part 3 of the Pensions Act 2004 is to be read for the purposes of schemes subject to these regulations. The overall effect is to require schemes to obtain annual valuations and to put in place a schedule of contributions based on that valuation within 12 months of the effective date of that valuation. Where any valuation identifies a shortfall in the amount of assets required to cover the amount of the technical provisions, schemes must make good that shortfall within 12 months.

Regulation 6 - Certification of additional assets requirement

24. Certification of technical provisions will already be required by the scheme funding regulations 2005 (due to come into force later this year). This regulation requires that, where these regulations apply, the calculation of the Regulatory Own Funds requirement must be certified by an actuary when a scheme valuation is carried out. The certification must take the form of that shown in the Schedule to these regulations.

Regulation 5 requires the actuary to report to the Pensions Regulator if he cannot certify the calculation of the Regulatory Own funds requirement. Section 10 of the Pensions Act 1995 penalties apply to an actuary who fails without reasonable cause to comply with the requirements of Regulation 6.

25. Please note that the wording of the certification is likely to be subject to change pending the finalisation of the Scheme Funding Regulations 2005.

Regulation 10 – Postponement

26. Article 22(3) of the Directive allows Member States to postpone until 23 September 2010 the application of Article 17(1) and (2) of Directive 2003/41/EC to institutions located in their territory which are assessed as at 23 September 2005 not to have the minimum level of regulatory own funds required.

27. Regulation 10 requires schemes wishing and able to postpone application, to inform the employer of the decision within a reasonable period.

28. Please note that schemes wishing to postpone application may not operate cross border (Article 22(4) of the Directive does not allow institutions wishing to operate pension schemes on a cross-border basis², to do so until they comply with all the requirements of the Directive).

Regulation 12 - Improvement Notices and Third Party Notices

29. This regulation adds the Regulatory Own Funds regulations to the list of circumstances in which Improvement and Third Party Notices (sections 13(7) and 14(8) of the Pensions Act 2004) may be issued by the Pensions Regulator.

Regulation 14 - Exemptions

30. As previously stated, the Government is not currently aware of any schemes to which these regulations will apply. However, in the event that such schemes did exist or develop, the Government would expect to take advantage of the latitude offered in Article 5 of the Directive, which permits the exemption of small schemes, and schemes made under statute which have a government guarantee.

31. Please note that a scheme exempted from these regulations cannot undertake cross-border activity.

² Cross-border activity occurs where an occupational pension scheme established in one EU Member State is sponsored by employers in another EU Member State. This concept is further defined in the cross-border regulations which are due to come into force later this year (and which are also currently out for consultation – link: <http://www.dwp.gov.uk/consultations/2005/>).

Question 2: Are there any other schemes for which a theoretical case for exemption from the regulations can be made?

Question 3: Will exempting any of the schemes on the list cause a problem because of the cross-border activity restriction?

Part Three – Draft regulations

STATUTORY INSTRUMENTS

2005 No. []

PENSIONS

**The Occupational Pension Schemes (Regulatory Own Funds)
Regulations 2005**

Made - - - - []
Laid before Parliament []
Coming into force - [2005]

The Secretary of State, being a Minister designated⁽³⁾ for the purposes of section 2(2) of the European Communities Act 1972⁽⁴⁾ in relation to matters relating to personal and occupational pensions, in exercise of the powers conferred by that section, sections 60(2)(h), 223(1)(b), 232, 315(2), 315(5) and 318(1) of the Pensions Act 2004⁽⁵⁾ and all other powers enabling him in that behalf, having consulted with such persons as he considers appropriate⁽⁶⁾, makes the following Regulations.

Citation and commencement

1. These Regulations may be cited as the Occupational Pension Schemes (Regulatory Own Funds) Regulations and shall come into force on 2005.

Interpretation

2. In these Regulations—

“the 1993 Act” means the Pension Schemes Act 1993⁽⁷⁾;

“the 1995 Act” means the Pensions Act 1995⁽⁸⁾;

“the 2004 Act” means the Pensions Act 2004;

“actuarial report” has the meaning given in section 224(2)(c) of the 2004 Act;

⁽³⁾ S.I. 2004/3328.

⁽⁴⁾ 1972 c.68.

⁽⁵⁾ 2004 c.35. Section 318 is cited because of the meaning there given to “modifications”, “prescribed” and “regulations”.

⁽⁶⁾ See section 317 of the Pensions Act 2004 (“the Act”) which provides that the Secretary of State must consult such person as he considers appropriate before making regulations by virtue of the provisions of that Act (other than Part 8). Section 317(2)(c) of that Act provides an exemption to consultation where the regulations are made before the period of six months beginning with the coming into force of the provisions by virtue of which they are made. As these regulations are made after the expiry of the period of six months beginning with the coming into force of section 60(2)(h) of the Pensions Act 2004 (c.35), the requirement for the Secretary of State to consult such persons as he considers appropriate applies.

