HM Treasury

The Repayment of Public Sector Exit Payments Regulations 2015
Notes on the text of the draft Regulations

1. These draft regulations have been produced to assist the consideration of clauses 149 to 151 of the Small Business, Enterprise and Employment Bill.

2. They set out in greater detail the key areas of Government's proposals to use the powers contained in those clauses to regulate repayment of public sector exit payments.

3. These regulations have been drafted for illustrative purposes. They do not purport to be a fully checked or comprehensive consultation draft.

4. The Government's detailed policy and final regulations will of course be influenced by any amendments and comments made during the progress of the Bill, and the responses to the main consultation on those regulations. We intend to produce a full draft for that consultation, which will be drafted more precisely, have undergone legal checking, and will cover the full extent of the policy in this area.

5. The Regulations are intended to form the starting point for dealing with public sector exit payments. If public bodies wish to go further and make more rigorous repayment requirements, these Regulations will not prevent them from doing so.

Part 1: General

6. These regulations contain the short title, extent, and interpretation provisions of the Regulations.

7. Some terms used in the regulations are not defined in this part of the regulations, because they are defined in the Bill clauses. They are:

> "exit payee" – defined in clause 149(7) as "an employee or office holder to whom any qualifying exit payment is payable"
>
> "responsible authority" – defined in clause 149(7) as "an authority by which any qualifying exit payments are payable"
>
> "subsequent authority" – defined in clause 150(4) as "(a) in relation to an exit payee who becomes an employer or a contractor, a public sector authority of which the exit payee becomes and employee or a contractor, or (b) in relation to an exit payee who becomes a holder of

a public sector office, an authority which is responsible for the appointment.”

8. The regulations are drafted to come into force on 1st April 2016. That is the current intended date of reform. The date of reform has been set for 2016 to enable those public sector employers whose exit payment arrangements are formalised into compensation schemes (in secondary legislation or otherwise) some time to amend their compensation schemes so that they comply with the Regulations.

9. The Regulations extend to the whole of the United Kingdom. This is to give effect to the agreed devolution settlement which is further detailed below.

Part 2: Exit payments

10. These regulations set out what exit payments are covered by the regulations. They can be broadly categorised as:
    (a) voluntary and compulsory redundancy payments,
    (b) payments made to secure a voluntary exit from employment,
    (c) discretionary payments to buy out actuarial reductions in pensions to allow for early retirement; and
    (d) other payments made as a result of loss of employment.

11. The Government’s response to the consultation on the policy of exit payments and repayments stated that the Government recognised that some payments made upon exit (such as leave entitlements that had not been taken at the time of exit, and payments in lieu of notice) would be excluded from the regulations as they represented outstanding contractual entitlements rather than exit payments as such. These regulations ensure that such payments are not included within the scope of the repayment regime.

12. However, ex gratia and severance payments remain in scope of the regulations. This is because these payments can be made in order to facilitate an exit as well as to settle potential claims of employer fault. We are aware that there is the potential for this to adversely impact upon the ability to settle potential employment claims with a voluntary severance payment. We think that this impact can be mitigated by using the waiver power to waive repayment of any exit payment that was made in order to settle an actual or potential claim of employer fault.

13. It is also the case that discretionary payments by employers to buy out actuarial reductions to pensions remain in scope. However, the Government has said that it will not seek to recover such payments where they are not discretionary, but there is an unqualified right to those payments under the scheme. This ensures that the Government’s 25 year guarantee in relation to public sector pensions is upheld. An example of how we intend to achieve this result, in relation to local government pensions, can be found at regulation 4. We will be able to make similar provision in respect of other unqualified rights to unreduced pension.

14. Regulation 7(1) ensures that the repayment requirements of these regulations only apply to those exit payees who are high earners; that is to say those exit payees whose earnings amount to £100,000 per annum or over. Exit payees who have served less than 12 months in office or employment, but whose earnings averaged up to an annual basis would have been over £100,000, are also captured by regulation 7(2). Part time workers are dealt wth by the deeming mechanism in regulation 7(3), which converts their actual earnings to full time equivalent earnings.

Part 3: Sub-sectors and employers

15. These regulations define the 'sub-sectors' as groups of bodies and offices listed together in Schedules.

16. The Government intends to base these sub-sectors on the list of public sector bodies held by the Office for National Statistics. As that list is revised, or as new public sector bodies or offices are created or abolished, we will update those Schedules from time to time by amending regulations. We intend that:
    (a) When new bodies or offices are added to Schedules, exit payments made before the date of addition are not captured by the exit payments regime.
    (b) When bodies or offices are removed from Schedules, exit payments may remain recoverable by successor bodies or directly by HM Treasury.
    These provisions will be made within the amending regulations.

17. The Schedules have been drafted to give effect to the devolution settlement agreed with the Scottish Government, Welsh Government, and Northern Ireland Executive.

18. They enable an exit payment made by a public body or in respect of a public office in England, Wales, or Northern Ireland to be recovered after a high earner takes up a new employment or office, or starts work under a relevant contract, with a public body or office in the same sub-sector elsewhere in the UK.

19. However, separate regulations made by Scottish Ministers will make provision for the recovery of exit payments made by relevant Scottish bodies. To prevent the main Regulations from mandating such recovery, Scottish public bodies have been listed in a separate column of the Schedules in the draft main Regulations.

