Workplace Pension Reform: completing the legislative framework for automatic enrolment

Government response to consultation

January 2012

DWP Department for Work and Pensions

Contents

1. Introduction

1. On 19 July 2011 we published the consultation document Workplace Pension Reform – Completing the legislative framework for Automatic Enrolment, together with draft regulations and Orders and draft guidance on certification of certain types of occupational pension scheme. This consultation closed on 11 October 2011.

2. The consultation covered the following:

    - arrangements for putting into effect the recommendations of the Making Automatic Enrolment Work (MAEW) Review, such as allowing employers to apply waiting periods in respect of eligible jobholders;

    - a series of minor amendments intended to clarify the policy and remove legislative obstacles;

    - new regulations and draft guidance for persons certifying money purchase, personal pension and the money purchase elements of hybrid schemes; and

    - new statutory instruments on special occupations not currently covered by automatic enrolment (seafarers, police not under a contract of employment and offshore workers).

3. We consulted formally for a period of twelve weeks. Earlier in the year we carried out an informal consultation exercise on draft regulations, with the intention of providing as much certainty and notice as possible to employers and pensions industry professionals and external suppliers who will be responsible for delivering elements of the employer compliance regime.

4. To ensure a thorough and comprehensive response, we shared our thinking with stakeholders through:

    - bi-lateral meetings, seminars and workshops, which we held before and during the consultation period; and

    - meetings with employers; employer representatives, including organisations representing small and medium-sized businesses; trades unions; pension providers and insurance companies; and accountants.

5. We received 59 formal written responses to this consultation.

6. The consultation closed on 11 October 2011 and we have carried out a thorough analysis of the responses.

7. This document summarises the responses to the consultation and proposes various changes to the draft legislation.

8. It also provides us with the opportunity to provide clarification on some of the issues raised which fall outside the scope of this consultation, but which we recognise are of significant importance to enable wider understanding of the reforms or legislation.

9. We are grateful to all those who gave so generously of their time to discuss the issues and share ideas and suggestions. A list of organisations that responded to the consultation is at Section 5.

10. Two sets of instruments are subject to the affirmative resolution procedure and will require the approval of both Houses of Parliament before they come into force on the commencement of the employer duty, which is scheduled to come into effect from 1 July 2012. The final statutory instruments have been published alongside this document.

11. This document is available on the DWP website at: www.dwp.gov.uk/consultations/2011/workplace-pension-reform-2011.shtml

12. A paper copy of this document can be obtained from:

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2. Background, summary of specific changes and next steps

1. In 2010, the Government commissioned an independent review of the legislation in place to support the workplace pensions reforms scheduled to begin in October 2012. The 'Making Automatic Enrolment Work' (MAEW) review's remit was to consider the proposed scope for automatic enrolment and the policy of establishing the National Employment Savings Trust (NEST).

2. The MAEW review concluded in November 2010, and recommended several changes to the reforms, most notably the introduction of optional waiting periods and simplification of the certification process.

3. The Government accepted the recommendations of the MAEW review and necessary amendments to primary legislation were made through the Pensions Act 2011 (which received Royal Assent on 3 November 2011). The regulations included in this consultation will complete the changes recommended in the MAEW Review by amending and adding to the secondary legislation framework for automatic enrolment.

4. In addition, the Government included proposals in the consultation for how the automatic enrolment requirements should be extended to cover seafarers and offshore workers, who were excluded from the original legislation during the passage of the Pensions Act 2008.

5. The consultation also included draft regulations to implement a Budget commitment to introduce a moratorium on legislation affecting micro businesses until March 2014. Since the consultation closed, the Government has announced that it intends to extend the timetable for staging employers into automatic enrolment, so that no small employer with fewer than 50 workers in its PAYE scheme will be brought in before May 2015.

6. The draft Automatic Enrolment (Miscellaneous Amendments) Regulations 2011 will need to be revised to reflect these changes. Those parts of the draft regulation included in the consultation which addressed the moratorium on micro business are therefore being withdrawn. The Government made a further statement about the implementation timetable on 25 January. Our revised implementation plan continues to provide the correct balance between easing the burden on smaller businesses and

ensuring that our delivery partners continue to be able to take on and process large volumes of employers gradually, without risk to the overall implementation of the reforms. We will consult on draft implementation regulations shortly.

7. In addition, the Government recognises that larger employers will already have started to prepare for automatic enrolment and require certainty about their staging date. Therefore, the revised draft regulations will not affect any staging date on or before 1 February 2014. Any employer with a staging date from October 2012 to 1 February 2014 will retain their original date.

8. In preparing this amending legislation the Government took the opportunity to make various minor amendments of a technical nature.

9. The draft regulations were issued for consultation in July 2011, and the consultation period ended on 11 October.

The stakeholder response

10. Overall, stakeholders responded favourably to the proposals, with detailed comments and criticisms directed at specific features rather than at the fundamental principles of the reforms.

11. The introduction of the **moratorium for micro-employers** was welcomed. Since the consultation closed, the Government has announced the intention to extend the timetable for staging employers into automatic enrolment, so that no small employer will be brought in before May 2015. This new staging profile will replace the moratorium in respect of automatic enrolment so, subsequently, the relevant parts of the draft regulations have been withdrawn.

12. Most stakeholders were in favour of abolishing the **'Person A'** requirement on the grounds of simplicity, although several considered that it should be retained. It was acknowledged that the problem that 'Person A' was intended to address, namely the possibility that pay spikes would trigger automatic enrolment for the low paid, would remain and could still give rise to some anomalous cases.

13. Support for the introduction of **waiting periods** was strong. However, stakeholders considered that many employers, in particular those with dispersed premises and one central HR office, might find it difficult to issue the necessary notice within the proposed period of one week. Most suggested that a period of one month should be allowed. Stakeholders were also of the view that most, if not all, employers would use a second waiting period, and that the rules for the first and second waiting period should be aligned.

14. Stakeholder comments on our proposals for the **revised certification test** were broadly favourable, with specific concerns expressed about the length of the certification period, and the treatment of schemes with a contribution cap or a pensionable pay cap. It was suggested that the rules could be relaxed further for employers certifying under either Tier 1 or Tier 3. Many stakeholders considered that the definition of pensionable pay should not include a range of pay items such as car allowances, shift allowances and incentive pay, which are not ordinarily pensionable.

15. With regard to the proposals in respect of **seafarers and offshore workers,** stakeholders offered a range of views on the "ordinarily working in the United Kingdom" test. Some recommended a more specific test, or the provision of more clarity and guidance on who would be captured by the test, and on enforcement issues. Stakeholders also asked for shipping companies to be staged in later in the timetable, to reflect the fact that they had not expected to be covered by the employer duty and therefore needed more time to prepare.