⁽⁷⁾ 1993 c.48.

⁽⁸⁾ 1995 c.26.

“actuarial valuation” has the meaning given by section 224(2)(a) of the 2004 Act;

“the actuary”, in relation to a scheme, means the individual appointed by the trustees or managers as the actuary of the scheme;

“the Authority” means the Occupational Pensions Regulatory Authority established by section 1 of the 1995 Act⁽⁹⁾;

“biometric risk”⁽¹⁰⁾ means liability risks linked to death, disability and longevity;

“employer” has the meaning given by section 318(1) of the 2004 Act;

“external liabilities” has the meaning given by regulation 4 of the Scheme Funding Regulations 2005;

“the Scheme Funding Regulations” means the Occupational Pension Schemes (Scheme Funding) Regulations 2005**(b)**;

“regulatory own funds requirement” has the meaning given by regulation 3;

“the relevant accounts” of a scheme are audited accounts for the scheme—

- (a) which comply with the requirements imposed under section 41 of the 1995 Act (provision of documents for members), and
- (b) which are prepared for the purpose of an actuarial valuation in respect of a period ending with the effective date of the valuation;

“schedule of contributions” has the meaning given by section 227(2) of the 2004 Act;

“Regulator” has the meaning given by section 1 of the 2004 Act;

“the Taxes Act” means the Income and Corporation Taxes Act 1988;

“technical provisions” has the meaning given by section 222(2) of the 2004 Act;

“statutory funding objective” has the meaning given by section 222(1) of the 2004 Act.

Regulatory own funds requirement

3.—(1) Where an occupational pension scheme, and not any employer in relation to that scheme—

- (a) underwrites any liability to cover against biometric risk;
- (b) guarantees an investment performance; or
- (c) guarantees a level of benefits,

the scheme must hold on a permanent basis additional assets above the aggregate of the scheme’s technical provisions, in order to absorb discrepancies between the anticipated and actual expenses and profits under the scheme (“the regulatory own funds requirement”).

- (2) The additional assets required under paragraph (1) must be—
 - (i) no less than the amount calculated in accordance with regulation 4, and
 - (ii)** free of all foreseeable liabilities.

(3) Where any requirement of this regulation is not complied with section 10(3) to (9) of the 1995 Act (civil penalties)**(c)** applies to a trustee or manager who has failed to take all reasonable steps to ensure compliance, as if this regulation was made under Part 1 of that Act.

⁽⁹⁾ Section 1 of the Pensions Act 1995 was repealed by section 320 and Schedule 13 of the Pensions Act 2004.

⁽¹⁰⁾ Under Article 6 of Directive 2003/41/EC of 3rd June 2003 on the Activities and Supervision of Institutions for Occupational Retirement Provision “biometrical risks” are defined as meaning risks linked to death, disability and longevity. There is no definition in the Directive of the term “biometric risk” which appears in Article 17 of the Directive.

(b) S.I. 2005/ [].

(c) 1995 c.26.

Calculation of the amount of the regulatory own funds requirement

- 4.—(1) The amount of the regulatory own funds requirement is the aggregate of—
- (a) a sum equal to 4% of the technical provisions of the occupational pension scheme; plus
 - (b) a sum equal to 0.1% of the capital at risk for members of the scheme in respect of whom the capital at risk is not a negative figure, except that in respect of short term (and group) death cover the figure of 0.1% is 0.15%.
- (2) For the purposes of paragraph (1)(b) “capital at risk” means—
- (a) to the extent that the benefit payable on death in respect of a member of the scheme comprises a lump sum benefit, the amount of that lump sum payable on death; or
 - (b) to the extent that the benefit payable on death comprises the purchase of an annuity, payment of a sum by instalments or any other kind of periodic payments, the present value of that benefit calculated in a way consistent with the determination of the scheme’s technical provisions;

less, the scheme’s technical provisions.

(3) Where any requirement of this regulation is not complied with, section 10(3) to (9) of the 1995 Act (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to ensure compliance, as if this regulation was made under Part 1 of that Act.

Modification of Part 3 of the 2004 Act

5. If an occupational pension scheme is subject to the regulatory own funds requirement, Part 3 of the 2004 Act and the Scheme Funding Regulations shall be read as if the following modifications applied—

- (a) in section 224—
 - (i) the words after “one year” in subsection (1)(a) are omitted;
 - (ii) paragraphs (c) and (d) of subsection (2) are omitted;
 - (iii) the word “and” at the end of paragraph (a) of subsection (3) and paragraph (b) of that subsection are omitted;
 - (iv) the words “or report” in subsections (4), (6) and (7) and the words “or reports” in subsection (5) are omitted;
- (b) in section 226 of the Act—
 - (i) for the words after “they must” in subsection (1) there is substituted “take such steps as are necessary to ensure that the statutory funding objective is met within 12 months after that date.”, and
 - (ii) subsections (2) to (6) are omitted;
- (c) in section 227(6)(b)(i), for “by the end of the period specified in the recovery plan” there is substituted “within 12 months after that date”;
- (d) in section 231, the words after “section 226” in subsection (1)(d) are omitted;
- (e) in regulations 7(2)(a), 9(1) and (2) and 13, for “15 months” there is substituted “12 months”;
- (f) regulations 7(5) and 8 are omitted;
- (g) in regulation 10—
 - (i) in paragraph (2), for “five years” there is substituted “two years” and
 - (ii) in paragraph (4), for the words “give effect to a recovery plan”, there is substituted “comply with section 226 or any regulatory own funds requirement”.

