

**The
OCCUPATIONAL AND PERSONAL PENSION
SCHEMES (MISCELLANEOUS AMENDMENTS)
REGULATIONS 2007**

**Analysis of the Responses to Consultation on the
Draft Regulations**

March 2007

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Executive summary

On 3 November 2006 the Department for Work and Pensions issued a consultation document containing draft regulations introducing a number of technical amendments to various Occupational and Personal Pensions legislation. The consultation period ended on 15 December 2006. There were 13 written responses from organisations, and one from a pensions expert writing in a private capacity.

The regulations are due to come into force on 6 April 2007. A copy of the regulations will be available on the Office of Public Information's website at: <http://www.opsi.gov.uk/acts.htm>.

Acknowledgements

The Department for Work and Pensions would like to thank everybody who responded to the consultation. This paper summarises the responses received, including those received after the consultation period ended on 15 December 2006.

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Background to the Regulations

The draft Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2007 include a number of technical amendments to the regulations governing personal and private sector pension schemes.

The amendments:

- address issues which have arisen from the practical operation of a number of the regulations flowing from the Pensions Act 2004;
- make consequential amendments in order to reflect changes introduced by the Finance Act 2004 and the Civil Partnership Act 2004; and
- implement the guaranteed minimum pension revaluation rate recommended in the Government Actuary's Department's quinquennial review.

The purpose of each of the provisions

Note: the references below refer to the Regulations as laid before parliament.

Regulation 1 contains the citation and commencement arrangements.

Regulation 2 amends The Personal Pension Schemes (Disclosure of Information) Regulations 1987 (SI 1987/1110), by removing or substituting references to legislation that no longer apply.

Regulation 3 amends The Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 (SI 1991/167) ("the Preservation of Benefit Regulations")

A member who has preserved rights in the form of short service benefit in an occupational pension scheme can take those rights in the form of a lump sum before reaching the scheme's normal pension age (NPA) if the conditions set out in regulation 5 of the Preservation of Benefit Regulations 1991 are satisfied. These provisions are no longer compatible with HMRC legislation, which was amended from April 2006 (for example, HMRC rules allow for a lump sum to be paid in certain circumstances where a scheme is winding-up, but the Preservation of Benefit Regulations do not).

Regulation 3(3) amends regulation 5 of the Preservation of Benefit Regulations to allow short service benefit to be paid by means of a lump sum before NPA where the HMRC rules in respect of the payment of the lump sums specified in the amended regulations are satisfied. (For more details see sections 166 of, and the associated Schedule 29 to, the Finance Act 2004).¹

¹ The lump sums in sections 166 and 168 of the Finance Act which are not included in the amended regulation would, we believe, either not be payable as short service benefit, or would not be payable before NPA.

Regulation 4 amends The Occupational Pension Schemes (Contracting Out) Regulations 1996 (SI 1996/1172) (“the Contracting-out Regulations”)

Regulation 4(2) amends the definition of an "overseas scheme" in regulation 1(2) of the Contracting-out Regulations in order to make it clear that an occupational pension scheme is an overseas scheme if it has its main administration outside the member states of the European Union (excluding a scheme which is contracted-out in the Isle of Man).

Regulation 4(3) amends regulation 62 of the Contracting-out Regulations in order to provide a revised rate of revaluation, in line with the Government Actuary's recommendation. The revised rate applies to schemes operating "fixed rate" revaluation of Guaranteed Minimum Pensions (GMPs) under sections 16(2) and (3) of the Pension Schemes Act 1993. The new annual rate of 4 per cent compound will apply to the GMPs of members who leave pensionable service in these schemes before normal pension age on or after 6 April 2007. This amendment gives effect to the recommendation in Cm 6758 (Occupational and Personal Pension Schemes: Review of Certain Contracting-out Terms).

Regulations 5 and 6 amend The Protected Rights (Transfer Payment) Regulations 1996 (SI 1996/1461) and the Contracting-out (Transfer and Transfer Payment) Regulations 1996 (SI 1996/1462), which allow for the transfer of contracted-out rights to occupational pension schemes which are administered wholly or partly outside the United Kingdom (UK), subject to certain conditions being met.

From 22 September 2005 a new definition of “occupational pension scheme” has applied, so that such a scheme must have its main administration either in the UK or outside the member States. What were previously defined as occupational pension schemes in member States other than the UK are now referred to as “European pensions institutions” (as defined in section 293(8) of the Pensions Act 2004). A consequence of the change in the definition of an occupational pension scheme is that the regulations no longer sanction the transfers of contracted-out rights to member States outside the UK.