16. Several stakeholders responded to our request for further evidence to help refine our estimates of the economic costs to businesses as well as the benefits to seafarers and offshore workers. We are grateful for the responses we have received. They have informed the impact assessment which has been published alongside this document and the regulations.

17. We propose to make a series of changes to the draft regulations in order to reflect the views and suggestions of stakeholders. The following section describes the main specific changes. Some very minor technical drafting points drawn to our attention have also been addressed but are omitted here for brevity. Where appropriate, we will also engage directly with individual respondents to provide clarification on specific technical issues raised in their responses.

Summary of specific changes

'Person A'

18. We propose to abolish the 'Person A' test.

19. We are grateful to stakeholders for pointing out the exclusion of a reference to section 1(1)(a) of the Pensions Act 2008 in draft Regulation 5(2)(a)(ii). We propose to amend the draft regulation to include the necessary reference.

Transitional arrangements

20. We propose to simplify the information requirements for employers making use of the transitional arrangements for defined benefit and hybrid occupational pension schemes, and to align the notice period and enrolment information period at one month, in common with other automatic enrolment provisions.

Waiting periods/information

21. In respect of waiting periods, we propose to extend the prescribed period for issuing a notice from one week to one month, beginning with the day after the starting day, for both the initial and any second waiting period.

22. We also propose to simplify and align provisions in the generic and tailored information provisions. This will include incorporating these requirements into an information "menu".

Payment of contributions

23. We are grateful to stakeholders who pointed out the omission in the regulations covering the due date for the payment of contributions to the scheme. We propose to amend Regulation 16(3) of the Occupational and Personal Pension Schemes (Scheme Administration) Regulations 1996 and Regulation 5(3) of the Personal Pension Schemes (Payments by Employers) Regulations 2000[1] to cover opt-in and automatic re-enrolment and the defined benefit and hybrid transitional period[2].

Certification

24. With regard to certification, we propose to amend the definition of basic pay to clarify what is and what is not included under that definition. We also propose to extend the validity period of a certificate from 12 to 18 months. Finally, we propose to make a small technical change to enable TPR to require an employer to terminate a certificate early where the TPR is of the view that there were not reasonable grounds for issuing the certificate and TPR give a notice to the employer requiring the employer to pay the difference between the contributions paid under the scheme and

[1] As amended by Regulations 48 and 49 of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010.
[2] Refers to section 3 of the Pensions Act 2008 (the Act) as amended by section 30(3) and (5) of the Act.

the contributions due under the quality or alternative requirement.

Seafarers and offshore workers

25. We do not propose to make any changes to the “ordinarily working in the United Kingdom” test for **seafarers and offshore workers**. Nor do we propose to change the staging dates for these groups. However we recognise the importance of assisting employers of seafarers in identifying which members of their workforce should be automatically enrolled. Some of the factors which are likely to be considered relevant to this decision are set out in this document. The Government will also continue to work with the Pensions Regulator to consider the scope for developing more detailed guidance on how the ordinarily working test might work in practice.

Next steps

26. The final versions of the statutory instruments have now been published, along with the impact assessment, Explanatory Memorandum and certification guidance.

27. It is proposed that the majority of these regulations will come into force on 1 July 2012, the date from which employers will begin to automatically enrol eligible jobholders into pension schemes. The exception is the implementation regulations, which will come into force from 1 June 2012 to allow employers to give the required one month of notice to the Pensions Regulator that they are bringing forward their staging date.

28. Some new legislation already includes a sunset or review clause, which can take a number of different forms. The Government has agreed that sunsetting will now be mandatory for new regulation introduced by Whitehall departments, where there is a net burden (or cost) on business or civil society organisations.

29. Subject to exceptions, the provisions relating to persons working on vessels and persons in offshore employment will cease to have effect on 1 July 2020. Before 1 July 2018, the Secretary of State must review the operation of the provisions and publish a report of his conclusions.

30. By ensuring that the need for each new regulation is regularly reviewed, sunsetting will contribute towards the Government's goal of transforming the role of regulation in our society. Where regulation is no longer needed, or where it imposes disproportionate burdens, sunsetting will help ensure that it is removed. In other cases, it will help keep effective regulation up to date, and support improvements where necessary.

31. Further consultations are being published on the final details of the automatic enrolment regime. These include

- a consultation to inform the review of the earnings trigger and qualifying earnings band which was published in December 2011 and closed on 26th January;

- a consultation setting out how the Government proposes to use the power included in the Pensions Act 2011 to exclude certain cross border employment from the automatic enrolment duty;

- detailed proposals including draft regulations setting out how the Government will implement the commitment that no small employer would be required to automatically enrol its workers before May 2015.

32. The Government recognises the need for good communications and clear guidance for employers, their advisers and their workers. Some guidance has already been issued, and DWP will continue to work with TPR to develop and deliver a properly targeted information campaign which addresses the needs of all those covered by the reforms.

3. Stakeholders' responses to the consultation and the Government's response

(i) The draft Automatic Enrolment (Miscellaneous Amendments) Regulations 2011

Automatic enrolment
Moratorium on regulations for small business

Draft Regulations 3, 4, 6, 7, 8 and 9 of The Automatic Enrolment (Miscellaneous Amendments) Regulations 2011 amend Regulations 2, 4 and 5 and 6 of The Occupational and Personal Pensions Schemes (Automatic Enrolment) Regulations 2010.

Background

1. At the Budget 2011, the Government announced a moratorium on regulation on businesses with fewer than ten workers to run from April 2011 to March 2014. The draft regulations published in July amended the staging provisions of the Employers' Duties (Implementation) Regulations 2010 to ensure that no business with fewer than ten workers is brought into automatic enrolment before April 2014. We also proposed additional provision to move the staging date of employers, with fewer than 10 workers, who are part of a multiple employer PAYE scheme and cannot be separately identified in PAYE data.

2. The parts of the draft regulations which make these changes are being withdrawn. This is because the Government has now made a commitment that no small employer should be brought into automatic enrolment before May 2015.

3. Other parts of the revised implementation regulations will be retained. These amendments also take forward the MAEW Recommendation that the largest employers who are due to be brought into the reforms on 1 October 2012 and 1 November 2012 should be able to move their staging

date forward up to 1 July 2012 so that they have similar flexibility around bringing forward their staging date as other employers. All other employers will continue to be restricted to an earliest staging date of October 2012.

4. To accommodate those largest employers who move their staging date forward up to 1 July 2012 the start date of the transitional period for money purchase and personal pension schemes and the start date of the transitional period for defined benefit and hybrid schemes need to be brought forward to 1 July 2012.

