

**DELEGATED POWERS AND REGULATORY REFORM COMMITTEE
SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL**

Supplementary Memorandum by the Department for Business, Innovation and Skills

Introduction

1. This Supplementary Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee (the “DPRRC”) by the Department for Business, Innovation and Skills. It identifies the Government amendments tabled in the House of Lords that confer new powers to make delegated legislation.

Presentment of cheques (clause 13)

Power to prescribe circumstances in which an instrument may not be presented by electronic image

Power conferred on: The Treasury

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Context and purpose

2. Clause 13 of the Bill inserts a new Part 4A into the Bills of Exchange Act 1882, enabling cheques and similar payment instruments to be presented by the provision of an electronic image of the instrument, rather than the instrument itself. This will enable cheques to be processed more quickly and efficiently, and enable banks to offer novel products to customers, such as the ability to pay in cheques through a smartphone app. The provisions also relate to other similar instruments, and the references to cheques below should be read as including reference to those other instruments. Presentment by electronic image is available only for instruments which appear to be intended to enable a person to obtain payment from a banker, and the Government’s expectation is that in practice all such presentment will take place through the inter-bank cheque clearing system, which will enable the application of common standards and security measures.
3. Amendment 3 inserts section 89A(1A) and (1B) into the 1882 Act to give a power for the Treasury to make regulations prescribing circumstances in which instruments may not be presented by provision of an electronic image.
4. The power is included in order to ensure that the Government is able to limit the use of presentment by image in case new types of instrument, or new types of dealing with existing types of instrument, are developed leading to the use of presentment by image without appropriate standards and security measures in place. The Government does not currently intend to exercise the power, but will keep under review whether it is necessary to exercise the power.

Justification for delegation

5. The power is intended to deal with unexpected or unforeseen uses of presentment by electronic image. It would not be possible to address such unexpected or unforeseen circumstances in the Bill itself.

Justification for procedure selected

6. Placing a restriction on the availability of a means of presenting a payment instrument which would otherwise be available is a significant step, in relation to which it is appropriate to seek Parliamentary approval by way of the affirmative procedure.

Power to require a certified copy of an electronic image to be provided to the payer and to provide for the copy to be evidence of receipt of payment by the payee

Power conferred on: The Treasury

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Context and purpose

7. Under common law, the drawer of an instrument is entitled to have the instrument returned to them once it has been paid. Section 3(1) of the Cheques Act 1957 provides that an unindorsed cheque which appears to have been paid by the bank on which it is drawn (most obviously by being stamped “paid” by the paying bank) is evidence of receipt of the sum payable by the cheque. A similar common law rule applies in relation to other instruments. While such evidence may be rebutted by proof that the payee has not in fact received payment, the evidence provides protection for the payer against unfounded claims by a payee that payment has not been received.
8. In the case of presentment by electronic image, it will not be possible for the original cheque to be returned to the drawer, because the drawer’s bank will receive an image of the cheque rather than the cheque itself. Therefore the payer will not be able to obtain this prima facie evidence that the payee has received payment.
9. Amendment 6 inserts section 89CA into the Bills of Exchange Act 1882, which gives a power for the Treasury to make regulations (a) requiring the paying banker to provide a copy of the instrument to the payer, and (b) providing that the copy provided is evidence of receipt of payment by the payee. The power is included so that the Government can ensure the continued availability of evidence of payment for the payer.

Justification for delegation

10. The details of the format in which the copy is to be provided, any accompanying information to be provided, and the precise circumstances in which the copy must be made available, will depend on the technical design of the cheque clearing system, which is not yet complete. It may also change in future if there are technical developments of the clearing system.

Justification for procedure selected

11. The conferral of evidential value on a document which does not in fact prove receipt of funds by the payee is a significant step, in relation to which it is appropriate to seek Parliamentary approval by way of the affirmative procedure.

Financial penalties for failure to pay sums ordered to be paid or settlement sums (Clause 148)

Amendment to power in new section 37O for the Secretary of State to apply financial penalty provisions with modifications in particular cases.

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

12. Amendments are being made to Clause 148 to ensure that, as well as covering compensation the employment tribunal has ordered the employer to pay the worker, the scope of the financial penalty provisions will include any legal costs (or a sum to cover preparation time) the worker has been awarded. In some cases a decision to award costs may come later than the decision to award compensation. This could mean a delay before the financial penalty process could be started.
13. The amendment adds an additional circumstance in which the power to make regulations already contained in new section 37O can be exercised. It allows the provisions to be applied with modifications where the only reason that money owed to the worker is not to be considered outstanding for the purposes of the financial penalty regime is that an application for costs remains unresolved. In particular it allows regulations to provide that the financial penalty enforcement officer can decide to treat costs separately, therefore allowing them to pursue an unpaid amount on behalf of the worker without waiting for a decision on whether the employer also owes money in relation to legal costs.

Justification for delegation

14. Costs orders in the employment tribunal are currently rare so the Government does not think this is likely to be a significant problem at present. If this is the case the power will not be exercised. However the use of costs orders may become more prevalent in the future and the resolution of costs issues may prove to be causing unforeseen delays. A power is therefore needed to allow the provisions to be applied with modifications in such situations. Further evidence would be needed to establish how best to apply modifications to address problems of delay where costs orders are involved. The delegated power will allow the Government to respond flexibly.

Justification for procedure

15. The affirmative procedure is considered appropriate for this power. It also reflects the procedure already provided for in the regulation making power contained in 37O.

Schedule 3: paragraph 25 of Schedule 1A to the Companies Act 2006: Limited partnerships

Power to prescribe certain persons that are not deemed persons with significant control

Power conferred on: the Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

16. Schedule 1A is inserted into the Companies Act 2006 by Schedule 3 of the Bill. This Schedule sets out the conditions by which a person is deemed a “person with significant control” over a company. Paragraph 25 of Schedule 1A provides that an individual holding shares or rights in a company by virtue only of being a limited partner in a limited partnership is not a person with significant control.
17. The new power that is being tabled in amendment 58 will enable the Secretary of State to prescribe the characteristics of individuals who will constitute a “foreign limited partner” and will not be treated as a person with significant control in the same way as limited partners under UK law will not.

Justification for delegation

18. It was necessary to take the power in order to allow the Department to consider carefully the different types of foreign entity that it may be appropriate to treat in the same way as limited partnerships. Foreign limited partnerships have a variety of characteristics, and it would not be practical to list all the various arrangements on the face of the Bill.
19. Further, new structures are frequently created (for instance two new types of limited partnership have been created in Jersey in the past 5 years). Taking a power therefore gives the Secretary of State additional flexibility to respond to the creation of new structures as come to the attention of the Department.

Justification for procedure selected

20. The affirmative procedure is considered appropriate in order to allow thorough Parliamentary scrutiny.

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