20. For example, as can be seen from the health sub-sector in Schedule 3 of the draft Regulations, an exit payment made by an NHS Trust in Wales will become repayable upon new employment by a Scottish NHS Trust. However, an exit payment made by a Scottish NHS Trust will not become repayable upon new employment by an NHS Trust in Wales – unless separate regulations made by Scottish Ministers mandate this.

21. The public sector contains individual organisations such as regulators and other bodies which are independent from Government by policy or by law. Given their independence from Government the Government intends to create

separate subsectors for each of these bodies, and enable them to administer their own waiver regime (subject to the same disclosure provisions as apply to other sub-sectors). An example of how this can be done can be found at Schedule 5, where the Office for National Statistics has its own sub-sector.

22. The Government has also decided that some bodies will be exempt from the repayment requirements in these regulations, such as the armed forces, some publicly owned financial corporations, public broadcasters and the Bank of England. They are not listed within the sub-sectors, and so fall outside of the repayment regime.

23. These clauses also define the old employer as being the body or office which the exit payee has received an exit payee in consequence of leaving, and the new employer as the authority responsible for their remuneration (as employee, contractor, or office holder) when they return to work in the sub-sector.

24. They also define what is considered to be a relevant contract for services. The definition is still being considered, and so regulation 11 is only included as an illustrative example of what such a definition might be.

Part 4: Repayment of exit payments.

25. These regulations set out the liability to repay an exit payment if the exit payee returns to the same sub-sector within 12 months of receiving the payment.

26. If they return within 28 days, the full amount of the exit payment is due.

27. If they return after 28 days, but before 1 year, only a proportion of the exit payment is due to be repaid. This is calculated as follows:
    (a) The amount to be repaid is the amount of the exit payment, less the salary that they would have been paid had it not been for leaving employment or office within the sub-sector.
    (b) The amount is further reduced so that they do not have to repay tax or national insurance contributions already paid in relation to the exit payment.
    (c) The amount is further reduced to reflect on any drop in the level of remuneration for the new employment when compared the employment in respect of which an exit payment was made. This will cover both those returning on a lower salary, and those returning part time.
    (d) The amount to be repaid is capped so that they do not have to repay any statutory redundancy pay (or an equivalent amount in the case of those public sector workers who do not have a right to statutory redundancy pay).

28. If they return after a year, no repayment is due.

Part 5: Duties

29. These regulations oblige:

(a) the old employer to inform exit payees of the potential consequences of returning to work in the same sub-sector, and to keep records of exit payments for as long as they may be necessary;
(b) the exit payee to inform the old and new employer of an exit payment that might be repayable;
(c) the exit payee, before taking up new employment or office, to enter into arrangements to repay to the old employer that part of the exit payment that is due to be repaid;
(d) the new employer not to allow the exit payee to take up new employments or office until those arrangements are in place;
(e) the exit payee to then repay to the old employer within a reasonable time that part of the exit payment that is due to be repaid;
(f) the old employer to take reasonable steps to seek repayment; and
(g) if the exit payee does not comply with the duty to repay any exit payment due, to enable the new employer to remove the exit payee from the new employment or office, or to stop them from working under the relevant contract.

Part 6: Waiver

30. These regulations enable the repayment requirements of these regulations to be waived. They set out who, in relation to each sub-sector, has the power to do so.

31. We do not expect that the waiver power will be used except in exceptional circumstances, such as:
(a) Where there is an urgent need to recruit a particular individual to deal with a particular issue;
(b) Where unexpected effects occur as a result of machinery of government changes; or
(c) Where the exit payment includes a settlement in respect of an actual or potential claim of employer fault.

32. That power is capable of being delegated to other persons. Such persons may include:
(a) Welsh Ministers and the Northern Ireland Department of Finance and Personnel, in relation to public sector exit payments made by relevant Welsh and Northern Irish public sector bodies or offices.
(b) Local authorities, in respect of bodies that operate at a local rather than national level. Treasury guidance will set out that the exercise of the waiver power will need to be authorised by a vote of the Full Council.
(c) Regulators or other independent bodies, to preserve their independence. For example, regulation 26(3)(e) enables the Office for National Statistics to operate the waiver regime in respect of its own exit payments.

33. These delegations will operate administratively by the side of the regulations. They help to give effect to the Government's commitment to hand control of waivers to local authorities in respect of local matters, and so take forward the localism agenda.

34. Those people who exercise the waiver power must keep records of the fact that they have done so, and issue an annual list of the times that they have used it. The publicity attached to such a list will help to ensure that the waiver power is not misused to frustrate the intention of these regulations.

35. The Treasury has two methods in which it can ensure that the waiver power is used properly:
    (a) A consent regime to ensure that each waiver is properly made, and/or
    (b) A guidance regime which sets out binding principles for use of the waiver power.

36. The Treasury currently intends to ensure that the waiver power is used appropriately via a guidance regime, which is catered for in regulation 28. However, if after 2016 there are concerns about how the waiver power is used, the potential for a consent regime to be put in place remains as a fall back option.

Service credits

37. The Government has considered responses to the consultation which stated that it would be unfair for a person, upon taking an exit payment calculated by reference to length of service, to repay that exit payment upon returning to the same sub-sector, but still lose the benefit of previous service making up the repaid exit payment if they receive a further exit payment in the future.

38. The Regulations do not make any provision about whether an exit payee should be given service credits upon re-entering employment and repaying part or all of their exit payments to avoid these consequences of the exit payment regime.

39. That will be a matter for old employers and any relevant compensation schemes.