What the draft regulations said

5. Regulation 3 amends regulation 1 (Citation, commencement and interpretation) of the Employers' Duties (Implementation) Regulations 2010.

6. Paragraph 3(a) amends the coming into force date to 1 June 2012.

7. Paragraph 3(b) provided a definition of the term "micro employer", substitutes "applicable" for "allocated" in the definition of "PAYE scheme", making it clear that an employer's "PAYE scheme" is the HMRC record applicable to that employer, and substitutes the definition of "staging date" with a new definition covering micro employers. This has now been withdrawn.

8. Paragraph 3(c) inserted a formula for the calculation of full time equivalent employees, applicable in the case of micro employers. This has now been withdrawn

9. Regulation 4 amends regulation 2 (Application of the employers' duties to employers) and sets revised automatic enrolment dates in certain circumstances.[This has been withdrawn.]

10. Paragraph 4(a) amended Regulation 2(1) by substituting a new paragraph (1) which provides provide the new definition of "staging date". This has now been withdrawn.

11. New paragraph (1)(a) of the amended Regulation 2 provides for the existing staging date arrangements for employers not affected by the moratorium.

12. New paragraph (1)(b) of regulation 2 provided the staging dates for micro employers. This has now been withdrawn.

13. Paragraph 4(b) inserted the words “or is part of” into regulation 2(2) to ensure that employers who are part of a multiple employer PAYE scheme fall within the definition of ‘employer’. This has now been withdrawn.

14. Regulation 5 amends regulation 3 (Early Automatic Enrolment) to set revised arrangements for early automatic enrolment for the largest employers.

15. Paragraph 5(a) amends Regulation 3(1) by substituting a new paragraph (1) which provides that where the conditions for early automatic enrolment are satisfied, the employers’ duties apply to an employer from one of the relevant dates set out in inserted new paragraph (5).

16. Paragraph 5(b) amends Regulation 3(2) by substituting a new paragraph (2) to make clear that where an employer does not meet the conditions in paragraph (4) their staging date remains as the original staging date.

17. Paragraph 5(c) amends Regulation 3(4)(c) by substituting new paragraphs (c)(i) to (iii), which provide the dates by which an employer is required to notify the Pensions Regulator in writing where they wish to move their automatic enrolment date forward.

18. New paragraph (c)(i) provides that an employer who chooses a staging date in the final column of the table in regulation 4 which is earlier than the date corresponding to that employers’ description, is required to notify the Pensions Regulator before the date specified in the second column of the table in regulation 4 corresponding to that earlier date.

19. New paragraph (c)(ii) provides that an employer, who chooses 1 December 2012 as an early automatic enrolment date, is required to notify the Pensions Regulator before 1 November 2012.

20. New paragraph (c)(iii) provides that an employer, of 50,000 or more employees by PAYE size or any other description who chooses an earlier date of 1 July, 2012, 1 August 2012 or 1 September 2012, is required to notify the Regulator no later than one month before one of the dates chosen.

21. Paragraph 5(d) amends Regulation 3 by inserting a new paragraph (5) into Regulation 3 which provides the relevant dates from which early automatic enrolment can apply to an employer.

22. New paragraph (5)(a) and (b) provide that the relevant date is any date in the final column of the table in regulation 4 which is earlier than the date corresponding to that employers’ description, or 1 December 2012.

23. New paragraph (5)(c) provides that the relevant date, for an employer of 50,000 or more employees by PAYE size or any other description, is 1 July, 2012, 1 August 2012 or 1 September 2012.

24. Regulation 6 amended regulation 4 (Staging of the employers' duties). The regulation amends the table in Regulation 4 to move the test tranche to April 2014 (and the April 2014 tranche to March 2014), move the August 2014 tranche to September 2014 and to take account of the range of PAYE reference numbers re-allocated to tranches October 2014 through to October 2015. This has now been withdrawn.

25. Regulation 7 inserts new Regulation 4A (Staging date for micro employers) prescribing the new staging dates for micro employers.

26. Regulation 8 amends paragraph a) of regulation 5 (Transitional period for money purchase and personal pension schemes) to extend the first transitional period for money purchase and personal pension schemes by three months so that it lasts from 1 July 2012 to 30 September 2016.

27. Regulation 9 amends Regulation 6 (Transitional period for defined benefits and hybrid schemes) to extend the transitional period for defined benefits and hybrid schemes so that it lasts from 1 July 2012 to 30 September 2016.

What stakeholders said

28. The easement on employers with fewer than 10 workers did not generate a substantial number of responses. Fewer than 10 respondents provided comments, which were positive and welcomed the change. However, one respondent thought that it should apply from April 2012 – the snapshot date for allocating employers by PAYE size to a staging date.

29. Several respondents asked for clarification around the staging date of those employers using multiple employer PAYE schemes where micro employers using such schemes have been given a later staging date. They asked whether the remaining employers would continue with the same staging date even though the number of workers remaining in the scheme would be such that it would fit a different PAYE size category with a later staging date.

30. There was also a suggestion that employers whose PAYE schemes are artificially swollen by the presence of non-workers, for example, pensioners where the PAYE scheme is used to pay a company pension, should be identified and where appropriate given later staging dates.

31. There was one request to lift all the restrictions on staging months so that employers are able to choose any month in advance of their official staging date.

32. There was also a call for targeted communications to those affected by changes to staging dates.

The Government's response to stakeholders

33. The Government welcomes the positive response to the amendments designed to ease the burden on employers with fewer than 10 workers. It has now decided to offer a further easement by postponing the commencement of the automatic enrolment duties for employers with fewer than 50 people in their PAYE scheme.

34. This further easement means that we are giving further consideration to how employers with fewer than 50 workers using a multi-employer PAYE scheme and those with non-workers in their PAYE scheme should be treated when allocating staging dates .

35. We have no plans to change the staging profile to allow employers to choose any month in advance of their official staging date. The regulations already allow employers to choose any alternative month, the exceptions being the months of December, other than December 2012. Many employers specifically asked us to avoid December staging dates as this is a particularly busy period for them.

36. Communications from The Pensions Regulator, and information on their website, will inform employers about changes to staging dates and the fact that those who use a multiple employer PAYE scheme may have a different staging date and that they should check the staging regulations.