Regulations 5 and 6 restore the policy intention by allowing transfers to both occupational pension schemes that have their main administration outside the member States, and to European pensions institutions.

Regulation 7 repeals regulation 8(2) of The Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996 (SI 1996/1537). This regulation is no longer needed as it applies only to lump sums paid on grounds of triviality and the link in paragraph 8(1A)(c) through to paragraph 7 of Part 1 of Schedule 29 to the Finance Act 2004 already provides for this.

Regulation 8 – amends The Occupational Pension Schemes (Disclosure of Information) Regulations 1996 (SI 1996/1655) (“the Disclosure of Information

Regulations") to clarify two provisions which were introduced by the Scheme Funding Regulations.

Regulation 8(2)(a) amends regulation 5(12ZA) of the Disclosure of Information Regulations in order to make it clear that trustees may issue a summary funding statement before the end of the prescribed period for ensuring that an actuarial valuation or report is received by them.

Regulation 8(2)(b) inserts a new provision into regulation 5 of the Disclosure of Information Regulations to make it clear that trustees are not required to send summary funding statements in the transitional period to members or beneficiaries who only have, or will have, an entitlement in the scheme to money purchase benefits.

Regulation 9 - amends The Divorce etc. (Notification and Treatment of Pensions) (Scotland) Regulations 2000 (SI 2000/1050) (S.4). These Regulations make provision with respect to the supply of information under section 12A of the Family Law (Scotland) Act 1985 about court orders for payment of pension lump sums where parties divorce or their marriage is declared to be null. The proposed amendments will extend the legislation so that it will apply to civil partners whose civil partnership has been dissolved or declared to be null.

Regulation 10 amends The Pensions on Divorce etc. (Pension Sharing) (Scotland) Regulations 2000 (SI 2000/1051) (S.5). These Regulations make provision with respect to pension sharing in Scotland, under the Welfare Reform and Pensions Act 1999, where parties divorce or their marriage is declared to be null. The proposed amendments will extend the legislation so that it will apply to civil partners whose civil partnership has been dissolved or declared to be null.

Regulation 11 amends The Stakeholder Pension Schemes Regulations 2000 (SI 2000/1403) to bring them into line with the tax requirement that the trustees or managers of a stakeholder pension scheme must deduct tax charges from a member's benefit or fund. (See The Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006 (SI 2006/36)).

Regulation 12 - amends The Occupational Pension Scheme (Winding up etc.) Regulations 2005 (SI 2005/706) ("the Winding up Regulations").

Regulation 12(2): Where an occupational pension scheme has less than 12 members, and all the members are either trustees or directors of the trustee company, the scheme is exempt from a number of provisions in private pensions legislation, including those governing the preferential liabilities on winding up. Regulation 12(2) amends the description of these small schemes in regulation 3(1) of the Winding up Regulations in order to ensure a consistent definition, and is one of a number of similar amendments in these draft regulations.

Regulation 12(3) amends regulation 8(4)(a) of the Winding up Regulations to extend the scope of that regulation to cover civil partnerships.

Regulation 13 amends regulation 2 of The Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) Regulations 2005 (SI 2005/2184) in order to align the definition of a small scheme with other similar provisions elsewhere in the legislation (see commentary on regulation 12(2) above).

Regulation 14 amends regulation 2 of The Pension Schemes (Categories) Regulations 2005 (SI 2005/2401) in order to ensure that the Pilots' National Pension Fund will be treated as an occupational pension scheme following the change in the definition in section 1 of the Pension Schemes Act 1993 which was introduced by section 239 of the Pensions Act 2004.

Regulation 15 amends The Occupational Pension Schemes (Scheme Funding) Regulations 2005 (SI 2005/3377) ("the Scheme Funding Regulations") to address issues which have arisen since the provisions came into force from 30 December 2005.

Regulation 15(2) amends regulation 17 of the Scheme Funding Regulations in order to align the definition of small scheme with other similar provisions elsewhere in the legislation (see 7.14 above).

Regulation 15(3)(a) and (b) amends paragraph 3(2) of schedule 3 to the Scheme Funding Regulations to correct a cross reference and to make it clear that trustees are not required to send summary funding statements during the transitional period between the Minimum Funding Requirement and the new arrangements to members or beneficiaries who only have, or will have, an entitlement in the scheme to money purchase benefits. It also corrects a typesetting error in paragraph 3(2) of Schedule 3 to the Scheme Funding Regulations, making it clear that reference to any payments made to the employer is a separate requirement for inclusion in summary funding statements sent during the period of transition between the minimum funding requirement and the scheme funding arrangements.