Certification of additional assets requirement

6.—(1) If an occupational pension scheme is subject to the regulatory own funds requirement, the calculation of the amount of the regulatory own funds requirement must be certified by the actuary.

(2) An actuarial valuation of the scheme must include the actuary's certification of the calculation of the amount of the regulatory own funds requirement in the form set out in the Schedule to these Regulations.

(3) If the actuary cannot certify the calculation of the amount of the regulatory own funds requirement, he must report the matter in writing to the Regulator within a reasonable period after the end of the period within which the actuarial valuation must be received by the trustees or managers.

(4) Where the actuary fails to take all reasonable steps to ensure compliance with this regulation, Section 10(3) to (9) of the 1995 Act applies, as if this regulation was made under Part 1 of that Act.

Restoration of regulatory own funds

7.—(1) If having obtained an actuarial valuation and certification of the calculation of the regulatory own funds requirement for the scheme, it appears to the trustees or managers that the regulatory own funds requirement was not met as at the effective date of the actuarial valuation, the trustees or managers must take such steps as are necessary to ensure that the regulatory own funds requirement is met within 12 months after that actuarial valuation.

(2) A trustee or manager must send the Regulator a report of the steps to be taken under paragraph (1), within a reasonable period after having obtained the actuarial valuation and certification of the calculation of the amount of the regulatory own funds requirement.

(3) Where paragraph (1) or (2) is not complied with the Regulator may by order exercise all or any of the following powers—

- (a) it may modify the scheme as regards the future accrual of benefits;
- (b) it may impose a schedule of contributions specifying—
 - (i) the rates of contributions payable towards the scheme by or on behalf of the employer and the active members of the scheme, and
 - (ii) the dates on or before which such contributions are to be paid.

(4) Where paragraph (1) or (2) is not complied with, section 10(3) to (9) of the 1995 Act applies to a trustee or manager who has failed to take all reasonable steps to ensure compliance, as if this regulation was made under Part 1 of that Act.

Certification of schedule of contributions

8.—(1) If an occupational pension scheme is subject to the regulatory own funds requirement the certification of the schedule of contributions for the scheme must also include certification of the schedule of contributions in respect of the additional assets requirement in the form set out in the Schedule.

(2) Where paragraph (1) is not complied with, section 10(3) to (9) of the 1995 Act applies to a trustee or manager who has failed to take all reasonable steps to ensure compliance, as if this regulation was made under Part 1 of that Act.

Statement of funding principles

9. The policy of the trustees or managers for securing that the regulatory own funds requirement is met is a prescribed matter for the purposes of section 223(1)(b) of the 2004 Act (statement of funding principles).

Postponement

10.—(1) If an occupational pension scheme would have had insufficient assets as at 23rd September 2005 to comply with the regulatory own funds requirement, compliance with the regulatory own funds requirement is postponed until 22nd September 2010 (the "postponement period"), after which date compliance with the regulatory own funds requirement cannot be further postponed.

(2) If compliance with the regulatory own funds requirement is postponed in accordance with paragraph (1) the trustees or managers must notify the employer of the postponement and the postponement period within two months after the commencement date.

(3) During the postponement period a trustee or manager must not—

- (a) accept any contributions from a European employer under section 287 of the 2004 Act⁽¹⁾ (occupational pension scheme receiving contributions from European employer) ;
- (b) apply for authorisation by the Regulator to accept any contributions from a European employer under section 288 of the 2004 Act (general authorisation to accept contributions from European employers); or
- (c) apply for approval by the Regulator in relation to a particular European employer under section 289 of the 2004 Act (approval in relation to a particular European employer).

(4) If at any time during the postponement period, the trustees or managers are satisfied, having taken actuarial advice, that the scheme has sufficient assets to meet the regulatory own funds requirement, they may resolve or determine that the regulatory own funds requirement applies to the scheme.

(5) If the trustees or managers resolve or determine in accordance with paragraph (4), that the regulatory own funds requirement applies to the scheme from a date prior to the expiry of the postponement period, they must, within one month of the resolution or determination, notify the employer of the resolution or determination and the date from which the regulatory own funds requirement applies to the scheme.