Registration and Compliance

Draft Regulations 11, 12, 13, 14, 15 and 16 of The Automatic Enrolment (Miscellaneous Amendments) Regulations 2011 amend Regulations 1, 3, 4, 6, 13 and 14 of the Employers' Duties (Registration and Compliance) Regulations 2011

Background

37. Employers will be required to register with TPR to declare how they have complied with the employer duties. The government is proposing to amend the registration requirements in order to allow for the use of waiting periods by employers and in order to assist TPR to identify individual employers faster and more accurately. We propose also to change the regulations which determine how the scaled, escalating and 'Prohibited Recruitment Conduct' penalties are calculated, in order that all relevant information has been brought to the notice of TPR may be taken into account.

What the draft regulations said

38. Regulation 11 amends Regulation 1 (Citation, commencement and interpretation), amending the definition of "PAYE scheme", substituting "applicable" for "allocated". This makes it clear that an employer's "PAYE scheme" is the HMRC record applicable to that employer.

39. It also requires an employer who uses a multi-employer occupational scheme to tell TPR the Pension Scheme Registry number of the scheme and the unique reference number or description used by the scheme to identify that employer, where such a unique reference exists.

40. Regulation 12 amends registration requirement to allow for the use of waiting periods by employers. The employer is allowed up to three months to complete the automatic enrolment process and a further month to carry out associated administrative tasks and complete the registration process.

41. Regulation 13 amends regulation 4 (Registration: Re-registration), so that an employer who is obliged to re-enrol eligible jobholders will be required to complete the re-enrolment process and register with the Regulator no later than one month from the re-enrolment date.

42. Regulation 14 amends regulation 6 (Records: employers). In respect of each person to whom an employer issues a waiting period notice under section 4 of the Pensions Act 2008 (as amended) records of the person's

full name, National Insurance number (where available) and the date the notice was given must be retained.

43. Regulation 15 prescribes that when determining the daily rate of an escalating penalty the number of persons within an employer's PAYE scheme, by which the penalty is scaled, is the number of persons within the PAYE scheme actually employed by that employer. This is only the case however where the Regulator knows (a) that the PAYE scheme includes some persons not employed by that employer and (b) the number of persons in the scheme who are actually employed by the employer.

44. Regulation 16 similarly prescribes that when determining the rate of 'Prohibited recruitment conduct' penalties the number of persons within an employer's PAYE scheme, by which the penalty is scaled, is the number of persons within the PAYE scheme actually employed by that employer. Again this is only the case where the Regulator knows (a) that the PAYE scheme includes some persons not employed by that employer and (b) the number of persons in the scheme who are actually employed by the employer.

The stakeholder response

45. Several respondents suggested that Regulation 13, as drafted, did not reflect the flexibility given to employers to choose a re-enrolment date between 33 and 39 months of their original staging dates. We consider, however, that the regulation is sufficiently broadly drafted

46. One respondent queried the value of requiring employers to keep records of deferral notices issued to workers who leave service during the deferral period – that is, before being automatically enrolled. We consider that the regulations as they currently stand have the virtue of simplicity and would not necessarily benefit from being amended to exclude certain categories of worker.

47. One respondent said, in respect of draft regulations 15, and 16, that they had assumed that TPR would have the ability to adjust the scaled penalty to the actual number of employees, where this is less than the size of the PAYE scheme. This is not the case at present which is why the amendment is needed.

Government response and proposals

48. We propose to make some minor changes to the draft regulations in order to clarify the policy intention.

Pay reference periods for the jobholder test

Draft Regulation 19 of The Automatic Enrolment (Miscellaneous Amendments) Regulations 2011 amends Regulation 4 of The Occupational and Personal Pensions Schemes (Automatic Enrolment) Regulations 2010.

Background

49. **Pay reference periods** are the technical devices that enable automatic enrolment to work in practice. Firstly, pay reference periods determine jobholder status.

50. Under the provisions of the Pensions Act 2008 and the Occupational and Personal Pensions Schemes (Automatic Enrolment) Regulations 2010, jobholder status was used to trigger automatic enrolment. With the introduction of the higher earnings trigger in the Pensions Act 2011 automatic enrolment is triggered by jobholder status where earnings exceed the level of the trigger. This higher level entry point requires supporting amendments to the secondary legislation.

51. **The Person A provision** is an income smoothing measure in the 2010 automatic enrolment regulations to address the problem of ”accidental jobholders.” It was put in place so that workers with a contracted annual salary, **paid at regular intervals** and just under the (then) qualifying earnings threshold of £5,035 were not auto-enrolled just because of an isolated pay spike. An isolated pay spike may take the person’s earnings over the appropriate weekly (or monthly) trigger but not over the annual trigger when added to the contracted salary.

52. The Person A provisions do not apply to workers without a contracted annual salary paid at regular intervals, ie zero hours contract workers; agency workers and “paid to contract” workers.

53. The Pensions Act 2011 modifies the threshold for automatic enrolment (and three-yearly automatic re-enrolment) by creating an automatic enrolment earnings trigger. A jobholder is automatically enrolled when their annual qualifying earnings exceed £7,475 (the value of the trigger in the Act) but contributions are then collected from £5,035[3] .

54. This new arrangement for an automatic enrolment earnings trigger shines a new light on the Person A provision. Person A was designed as an easement for employers as a way of excluding people who might only have jobholder status for perhaps one or two isolated weeks of the year.

[3] Both these figures will be reviewed for 2012/13.

What the draft regulations said

55. Draft Regulation 19 amends Regulation 4 of The Occupational and Personal Pensions Schemes (Automatic Enrolment) Regulations 2010.

56. Regulations 19(a) and 19(b) extend the pay reference period rules to cover jobholders whose earnings exceed the automatic enrolment (and three-yearly automatic re-enrolment) earnings trigger.

57. Regulation 19(c) removes the Person A provisions.

The stakeholder response to consultation

58. The technical amendments to extend the coverage of the pay reference period rules in regulation 4 to support the assessment of jobholder status attracted no interest with the exception of Person A.

59. Of those who commented on the Person A provisions one third thought the provision should be retained in some form. They felt that this approach addressed a sound principle - the exclusion from automatic enrolment of the very low paid with seasonal upturns in wages or occasional pay spikes.

60. Some respondents felt that a modified optional rule should allow employers to make a considered assessment of likely annual earnings to judge whether to exclude individuals from automatic enrolment.

61. They accepted that waiting periods would solve some of the problems that Person A was designed to address. But concerns remained that the employer burden would be shifted from continuous monitoring and cumulative addition of pay spikes to repetitive issuing of information about waiting periods and automatic enrolment and the creation of some unnecessary small pots.

62. Nevertheless the Person A provision as it stands was the subject of sustained criticism. Two thirds of respondents said that the Person A rule, and the concept, was too complex and would impose a significant monitoring burden on employers out of all proportion to its original purpose. A “nightmare” to administer was the theme emerging from most stakeholders even though the principle still found some favour. The overall view was that despite the logical rationale for developing such a provision it would be better to remove the rule in the interests of simplicity and accept that abolition would give rise to some anomalies.