Regulation 15(4)(c) amends Schedule 4 to the Scheme Funding Regulations to make it clear that where the actuary certifies that the contributions payable to the scheme are not adequate (under the transitional provision at paragraph 15 of Schedule 4), the trustees must obtain a new actuarial valuation in accordance with Part 3 of the Pensions Act 2004.

Regulation 16 - amends The Occupational Pension Schemes (Investment) Regulations 2005 (SI 2005/3378) ("the Investment Regulations").

Regulation 16(2) amends regulation 1 of the Investment Regulations in order to align the definition of a small scheme with other similar provisions elsewhere in the legislation (see commentary on regulation 12(2) above).

Regulation 16(3) amends regulation 12 of the Investment Regulations to clarify that the restriction on employer-related investments applies to all occupational pension schemes, not only those set up under a trust.

Regulation 17 - amends The Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005 (SI 2005/3380) (“the Regulatory Own Funds Regulations”).

Regulations 17(2)&17(3): correct an omission in the definition of a “European Employer” for the purposes of regulation 11 of the Regulatory Own Funds Regulations, which do not currently specify who is a qualifying person or a seconded worker. The amendments achieve the policy intention by deleting regulation 11, and cross-referring instead to the definition of “European Employer” in the Cross-border Regulations.

Regulation 17(4) amends regulation 15 of the Regulatory Own Funds Regulations in order to align the definition of a small scheme with other similar provisions elsewhere in the legislation (see commentary on regulation 12(2) above).

Regulation 18 - amends The Occupational Pension Schemes (Cross-border Activities) Regulations 2005 (SI 2005/3381) (“the Cross-border Regulations”).

Regulation 18(2)(b) amends regulation 2(3) of the Cross-border Regulations to ensure that the more stringent cross-border full-funding requirement only applies to those sections of a multi-employer scheme to which employers involved in cross-border activity contribute.

Regulation 18(3) amends the definition of a “European employer” and a “host Member State” in Regulation 3 to ensure that the trustees must seek fresh cross border approval whenever their scheme starts to operate in a new Member State.

Regulations 18(4)–(6) amend regulations 5, 7 and 10 in order to: allow schemes which were operating on a cross-border basis prior to the 23 September 2005 (‘pre-23 September 2005 schemes’) to apply for authorisation if they missed the 29 March 2006 deadline; and to allow such schemes to apply for approval to operate on a cross-border basis with other European employers. The regulations do not currently provide for either situation.

Regulation 18(7) amends the definition of “ringfencing” in regulation 15 to ensure that the Regulator can instruct the trustees of the scheme to complete the necessary ringfencing within a specified period of time.

Regulation 18(8) ensures that cross-border schemes are exempt from the requirement of section 66A(3) of the Pensions Act 1995 which requires that members of a scheme who work outside the UK should be treated the same as members of a scheme who work wholly in the UK. UK based cross-border pension schemes cannot comply with this requirement as the Cross-border

Regulations (as expressed by Article 20.5 of the EU Occupational Pensions Directive) require schemes to observe the social and labour law relevant to the Member State in which the member is based. Consequently, members who work permanently outside the UK may be treated differently from those members who work wholly in the UK, on account of other EU States' differing social and labour law. The Cross-border Regulations do not, however, apply to members working on secondment (as defined in the Cross-border Regulations) in other EU States.

Regulation 18(9) amends paragraph 6(7) of Schedule 1 to add three further information requirements for schemes seeking approval to accept contributions in relation to a particular European employer. The additional requirements reflect changes to a protocol document covering schemes operating on a cross-border basis which were agreed by The Committee of European Insurance and Occupational Pension Supervisors (CEIOPS)².

Regulation 19 - amends regulation 4(4) of The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349) in order to align the definition of a small scheme with other similar provisions elsewhere in the legislation (see commentary on regulation 12(2) above).

Regulation 20 amends regulation 2 of The Occupational Pension Schemes (Trustees' Knowledge and Understanding) Regulations 2006 (SI 2006/686) in order to align the definition of a small scheme with other similar provisions elsewhere in the legislation (see commentary on regulation 12(2) above).