(6) If the trustees or managers resolve or determine in accordance with paragraph (4), that the regulatory own funds requirement applies to the scheme from a date before the expiry of the postponement period, they cannot subsequently resolve or determine to reapply the postponement period to the scheme.

(7) Where any requirement of this regulation is not complied with, section 10(3) to (9) of the 1995 Act applies to a trustee or manager who has failed to take all reasonable steps to ensure compliance, as if this regulation was made under Part 1 of that Act.

(8) In this regulation—

“European employer” means a person who employs qualifying persons, or a qualified self-employed person, and, where—

- (a) the Regulator has approved the trustees or managers of a scheme in relation to a European employer, and
- (b) benefits are, or will become, payable under the scheme rules to or in respect of any member who is or was a qualifying person or a qualifying self-employed person in relation to that European employer,

includes,—

- (i) in a case where the approval was granted in relation to a body corporate which has since ceased to be an employer of qualifying persons, that body corporate,
- (ii) in a case where—
 - (aa) the approval was granted in relation to a European employer who is not a body corporate, and
 - (bb) that European employer has ceased to be an employer of qualifying persons, the person who was the employer of qualifying persons who were, in accordance with that approval, members of the scheme immediately before the time at which the scheme ceased to have any such active members, and
- (iii) in a case where the approval was granted in relation to a European employer who has ceased to be a qualifying self-employed person, that person.

⁽¹⁾ See S.I. []. European employer is defined in regulations 2 and 3(1) of the Occupational Pension Schemes (Cross Border Activities) Regulations 2005 made under section 287(6) of the 2004 Act.

Scheme annual report and accounts and actuarial valuation

11.—(1) If an occupational pension scheme is subject to the regulatory own funds requirement the scheme's annual report and relevant accounts and annual actuarial valuation must—

- (a) include a statement that the regulatory own funds requirement applies to the scheme;
- (b) include the effective date from which the requirement applies;
- (c) show the amount of the regulatory own funds requirement calculated as at the date of the scheme's last actuarial valuation; and
- (d) show the amount of additional assets held by the scheme to cover the requirement.

(2) If compliance with the regulatory own funds requirement is postponed in accordance with regulation 10(1), the scheme annual report and accounts and annual actuarial valuation must include a statement that compliance with the regulatory own funds requirement is postponed until 22nd September 2010.

(3) Where any requirement of this regulation is not complied with, section 10(3) to (9) of the 1995 Act applies to a trustee or manager if he fails to take all reasonable steps to ensure compliance, as if this regulation was made under Part 1 of that Act.

Improvement notices and third party notices

12. Sections 13(7) and 14(8) of the 2004 Act shall be read as if the definition of "pensions legislation" includes these Regulations.

Registrable Information

13. Whether the regulatory own funds requirement applies to the scheme and, if it applies, the date from which it applies, is prescribed registrable information for the purposes of section 60(2)(h) of the 2004 Act.

Exemptions

14.—(1) These Regulations do not apply to—

- (a) an occupational pension scheme which provides relevant benefits, but is not—
 - (i) a scheme which is approved or was formerly approved under section 590 or 591 of the Taxes Act⁽¹²⁾ or in respect of which an application for such approval has been duly made but has not been determined;
 - (ii) a scheme which is, or is treated as, registered under Chapter 2 of Part 4 of the Finance Act 2004⁽¹³⁾ (registration of pension schemes), or
 - (iii) a relevant statutory scheme, the meaning of which is given in section 611A of the Taxes Act⁽¹⁴⁾,and which has fewer than 100 members;

⁽¹²⁾ 1988 c.1. Section 590 was amended by section 35 of, and paragraph 18 of Part 1 of Schedule 3 to, the Finance Act 1988 (c.39); sections 75 and 187 of, paragraphs 3 and 18(2) of Schedule 6, and Part 4 of Schedule 17 to, the Finance Act 1989 (c.26); sections 34(2) to (4), 36(2) and 123 of, and Part 5 of Schedule 19 to, the Finance Act 1991 (c.31), section 79 of, and paragraphs 2(1) to (8) of Schedule 10 to, the Finance Act 1999 (c.16) and S.I. 2005/723. Section 591 was amended by section 146 of, and paragraph 6 of Part 1 of Schedule 13 to, the Finance Act 1988; sections 107(2) and (3) and 258 of, and Part 5 of Schedule 26 to, the Finance Act 1994 (c.9); sections 59(2) of the Finance Act 1995 (c.4), and section 79 of, and paragraphs (3)(a) and (b) of Schedule 10 to, the Finance Act 1999. Section 590 and 591 are to be repealed by Part 3 of Schedule 42 of the Finance Act 2004(c.12) with effect from 6th April 2006.

⁽¹³⁾ 2004 c.12.