Government response and proposals

63. The Person A rule was developed before the separation of the automatic enrolment earnings trigger from the qualifying earnings threshold, and before the option of using a waiting period was introduced.

64. The introduction of a gap between the automatic enrolment trigger and the threshold of the qualifying earnings band – the point from which contributions are payable - reduces the possibility of an isolated pay spike causing someone to acquire accidental jobholder status. We believe that this has significantly reduced the likelihood of individuals being put into automatic enrolment and then only paying very small contributions.

65. Employers may also be able to use the waiting period to deal with one-off pay spikes, depending on the individual circumstances. Where an individual has not been automatically enrolled and they have a pay spike, the employer can defer automatic enrolment for up to 12 weeks. If the individual is not eligible at that point, the employer does not need to do anything save continue to monitor their earnings against the trigger.

66. We have sympathy with calls for the introduction of a simpler version of Person A. However, we feel that none of the alternative models that respondents put forward would have provided certainty for employers about what they are required to do, nor provided adequate protection for individuals. We do not support the introduction of a flexible option to allow employers to take a discretionary considered view of who to automatically enrol.

67. We want people to be automatically enrolled because of what they actually earn. That means either continuous tracking of earnings or a pay-packet by pay-packet calculation. Tracking earnings, often spanning a tax year, would be difficult and expensive, if not impossible, in many cases.

68. The downside of not having a Person A rule is that some very low paid people may get auto-enrolled because their earnings in an isolated week (or month) will trigger pension saving.

69. We accept that individuals automatically enrolled on lower earnings may be more likely to opt out. We also accept that taking contributions from the very low paid, based on a simple weekly or monthly calculation may create some more small pots. However, a weekly (or monthly) calculation with no element of annualisation means that everyone is treated equally.

70. We have weighed in the balance the views of one national organisation that does appear to have a significant number of workers with a contracted annual salary who seem to have Person A status. We have also

investigated and taken into account wage patterns on the high street (including Agency workers) where the Person A provision can not be used as the law is currently drafted.

71. Overall, we have concluded from the evidence presented in the responses that the complexity and costs that would be incurred in the administration of Person A would not be justifiable and we propose to revoke the Person A regulation.

Pay reference periods for the quality test

Draft Regulation 20 of the Automatic Enrolment (Miscellaneous Amendments) Regulations 2011 amends Regulation 5 of The Occupational and Personal Pensions Schemes (Automatic Enrolment) Regulations 2010.

Background

72. Pay reference periods set a framework for contribution requirements for the quality test for money purchase schemes. To satisfy the qualifying scheme conditions, the scheme must require contributions, however calculated, at least equal to a prescribed minimum over a 12 month period. To avoid the situation where each and every worker has an individualised 12 months (which could have resulted in a heavy administrative burden for schemes and employers) the pay reference period provisions set the start of the 12 months as the employer's staging date and every anniversary thereafter for everyone.

73. Not everyone will have jobholder status for the entire 12 month period. Some people will start or leave an employer during the 12 months; others will opt in, or opt out; others may lose jobholder status or scheme membership for periods when their earnings fluctuate below the threshold of the qualifying earnings band. The regulations need to be flexible enough to allow schemes to maintain qualifying scheme status for each jobholder and to set minimum contribution requirements only for periods when the employer is liable for contributions.

74. The existing Regulation 5 caters for quality requirements for late starters and early leavers. It does not cater for opt-in; opt out, re-enrolment or for periods when fluctuating earnings remove the liability for contributions[4]. It does not cater for "short years" when an employer chooses to use a waiting period(s).

[4] Although depending on scheme rules and the scheme's definition of pensionable pay there may not be break in contributions.

75. The proposed revised Regulation 5 is now couched in generic terms to turn-on and to turn-off the quality requirement to cover the full range of circumstances which bring a jobholder into active scheme membership of a qualifying scheme under the Act or cause a jobholder to lose such membership.

What the draft regulations said

76. Draft Regulation 20 replaces Regulation 5 of The Occupational and Personal Pensions Schemes (Automatic Enrolment) Regulations 2010.

77. New Regulation 5(1) is unchanged.

78. New Regulation 5(2)(a)(i) "turns on" the start of the first pay reference period for the quality requirement for the first year by defining the start as the **automatic enrolment date**, the **automatic re-enrolment date** or the **enrolment** date following opt-in.

79. New Regulation 5(2)(a)(ii) turns the quality requirement back on at the end of a period when the individual does not have qualifying earnings and hence loses jobholder status.

80. New Regulation 5 (2)(b) "turns on" the quality requirement for second and subsequent years by defining the start date as the anniversary of the employers staging date.

81. New Regulation 5(3) "turns off" the quality requirement each time the employment, or jobholder status or active membership of a qualifying scheme is interrupted.

The stakeholder response to consultation

82. This is a technical area and prompted very few responses. Pension professionals flagged one omission and one apparent gap in coverage in the replacement regulation as drafted.

83. Regulation 5(2)(a)(ii) turns the quality requirement back on at the end of a period when the individual loses jobholder status because they do not have qualifying earnings. There is a gap for those people who lose jobholder status by falling out of 1(1)(a) of the Pensions Act 2008 (ordinarily working in GB) who remain members of the scheme and who then re-satisfy 1(1)(a).

84. Regulation 5 appears not to make any provision to turn on the quality requirement when the employer uses a waiting period.

Government response and proposals

85. We are grateful to stakeholders for picking up the exclusion of a reference to section 1(1)(a) of the Act in Regulation 5(2)(a)(ii). We propose to amend the draft regulation to pick this up.

86. (New) Regulation 5(2)(a)(i) does allow for waiting periods but it may be useful to explain how. If an employer chooses to use a waiting period, automatic enrolment is deferred until the "deferral date"[5]. The deferral date becomes the automatic enrolment date.[6] The automatic enrolment date "turns on " the quality requirement and by so doing automatically excludes the waiting period during which there is no liability for contributions. For example, if an employer chooses to use a waiting period of three months, the automatic enrolment date is Day One, Month Four and the first pay reference period for the quality requirement starts on Day One, Month Four. There is no employer liability for contributions during the waiting period and the scheme will not be required to set a quality requirement for the waiting period which precedes the automatic enrolment date.

Continuity of scheme membership

Draft Regulation 22 of The Automatic Enrolment (Miscellaneous Amendments) Regulations 2011 amends Regulation 14 of The Occupational and Personal Pensions Schemes (Automatic Enrolment) Regulations 2010.