Regulation 21 - amends The Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006 (SI 2006/714) ("the Member-nominated Trustees and Directors Regulations").

Regulation 21(2) amends regulation 1 of the Member-nominated Trustees and Directors Regulations in order to align the definition of a small scheme with other similar provisions elsewhere in the legislation (see commentary on regulation 12(2) above).

Regulations 21(3) and (4) exempt the National Assembly for Wales Members' Pension Scheme (NAWMPS), and the schemes listed in the schedule to The Railway Pensions (Protection and Designation of Schemes) Order 1994, from the requirements of the Member-nominated Trustees and Directors Regulations. The NAWMPS is analogous to the scheme set up under the Parliamentary and other Pensions Act 1987, which is already exempt from these requirements, and the inclusion of the schemes listed in the Railway Pensions Order 1994 is necessary in order to ensure that the pre-existing exemptions for these schemes will continue.

² CEIOPS was established in 2005 to provide advice to the European Commission on insurance and occupational pensions matters and to establish standards and guidelines to facilitate cooperation between national supervisory authorities.

Regulation 21(5) amends two typographical errors in the listed of revoked regulations in the schedule to the principal regulations.

Regulation 22 – makes two revocations that are consequential to the Pensions Act 2004, but were omitted from the schedule of revocations.

Outcome of consultation

General

Most respondents welcomed the package, and a few had no other comment than that.

The inclusion of drafting and clarifying suggestions in some of the responses was very welcome, and many of these have been adopted but we have not identified them individually.

There were a few suggestions made which we have not been able to include in this set of amendment regulations but will consider them for the future.

Regulation 3 (preservation of benefit)

The point was made that the changes we were making to regulation 5 of the Preservation of Benefit regulations would mean – because regulation 8 of these regulations cross-refers to regulation 5 - that deferred members would be barred from taking their deferred pension before normal pension age if they took early retirement or had to retire early on health grounds. The Government agrees that it would have this unintended – and undesirable – effect, and regulation 8(2) of the Preservation of Benefit regulations has been amended to ensure that early payment of a deferred pension can be made where a person has reached normal minimum pension age or meets the ill-health condition (as set out in the Finance Act 2004).

It was also suggested that the lifetime allowance excess lump sum should be included in the new regulation 5, and the Government has accepted this and made the necessary amendment.

Further, it was commented that including lump sums payable on death is misconceived as these are outside the scope of the preservation requirements as set out in the primary legislation. Having given this matter further consideration, the Government agrees with this, and has removed these lump sums from the new regulation.

Although not arising as a direct result of comments received, the Government has decided that including provisions relating to contracted-out benefits is unnecessary as they are already covered in contracted-out legislation.

Regulation 9 (pensions on divorce, Scotland)

It was suggested that the definition of "the other person" should be re-drafted so that it is consistent with the wording used in section 12A of the Family Law (Scotland) Act 1985. However, in the Government's view the wording used in the draft regulation achieves the intended purpose, and so no change has been made.

Regulation 15 (scheme funding)

Several respondents suggested that the change proposed in draft regulation 15(2) was unnecessary, and could lead to an unintended increase in scheme administration costs. We concluded that in view of the concerns that have been raised we did not wish to proceed with this amendment. (We have discussed this issue with the Pensions Regulator, and the Regulator will consider whether some guidance might be helpful in clarifying the current requirements.

Regulation 18 (cross border)

Regulation 18(2)

It was suggested that the drafting of this section, especially the use of the term “associated employers” would cause all sections of the multi-employer scheme to be required to fully-fund their sections of the scheme, including employers who are not operating cross-border - the opposite of the intention of the amendment. It was also suggested that the amendment should go one step further and that the full-funding requirement should be limited to the sections within an employer’s scheme which receive contributions from European employers, rather than the whole scheme or sections within the multi-employer scheme.

We agree that there is a possibility that the term “associated employers” used in the draft sent for consultation could be misconstrued and cause all sections of a multi-employer scheme to be required to fully-fund their sections of the scheme. We have therefore revised this section so that there must be a clear link between a European employer and one or more other employers within the multi-employer scheme for those sections to be treated as one scheme and the full-funding requirement to apply.