⁽¹⁴⁾ 1988 c.1 Section 611A was inserted by section 75 of and paragraph 15 of Schedule 6 to the Finance Act 1989 (c.26), was amended by section 52(1) of and paragraph 5 of Schedule 5 to the Finance Act 1999, Section 611A is to be repealed by section 326(1) of, and Part 4 of Schedule 3 to, the Finance Act 2004 (c.12) from 6th April 2006.

- (b) a scheme with such a superannuation fund as referred to in section 615(6) of the Taxes Act (funds for the provision of benefits in respect of employment outside the United Kingdom) which has fewer than 100 members;
- (c) a scheme with fewer than two members;
- (d) a scheme with fewer than 12 members where all the members are trustees of the scheme and either—
 - (i) the rules of the scheme provide that all decisions are made only by the trustees who are members of the scheme by unanimous agreement; or
 - (ii) the scheme has a trustee who is independent in relation to the scheme for the purposes of section 23 of the 1995 Act⁽¹⁵⁾ (power to appoint independent trustees) (see subsection (3) of that section) and is registered in the register maintained by the Authority in accordance with regulations made under subsection (4) of that section;
- (e) a scheme with fewer than 12 members where all the members are directors of a company which is the sole trustee of the scheme and either—
 - (i) the rules of the scheme provide that all decisions are made only by the members of the scheme by unanimous agreement, or
 - (ii) one of the directors of the company is independent in relation to the scheme for the purposes of section 23 of the 1995 Act and is registered in the register maintained by the Authority in accordance with regulations made under subsection (4) of that section.

(2) In this regulation “relevant benefits” before 6th April 2006 has the meaning given in section 612(1) of the Taxes Act⁽¹⁶⁾ and, from that date, section 393B of the Income and Tax (Earnings and Pensions) Act 2003⁽¹⁷⁾.

⁽¹⁵⁾ Section 23 is substituted by section 36(3) of the Pensions Act 2004 (c.35).

⁽¹⁶⁾ Section 612(1) is repealed from 6 April 2006 by section 326(1) of the Finance Act 2004 (c.12).

⁽¹⁷⁾ 2003 c.1; section 393B was inserted by section 249(3) of the Finance Act 2004 (c.12).

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

[.....2005]

Minister of State,
Department for Work and Pensions

ACTUARY'S CERTIFICATE

Form of actuary's certification of regulatory own funds requirement*Name of scheme*

I certify that in my opinion, the calculation of the scheme's regulatory own funds requirement as at [effective date of valuation on which the calculation is based] is made in accordance with the Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005.

Form of actuary's certification of schedule of contributions for the regulatory own funds requirement*Name of scheme*

Adequacy of rates of contributions

1. I hereby certify that, in my opinion, the rates of contributions shown in the schedule of contributions dated dd/mm/yyyy are such that, as at [effective date of valuation on which the schedule is based]—

the regulatory own funds requirement could have been expected to continue to be met for the period for which the schedule is to be in force⁽¹⁸⁾ or

the regulatory own funds requirement could have been expected to be met within one year of the effective date of that valuation⁽¹⁹⁾.

2. In forming this opinion, I have complied with the requirements imposed by the Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005.

Signature:

Date:

Name:

Qualification:

Address:

Name of employer (if applicable):

(a) This applies where the regulatory own funds requirement was met on the effective date of the last actuarial valuation.

⁽¹⁹⁾ This applies where the regulatory own funds requirement was not met on the effective date of the last actuarial valuation. Whichever of the alternatives does not apply should be deleted.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made for the purposes of section 2(2) of the European Communities Act 1972 (c.) and implement Article 17 of the European Union Directive of 3 June 2003 on the Activities and Supervision of Institutions for Occupational Retirement Provision (Directive 2003/41/EC).

As these Regulations are made after the expiry of the period of six months beginning with the coming into force of section 60(2)(h) of the Pensions Act 2004 (c.35), the requirement under section 317(1) of the Pensions Act 2004 for the Secretary of State to consult such persons as he considers appropriate does apply.

Regulation 3 requires that where an occupational pension scheme itself, rather than an employer, covers any liability for risks linked to death, disability or longevity, guarantees any investment return performance, or guarantees to provide defined benefits, the scheme must have additional assets above its technical provisions, which are no less than the minimum required under regulation 4. The additional assets must be free of foreseeable liabilities and must absorb discrepancies between anticipated and actual expenses and profits under the scheme. Section 10 of the Pensions Act 1995 (c.26) (“the 1995 Act”) penalties may apply to the trustees or managers.

Regulation 4 provides that the minimum additional assets required (“the regulatory own funds requirement”) is 4% of the scheme’s technical provisions, plus 0.1%, but 0.15% for short term (and group) death cover, of the amount by which the total amount which the scheme would be obliged to pay on the immediate death of all members of the scheme exceeds the technical provisions. The amount of additional assets held to cover the regulatory own funds requirement shall be taken to be the amount shown in the scheme annual report and accounts. Section 10 of the 1995 Act penalties may apply to the trustees or managers.