Background

87. The policy underpinning automatic enrolment is to provide for a continuing employer duty – employers are obliged to put an eligible jobholder into a qualifying scheme and keep them in unless the person himself chooses to leave.

88. Section 2 as originally drafted had an unintended outcome. If an employer chooses to change or switch schemes, ongoing membership of the replacement scheme for those affected is predicated on jobholder consent. If this consent is delayed or withheld then the employer would be in breach of the Act for not achieving active membership of the replacement scheme

[5] Section 4(3) of the Pensions Act 2011
[6] Section 4(1)(b) of the Pensions Act 2011

within the prescribed time.

89. To solve this problem, the Pensions Act 2011 inserts an overt automatic re-enrolment obligation to restore the policy intention of continuous membership.

90. Automatic enrolment is compulsory: pension saving is not. A person can opt out, or cancel membership but every three years[7] the employer is obliged to automatically re-enrol any eligible jobholder who is not an active member of a qualifying scheme. To avoid badgering people who have only recently decided to stop saving, employers are exempt from the obligation to re-enrol those who have opted out or cancelled membership in the 12 months before the employer's three-yearly re-enrolment exercise.

91. This exemption is in the original section 5 of the Pensions Act 2008. As drafted section 5 would have simultaneously prohibited the immediate automatic re-enrolment obligation just created in the Pensions Act 2011. To resolve this, we have moved the exemption from the re-enrolment obligation from the 2008 Act in these proposed amending regulations to be able more accurately to prescribe when and in what circumstances automatic re-enrolment applies.

What the draft regulations said

92. Draft Regulation 22 replaces Regulation 14 of The Occupational and Personal Pensions Schemes (Automatic Enrolment) Regulations 2010.

93. New Regulation 14(1) excludes jobholders from automatic re-enrolment in prescribed circumstances.

94. Regulation 14(2)(a) excludes jobholders from **cyclical re-enrolment** who, within the 12 months before the employers three-yearly re-enrolment exercise, cancel their active membership of a qualifying scheme or ask their employer to do something to take them out of such membership.

95. Regulation 14(2)(b) provides the same exemption for individuals who have opted out within the preceding 12 months.

96. Regulation 14(3) excludes a jobholder from **immediate re-enrolment** if the person loses active membership of a qualifying scheme because they asked their employer to do something to take them out of such membership.

[7] We propose to amend the regulations so that the employer will have the right to move the date forward or back by three months.

The stakeholder response to consultation

97. Stakeholders welcomed the principle that an employer who changes or closes a qualifying scheme should be obliged to provide a replacement one straightaway and that the same duty should apply if any third party causes the individual to lose scheme membership.

98. Respondents posed a number of technical questions intended to clarify the link between the revised continuity of scheme membership arrangements, immediate automatic re-enrolment duty and the one month window for the immediate automatic re-enrolment *process.*

Government response and proposals

99. The amendments to Regulation 14 are a consequence of changes made to sections 2, 5 and 6 of the Pensions Act 2008 by the Pensions Act 2011. The Government does not propose to amend the draft Regulations; however, it may be helpful to set out the effect of the changes in the Act 2011 and the automatic re-enrolment process in more detail to address specific technical questions and misunderstandings.

100. The combined effect of the amendments to the continuity of scheme membership and the automatic re-enrolment provisions is that if a third party (eg employer, scheme manager, trustee, provider) does anything to cause the jobholder to lose active membership of a qualifying scheme, then the employer will be obliged to automatically re-enrol the individual into a qualifying automatic enrolment scheme. Active membership must then take effect from and including the day after membership ceased.

101. However, there are two areas of confusion. The first is about the process. The changes to the Act set the automatic re-enrolment date as the day after membership ceased. This does not mean that the employer has only one day to complete the automatic re-enrolment process. Membership must be continuous but the employer has one month from and including the re-enrolment date to complete the process. The re-enrolment date must be the start date of active membership of the new scheme, but the employer is not required to complete all the administration in one day.

102. The automatic re-enrolment process (mirroring the automatic enrolment process) requires the employer to “achieve active membership” effective from the re-enrolment date. The employer must issue jobholder information to the scheme and issue the terms and conditions of a personal pension and enrolment information to the jobholder by the end of one month from the re-enrolment date.

103. The second area of confusion concerns the concept of the “original” and the “replacement” scheme. Neither the Act nor the Regulations require

the employer to put the jobholder into a “replacement scheme”. Sometimes a “replacement scheme” will be appropriate. For example, if the original scheme is no longer available (or qualifying) then the employer must provide a replacement scheme.

104. There may, however, be circumstances where the employer can just put the person back into the “original” scheme. Membership may have lapsed because an administrative error caused a hiatus in payments to the scheme. This could happen where active membership is predicated on payment of contributions. It may be that the original scheme is still qualifying, and will still accept the jobholder as an active member. The employer needs to correct the error, make the payments and re-instate active membership effective from the day after the cessation so that there is, in effect, no break.

105. We do not believe that it is appropriate to mandate the employer to use a different scheme when the original one may still be able to meet all the conditions. If the original scheme is no longer a qualifying scheme, then the employer can not continue to pay contributions deducted under the automatic enrolment provisions into it.

106. There was no evidence in the responses to indicate that an employer could be taken by surprise by major changes to a scheme. An employer who initiates or is a party to a scheme rule change would have advance notice. If the employer changes the nature of the scheme so that the contributions due mean that the scheme is no longer meeting the minimum quality requirements then there is a breach of the continuity provisions and the employer is obliged to take action.

107. However, if the employer does anything to cause the jobholder to lose active membership of a qualifying scheme but this was at the jobholder’s request, then the automatic re-enrolment obligation does not apply. The proposed paragraph 14(3) turns off the immediate re-enrolment obligation. This situation may be uncommon but the regulation is designed to prevent a catch-22 for the employer.

Other substantive issues

108. Stakeholders raised a number of questions on automatic enrolment and pensions unrelated to these amending regulations or the issues on which we were consulting. The topics included enhanced and fixed protection; salary sacrifice; sectionalised schemes; late payment of contributions and late joining but this is not an exhaustive list. We have referred the questions raised to The Pensions Regulator to consider whether it is appropriate to amend its guidance in light of the issues raised.

Defined Benefit schemes: transitional arrangements

Regulation 24 of the Automatic Enrolment (Miscellaneous Amendments) Regulations 2011 amends regulation 27 (Automatic enrolment following the transitional period for defined benefit and hybrid schemes: Information) of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010.