Unfortunately, we cannot limit the full-funding requirement to just those sections of a scheme which receive contributions from European employers as this would contravene Article 16 (3) of the EU Occupational Pensions Directive 2003 which requires that: *“in the event of cross-border activity as referred to in Article 20, the technical provisions shall at all times be fully funded in respect of the total range of pension schemes operated.”*

Regulation 18 (4-6)

These amendments seek to ensure that existing (pre 23 September 2005) cross-border schemes who did not apply for authorisation and approval before 29 March 2006 (the last date by which transitional provisions for these schemes was due to expire) are not prohibited indefinitely from making such applications or from seeking further approval to extend their cross-border activity to other Member States. It was suggested that the amendments do not provide for existing (pre 23 September 2005) cross-border money purchase schemes to seek authorisation and approval after 22 September 2008.

We agree that the amendments did not make provision for existing (pre 23 September) cross-border money purchase schemes to seek authorisation and approval after 22 September 2008. We have since amended these regulations to ensure that this is possible. We have also noted that the amendments suggested that the 23 September 2008 should be the date at which the information requirements to be supplied by existing (pre 23 September 2005) defined benefit schemes seeking authorisation and approval should change. This was incorrect. These schemes, up to and including the 21 September 2008 will be required to provide their most recent minimum funding valuation, and from 22 September 2008 will need to provide an actuarial valuation within the period of 12 months ending on the date of application showing that they are able to meet the scheme funding objective. Our amendments to Regulation 18 (4-6) reflect the fact that the 22 September is the date at which information requirements for existing cross-border defined benefit schemes changes.

The error in the date on Regulation 18(4)(c) was picked up by several respondents and has been corrected.

Regulation 18 (8)

The new regulation 19 (of the Cross-border Regulations) relates to section 66A(3) of the Pensions Act 1995. It was suggested that: (i) it should also refer to section 66A (2) of that Act. (ii) the wording suggested that schemes who were seeking to remove members located permanently in other EU States from their schemes would first need to be authorised by the Pensions Regulator in order to “comply with these Regulations”, even though the intention was not to receive contributions in respect of those members based elsewhere in the EU.

(i) We are unable to agree with this suggestion. Section 66A (2) ensures that an employee’s entitlement to benefits within the scheme remains the same regardless of their location. We see no reason to make reference to this provision as it is unaffected by the introduction of the Cross-border Regulations.

(ii) Although it is possible to put this construction on the regulation, this is not the intention and we will adopt a pragmatic approach. We can advise that where schemes intend to remove membership of the scheme to those employees based permanently in other EU States and there is therefore also an intention that they will not be accepting contributions in respect of these employees, such schemes will not be required to be authorised by the Pensions Regulator.

Regulation 18 (9)

It was suggested that the term “external, contractual-based asset manager” needs to be defined.

Having considered that whilst schemes applying for approval to operate in another EU State must let the Regulator know whether or not they employ an “external, contractual-based asset manager”, it is not a mandatory requirement of the Cross-border Regulations that schemes must have an external, contractual-based asset manager, and therefore to avoid over-regulation, we do not consider that a definition is required. If there is any doubt as to what constitutes an “external, contractual-based asset manager”, the Pensions Regulator will be able to provide guidance.

List of organisations to which the draft Regulations were issued

Association of British Insurers
Association of Consulting Actuaries
Association of Corporate Trustees
Association of Pensions Lawyers
Association of Pensions Trustees
Auditing Practices Board
British Chambers of Commerce
Cabinet Office (Regulatory Impact Unit)
Confederation of British Industry
Consumers Association
Equal Opportunities Commission
Faculty and Institute of Actuaries
Federation of Small Businesses
Financial Services Authority
HM Treasury
Industry Wide Pension Schemes Group
Inland Revenue
Institute of Chartered Accountants in England and Wales
Institute of Chartered Accountants in Scotland
Institute of Directors
Investment Managers Association
Law Society
Law Society of Scotland
National Association of Pension Funds
National Consumer Council
National Pensioners Convention
Occupational Pensions Advisory Service
Pensions Management Institute
Pensions Ombudsman
Scottish Executive
Small Business Service
Social Security Policy and Legislation Division, DSD Northern Ireland
Society of Pensions Consultants
Trades Union Congress
Welsh Assembly

List of organisations which responded to the consultation

Association of British Insurers
Association of Consulting Actuaries
Association of Pensions Lawyers
Baker and McKenzie LLP
British Chambers of Commerce
Electricity Supply Pension Scheme
Faculty and Institute of Actuaries
Hewitt, Bacon and Woodrow Ltd
Local Government Employers
Ministry of Defence
Pensions Regulator
Society of Pension Consultants
Watson Wyatt