Regulation 5 modifies Part 3 of the Pensions Act 2004 so that where these Regulations apply an actuarial valuation of the occupational pension scheme must be carried out annually.

Regulation 6 provides that when an actuarial valuation is carried out the actuary must certify the calculation of the regulatory own funds requirement in the form set out in the Schedule to these Regulations. Any failure to do so must be reported by the actuary to the Regulator. Section 10 of the 1995 Act penalties apply to the actuary.

Under Regulation 7 if the regulatory own funds requirement was not met as at the actuarial valuation, the trustees or managers must, within 12 months, after the effective date of the valuation, prepare, review, and if necessary revise, steps to be taken to meet the requirement by the effective date of the next valuation. The trustees or managers must send the Regulator a report of the steps, or revised steps, to be taken. Section 10 of the 1995 Act penalties may apply to the trustees or managers. And the Regulator may modify the scheme as regards future accrual of benefits, may give directions as to the calculation of the regulatory own funds requirement and the period within which, and manner in which, any failure to meet the requirement is to be remedied. The Regulator may also impose a schedule of contributions.

Regulation 8 provides that certification of the schedule of contributions must be in the form set out in the Schedule to these Regulations. Section 10 of the 1995 Act penalties may apply to the trustees or managers.

Regulation 9 provides that the statement of funding principles for the scheme must include policy for securing that the regulatory own funds requirement is met.

Regulation 10 provides that for those schemes with insufficient assets as at 23rd September 2005 to meet the regulatory own funds requirement, compliance is postponed until 23rd September 2010. The trustees or managers must inform the employer if compliance is postponed. If during the postponement period the scheme has sufficient assets to meet the regulatory own funds requirement the trustees or managers may resolve or determine that the requirement applies to the scheme, and if so, they must inform the employer. Section 10 of the 1995 Act penalties may apply to the trustees or managers.

Under Regulation 11 the annual report and accounts of an occupational pension scheme must state whether the regulatory own funds requirement applies to the scheme, and the date from which it applies. If compliance is postponed until 23rd September 2010 the scheme annual report and relevant accounts must include a statement to that effect. Section 10 of the 1995 Act penalties may apply to the trustees or managers.

Regulation 12 provides that sections 13(7) and 14(8) of the 2004 Act are to be read as if the definition of “pensions legislation” included these Regulations.

Regulation 13 provides that information as to whether the regulatory own funds requirement applies to a scheme and whether compliance has been postponed, are prescribed registrable information for the purposes of section 60(2)(h) of the 2004 Act.

Regulation 14(1) exempts certain schemes or descriptions of schemes from the requirements of these Regulations. Regulation 14(2) provides for interpretation under regulation 14.

The Schedule to the Regulations sets out the form of the regulatory own funds certificates for calculation of the regulatory own funds requirement and the schedule of contributions.

The transposition of Article 17 of Directive 2003/41/EC is detailed in the Transposition Note that accompanied these Regulations. A copy of that Note has been placed in the libraries of both Houses of Parliament. Copies may be obtained from the Department for Work and Pensions, Private Pensions Policy and Regulation team, 3rd floor, Adelphi, 1-11 John Adam Street, London WC2N 6HT.

A regulatory impact assessment of the impact on business, charities or the voluntary sector of the provisions in these regulations has been carried out, and a copy placed in the libraries of both Houses of Parliament. Copies may be obtained from the Department for Work and Pensions, Better Regulation Unit, 4th floor, Adelphi, 1-11 John Adam Street, London WC2N 6HT.

Annex A - List of those consulted

Association of British Insurers
Association of Consulting Actuaries
Association of Pension Lawyers
British Chambers of Commerce
Confederation of British Industry
Construction Company
Engineering Employers Federation
Faculty and Institute of Actuaries
HM Treasury
Investment Managers' Association
Institute of Chartered Accountants in England and Wales
National Association of Pension Funds
National Consumers Council
National Pensions Convention
Pensions Management Institute
Pensions Ombudsman
Policy and Legal Division DHSS Northern Ireland
Scottish Executive
Small Business Service
Society of Pension Consultants
The Pensions Advisory Service
The Pensions Regulator
Trades Union Congress
National Assembly for Wales

ANNEX B – Wording of Article 17 of Directive 2003/41/EC

Extract From DIRECTIVE 2003/41/EC of the European Parliament and of the Council on the Activities and Supervision of Institutions for Occupational Retirement Provision

Article 17

Regulatory own funds

1. The home Member State shall ensure that institutions operating pension schemes, where the institution itself, and not the sponsoring undertaking, underwrites the liability to cover against biometric risk, or guarantees a given investment performance or a given level of benefits, hold on a permanent basis additional assets above the technical provisions to serve as a buffer. The amount thereof shall reflect the type of risk and asset base in respect of the total range of schemes operated. These assets shall be free of all foreseeable liabilities and serve as a safety capital to absorb discrepancies between the anticipated and the actual expenses and profits.
2. For the purposes of calculating the minimum amount of the additional assets, the rules laid down in Articles 18 and 19 of Directive 79/267/EEC shall apply.
3. Paragraph 1 shall, however, not prevent Member States from requiring institutions located in their territory to hold regulatory own funds or from laying down more detailed rules provided that they are prudentially justified.