Background

109. Regulation 27 prescribes the information to be provided under section 30 of the Pensions Act 2008. Section 30 allows employers using defined benefits and hybrid schemes to adjust gradually to the additional costs of the reforms. It allows them to delay automatic enrolment of relevant jobholders into such a scheme until the end of a transitional period where certain conditions are met.

110. We have corrected the flaw in section 30 of the Pensions Act 2008, enabling employers who use defined benefits or hybrid schemes to choose whether or not they use the transitional period to defer automatic enrolment.

111. An employer who intends to defer the automatic enrolment date of a relevant jobholder will be required to notify that individual with a notice of that intention by the end of a prescribed period.

112. Employers who defer automatic enrolment of eligible jobholders will be required to automatically enrol those jobholders in the usual way at the end of the transitional period. Employers who do not provide a notice will be required to automatically enrol in the usual way.

113. There is no effect on new workers joining the company on or after the employer's staging date. An employer will be required to automatically enrol these individuals.

What the draft regulations said

114. Regulation 24 amends regulation 27 (Automatic enrolment following the transitional period for defined benefit and hybrid schemes: Information), and sets out the information requirements as a consequence of the new notice to defer automatic enrolment for defined benefit and hybrid schemes.

115. Paragraph 24(2) substitutes a new heading for Regulation 27: “Notice to be given under section 30(3) of the Act”.

116. Paragraph 24 (3) amends Regulation 27(1) by substituting a new paragraph (1) and inserting new paragraph (1A).

117. New paragraph (1) sets out the conditions for an employer providing a notice.

118. New sub-paragraph (1)(a) provides that the notice must be in writing.

119. New sub-paragraph (1)(b) provides that the notice must include a statement that the employer intends to defer the automatic enrolment date in respect of a jobholder until the end of the transitional period.

120. New sub-paragraph (1)(c) provides that the notice must be given to the jobholder by the end of the period of one week beginning with the day after the employer’s first enrolment date.

121. New sub-paragraph (1)(d) provides that the notice may also provide the information specified at regulation 27(3).

122. New paragraph (1A) provides that where the information specified at regulation 27(3) has been provided with the notice, the employer has satisfied the requirement at regulation 27(2).

123. New paragraph (4) inserts an exception to clarify that where the information specified at regulation 27(3) has been provided with the notice, the employer is not required to provide that information again.

The stakeholder response

124. This area of policy generated minimal interest. One respondent thought that employers could use the transitional period to defer the automatic enrolment date of new workers as well as that of existing. Because of this, they suggested that both should be provided with the same information about the transitional period.

125. Another respondent recognised the purpose of the transitional period, but expressed concern that otherwise eligible jobholders will not be able to join defined benefits or hybrid schemes until a later date. The respondent also acknowledged that providing employers who have defined benefits or

hybrid schemes the choice of whether or not to defer automatic enrolment goes some way to addressing this situation.

The Government's response to stakeholders

126. Employers can only use the transitional period for existing workers who are entitled to become an active member of the employer's defined benefit or hybrid scheme on the employer's staging date. It follows that information about the transitional period should only be provided to this group of workers. Workers who receive a notice from their employer about the transitional period are able to opt in to the employer's scheme in the usual way. We welcome the positive response to the amendment which provides employers with a choice of whether or not to defer automatic enrolment.

127. We accept there is a need to simplify the automatic enrolment information provisions so that they are easier for employers to understand and use.

128. We have looked again at the proposed deadline for providing the notice about the transitional period. Continuing with the theme of simplification and reducing burden, we believe that the proposal of one week is too short and the one month deadline common to the core automatic enrolment processes is less burdensome to employers.

What the Government proposes to do

129. We propose to simplify the information requirements for employers using the transitional period by incorporating these requirements into an information "menu". Information on how this menu will work is in the section on waiting periods and information.

130. We propose to align the period for giving notice to one month beginning from the employer's first enrolment date in line with other common deadlines in the automatic enrolment provisions.

131. We propose to change the requirement on employers to provide the enrolment information currently prescribed at regulation 27(3) within two months, and require employers to provide it by the same one month deadline. This aligns with the existing deadline for provision of information, which employers are already familiar with.

132. We are also using this as an opportunity to prescribe, under section 15 of the 2011 Act, that an employer may use a personal pension scheme as

an alternative automatic enrolment scheme. We will do this by amending regulation 6 as substituted by regulation 29(a) of the automatic enrolment regulations.

Automatic re-enrolment

Draft regulation 21 of the Automatic Enrolment (Miscellaneous Amendments) Regulations 2011 amends regulation 12 of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010.

Background

133. Section 5 of the Pensions Act 2008 (the Act) places a duty on employers to periodically re-enrol jobholders who are not active members of a qualifying workplace pension scheme - including those who left pension saving either during or after their opt out period. While pension saving may not have been the right decision at the time of automatic enrolment, a change in an individual's circumstances may mean it is the right decision later on.

134. Section 6 of the Act limited the re-enrolment duty on employers so that it applies no more than once in any three year period. The independent review Making Automatic Enrolment Work looked at whether the regulatory burdens associated with re-enrolment were appropriate. The Review recommended allowing employers increased flexibility around the date on which they automatically re-enrol jobholders, extending the window from one month after the three yearly re-enrolment date to three months either side of the three yearly re-enrolment date.

135. Section 7 of the Pensions Act 2011 amends section 6(1)(b) of the Act to change the maximum frequency which may be prescribed for re-enrolment from once in every three year period to once in every two years and nine months.

What the draft regulations said

136. Draft regulation 21 amends regulation 12(1)(a) and (b) (Automatic re-enrolment dates). It extends employers flexibility to choose an automatic re-enrolment date to three months either side of the three year anniversary of the employer's staging date or previous automatic re-enrolment date.

The stakeholder response

137. Draft regulation 21 prompted very few responses. All employers welcomed greater flexibility.

138. Pension consultants and human resource practitioners writing on behalf of larger employers wanted complete freedom to choose any date within a year. This would allow employers to align automatic re-enrolment with annual pay reviews and bonus cycles, for example.

139. Occupational pension schemes wanted the three months flexibility either side of the three year anniversary of the staging date (the "window") extended to six months either side of the three year anniversary staging date.

140. The Trades Unions wanted a fixed three-year cycle with no flexibility. Their view was that flexibility could delay saving.

The Government's response to stakeholders

141. The message that we take from the consultation is that employers want greater flexibility to enable them to absorb automatic enrolment into existing business processes.

142. Nevertheless we still believe that re-enrolment should take place regularly, around every three years. We have recognised employer concerns about alignment with existing processes by allowing flexibility, and the most appropriate way to provide a six month window is to centre it on the three year anniversary. We believe that extending the flexible automatic re-enrolment period to 12 months could mean too long a savings gap. It would tip the balance away from the primary objective of increasing the number of people saving for their retirement.