ANNEX C – Wording of Articles 27 and 28 of Directive 2002/83/EC

Extract From Directive of the European Parliament and of the Council 2002/83/EC Concerning Life Assurance

Rules Relating to the Solvency Margin and to the Guarantee Fund

Article 27

Available solvency margin

1 Each Member State shall require of every assurance undertaking whose head office is situated in its territory an adequate available solvency margin in respect of its entire business at all times which is at least equal to the requirements in this Directive.

2 The available solvency margin shall consist of the assets of the assurance undertaking free of any foreseeable liabilities, less any intangible items, including:

- (a) the paid-up share capital or, in the case of a mutual assurance undertaking, the effective initial fund plus any members' accounts which meet all the following criteria:
 - (i) the memorandum and articles of association must stipulate that payments may be made from these accounts to members only in so far as this does not cause the available solvency margin to fall below the required level, or, after the dissolution of the undertaking, if all the undertaking's other debts have been settled;
 - (ii) the memorandum and articles of association must stipulate, with respect to any payments referred to in point (i) for reasons other than the individual termination of membership, that the competent authorities must be notified at least one month in advance and can prohibit the payment within that period;
 - (iii) the relevant provisions of the memorandum and articles of association may be amended only after the competent authorities have declared that they have no objection to the amendment, without prejudice to the criteria stated in points (i) and (ii);
- (b) reserves (statutory and free) not corresponding to underwriting liabilities;
- (c) the profit or loss brought forward after deduction of dividends to be paid;
- (d) in so far as authorised under national law, profit reserves appearing in the balance sheet where they may be used to cover any losses which may arise and where they have not been made available for distribution to policy holders.

The available solvency margin shall be reduced by the amount of own shares directly held by the assurance undertaking.

3 The available solvency margin may also consist of:

(a) cumulative preferential share capital and subordinated loan capital up to 50% of the lesser of the available solvency margin and the required solvency margin, no more than 25% of which shall consist of subordinated loans with a fixed maturity, or fixed-term cumulative preferential share capital, provided that binding agreements exist under which, in the event of the bankruptcy or liquidation of the assurance undertaking, the subordinated loan capital or preferential share capital ranks after the claims of all other creditors and is not to be repaid until all other debts outstanding at the time have been settled.

Subordinated loan capital must also fulfil the following conditions:

- (i) only fully paid-up funds may be taken into account;
- (ii) for loans with a fixed maturity, the original maturity must be at least five years. No later than one year before the repayment date, the assurance undertaking must submit to the competent authorities for their approval a plan showing how the available solvency margin will be kept at or brought to the required level at maturity, unless the extent to which the loan may rank as a component of the available solvency margin is gradually reduced during at least the last five years before the repayment date. The competent authorities may authorise the early repayment of such loans provided application is made by the issuing assurance undertaking and its available solvency margin will not fall below the required level;
- (iii) loans the maturity of which is not fixed must be repayable only subject to five years' notice unless the loans are no longer considered as a component of the available solvency margin or unless the prior consent of the competent authorities is specifically required for early repayment. In the latter event the assurance undertaking must notify the competent authorities at least six months before the date of the proposed repayment, specifying the available solvency margin and the required solvency margin both before and after that repayment. The competent authorities shall authorise repayment only if the assurance undertaking's available solvency margin will not fall below the required level;
- (iv) the loan agreement must not include any clause providing that in specified circumstances, other than the winding-up of the assurance undertaking, the debt will become repayable before the agreed repayment dates;
- (v) the loan agreement may be amended only after the competent authorities have declared that they have no objection to the amendment;

(b) securities with no specified maturity date and other instruments, including cumulative preferential shares other than those mentioned in point (a), up to 50% of the lesser of the available solvency margin and the required solvency margin for the total of such securities and the subordinated loan capital referred to in point (a) provided they fulfil the following:

- (i) they may not be repaid on the initiative of the bearer or without the prior consent of the competent authority;
- (ii) the contract of issue must enable the assurance undertaking to defer the payment of interest on the loan;
- (iii) the lender's claims on the assurance undertaking must rank entirely after those of all non-subordinated creditors;
- (iv) the documents governing the issue of the securities must provide for the loss-absorption capacity of the debt and unpaid interest, while enabling the assurance undertaking to continue its business;

(v) only fully paid-up amounts may be taken into account.

4 Upon application, with supporting evidence, by the undertaking to the competent authority of the home Member State and with the agreement of that competent authority, the available solvency margin may also consist of:

(a) until 31 December 2009 an amount equal to 50% of the undertaking's future profits, but not exceeding 25% of the lesser of the available solvency margin and the required solvency margin. The amount of the future profits shall be obtained by multiplying the estimated annual profit by a factor which represents the average period left to run on policies. The factor used may not exceed six. The estimated annual profit shall not exceed the arithmetical average of the profits made over the last five financial years in the activities listed in Article 2(1).

Competent authorities may only agree to include such an amount for the available solvency margin:

- (i) when an actuarial report is submitted to the competent authorities substantiating the likelihood of emergence of these profits in the future; and
- (ii) in so far as that part of future profits emerging from hidden net reserves referred to in point (c) has not already been taken into account;

(b) where Zillmerising is not practised or where, if practised, it is less than the loading for acquisition costs included in the premium, the difference between a non-Zillmerised or partially Zillmerised mathematical provision and a mathematical provision Zillmerised at a rate equal to the loading for acquisition costs included in the premium. This figure may not, however, exceed 3,5% of the sum of the differences between the relevant capital sums of life assurance activities and the mathematical provisions for all policies for which Zillmerising is possible. The difference shall be reduced by the amount of any undepreciated acquisition costs entered as an asset;

(c) any hidden net reserves arising out of the valuation of assets, in so far as such hidden net reserves are not of an exceptional nature;

(d) one half of the unpaid share capital or initial fund, once the paid-up part amounts to 25% of that share capital or fund, up to 50% of the lesser of the available and required solvency margin.

5 Amendments to paragraphs 2, 3 and 4 to take into account developments that justify a technical adjustment of the elements eligible for the available solvency margin shall be adopted in accordance with the procedure laid down in Article 65(2).

Article 28

Required solvency margin

1 Subject to Article 29, the required solvency margin shall be determined as laid down in paragraphs 2 to 7 according to the classes of assurance underwritten.

2 For the kinds of assurance referred to in Article 2(1)(a) and (b) other than assurances linked to investment funds and for the operations referred to in Article 2(3), the required solvency margin shall be equal to the sum of the following two results:

(a) first result:

a 4% fraction of the mathematical provisions relating to direct business and reinsurance acceptances gross of reinsurance cessions shall be multiplied by the ratio, for the last financial year, of the total mathematical provisions net of reinsurance cessions to the gross total mathematical provisions. That ratio may in no case be less than 85%;

(b) second result:

for policies on which the capital at risk is not a negative figure, a 0,3% fraction of such capital underwritten by the assurance undertaking shall be multiplied by the ratio, for the last financial year, of the total capital at risk retained as the undertaking's liability after reinsurance cessions and retrocessions to the total capital at risk gross of reinsurance; that ratio may in no case be less than 50%. For temporary assurance on death of a maximum term of three years the fraction shall be 0,1%. For such assurance of a term of more than three years but not more than five years the above fraction shall be 0,15%.

3 For the supplementary insurance referred to in Article 2(1)(c) the required solvency margin shall be equal to the required solvency margin for insurance undertakings as laid down in Article 16a of Directive 73/239/EEC, excluding the provisions of Article 17 of that Directive.

4 For permanent health insurance not subject to cancellation referred to in Article 2(1)(d), the required solvency margin shall be equal to:

(a) a 4% fraction of the mathematical provisions, calculated in compliance with paragraph 2(a) of this Article; plus

(b) the required solvency margin for insurance undertakings as laid down in Article 16a of Directive 73/239/EEC, excluding the provisions of Article 17 of that Directive. However, the condition contained in Article 16a(6)(b) of that Directive that a provision be set up for increasing age may be replaced by a requirement that the business be conducted on a group basis.

5 For capital redemption operations referred to in Article 2(2)(b), the required solvency margin shall be equal to a 4% fraction of the mathematical provisions calculated in compliance with paragraph 2(a) of this Article.

6 For tontines, referred to in Article 2(2)(a), the required solvency margin shall be equal to 1% of their assets.

7 For assurances covered by Article 2(1)(a) and (b) linked to investment funds and for the operations referred to in Article 2(2)(c), (d) and (e), the required solvency margin shall be equal to the sum of the following:

- (a) in so far as the assurance undertaking bears an investment risk, a 4% fraction of the technical provisions, calculated in compliance with paragraph 2(a) of this Article;
- (b) in so far as the undertaking bears no investment risk but the allocation to cover management expenses is fixed for a period exceeding five years, a 1% fraction of the technical provisions, calculated in compliance with paragraph 2(a) of this Article;
- (c) in so far as the undertaking bears no investment risk and the allocation to cover management expenses is not fixed for a period exceeding five years, an amount equivalent to 25% of the last financial year's net administrative expenses pertaining to such business;
- (d) in so far as the assurance undertaking covers a death risk, a 0,3% fraction of the capital at risk calculated in compliance with paragraph 2(b) of this Article.