143. There must be a balance. We acknowledge the Trades Unions' point that any delay in re-enrolling an individual who is not in a workplace pension is a delay in the start of their pension saving. Nevertheless, automatic enrolment must work in practice. The Act already allows the employer a one month window from which to choose an automatic re-enrolment date so the principle of employer discretion is established.

144. There is another potential downside to the proposition of a 12 month window centred on the three year anniversary of the automatic enrolment date. We believe it may result in employers moving to a "common commencement date" for their first cyclical automatic re-enrolment exercise. The volume of concentrated re-enrolment activity during a period when automatic enrolment is still not fully rolled-out could have a negative

impact on providers and The Pensions Regulator.

145. We believe that extending the existing flexibility from a one month to a six month window is a reasonable easement for employers and balances this with the rights of individuals.

Waiting periods and information

Draft Regulation 24(4) of the Automatic Enrolment (Miscellaneous Amendments) Regulations 2011

Background

146. The MAEW Review recommended the introduction of an optional waiting period of up to three months before an employer has to automatically enrol a jobholder. The Pensions Act 2011 provides for a waiting period to apply from one of three points, or starting days. These are:

- the employer's staging date;
- the date on which a new worker is employed by an employer; or
- the date on which an existing worker becomes eligible for automatic enrolment. (This could be a second waiting period If one has already been applied on one of the dates above).

147. To use a waiting period, an employer will be required to provide a worker with a notice setting out his intention, together with the worker's new automatic enrolment date, within a prescribed deadline. The notice will also have to provide the worker with information about the right to opt in during the waiting period.

What the draft regulations said

148. Regulation 24(4) prescribes:

"For the purposes of section 4(5) of the Act, the prescribed period is the period of one week beginning with the day after the starting day".

The stakeholder response

149. The consultation on the draft Postponement regulations generated a large number of responses to the proposed one week period.

150. We asked: Is a period of one week from the day following the starting day sufficient time for all employers to issue a notice?

151. The majority of respondents thought that one week was insufficient and that complying with this deadline would be a real challenge for most employers. A large proportion stated that they would not be able to comply. They said that the internal communications processes of large multi-site employers served by one HR or payroll site would make a one week deadline unworkable.

152. Smaller employers, with less resource, having to deal with high volumes of notices or those with de-centralised structures where recruitment is done locally would also find a one week deadline impractical. Those employers taking on large numbers of seasonal workers, those whose payroll or HR is administered by a third party, or where an individual's earnings fluctuate or cannot be predicted would also have difficulties. The one week period would also be impossible where the employer uses payroll to determine automatic enrolment eligibility.

153. In summary, in many circumstances, the one week period would have ended before the employer has been able to determine, through the payroll, that a worker has become a jobholder eligible for automatic enrolment, or before the employer could categorise the worker if wanting to provide a tailored notice. A few respondents questioned whether an employer would choose to give a tailored notice where a generic one can be provided instead.

154. A minority of respondents thought that a week was sufficient or thought that it would only be sufficient for large employers or employers issuing a notice when using a waiting period at their staging date. Some respondents thought that a week offered the correct balance between providing employers with an administrative easement and jobholders with the benefit of opt in. It was also recognised that the opt-in process only allows a monthly paid jobholder to gain a maximum of two extra months of employer contributions.

155. Around half of those who thought that a week was insufficient did not suggest an alternative period. Of those who did suggest an alternative period, a small proportion suggested two or three weeks in order to provide a more appropriate balance between the requirement on employers to issue the notice and ensuring that information provision to workers is not delayed. The view of the larger proportion who suggested an alternative period was that the prescribed period should be one month from the starting day. These respondents thought that a period of one week and providing early notification in respect of opt in was less important than providing employers with a workable process, allowing

them to issue notices within a prescribed deadline which they can comply with.

156. There was also a call for opt-in during the waiting period to be abandoned as the costs to employers of administering it outweigh the benefits to individuals. Amongst the largest of employers who responded, it was generally thought that very few individuals would take-up the opportunity to opt in.

157. We also asked: Will employers use a second waiting period?

158. The overall majority view was that most employers would use a second waiting period. A number of respondents were concerned about the additional burden on employers. One respondent suggested the possibility that the use of multiple waiting periods could mean that an individual never reaches the point of being automatically enrolled, leading to disengagement from pension saving.

159. The majority of respondents also thought that the rules for the first and second waiting period should remain aligned, ensuring we don't introduce a complex two-tier system of different periods for different notices.

160. The consultation generated a number of responses containing suggestions for technical or operational changes, for example, aligning the prescribed period with the pay reference period, linking it to a payday, requiring the assessment for automatic enrolment eligibility to be made at the beginning of a waiting period and not at the end, or issuing the notice on day one so that workers are aware of their rights to opt in from day one.

161. There was also a view that identification of jobholder status and issuing information adds complexity that waiting periods were intended to prevent and a number of comments on the legal drafting and wording of the information notices.

162. It was suggested that all the information provisions should be presented in the legislation in as coherent and simple manner as possible with a suggestion that content common to all notices be included in an appendix with content specific to the different categories of worker being defined separately

163. There was also a suggestion that for employers who do not use a waiting period, there should be a generic information notice that they can issue to workers who are not eligible for automatic enrolment. This would avoid having to identify such workers when they first have the right to opt in or join then having to issue the relevant information to them.

164. Some stakeholders thought that there was scope for the generic and tailored notices to be simplified and aligned. For example, it was suggested that it should not be a requirement to include the amount or percentage of contributions in the tailored notice. And that in some cases, the wording on the generic notice was inconsistent with the tailored equivalent even where the same topic was being addressed. Some stakeholders also sought clarity on how the signposting provisions would work

165. There were also requests for clarification in a number of areas.

166. Clarification was sought on how the waiting period would be applied to an agency worker who has carried out one assignment for an agency, followed by a lengthy period in which no assignments have been undertaken. It was also thought that it will be more complicated to identify when an agency worker's employment or engagement with an employment business starts and ends, given that they are not employees in the strictest sense. Clarification was also sought on how the start of the waiting period will be determined, e.g. whether it will it be in line with the start date of the contract or the date that the agency worker starts their first assignment.

167. One stakeholder also asked for clarity around whether a notice must be issued where a waiting period has been superseded by an automatic enrolment event. For example, does a retrospective notice need to be issued if an employer uses a short waiting period and automatic enrolment occurs before the notice deadline passes.

168. A small minority of respondents were totally opposed to waiting periods, suggesting that the whole concept of inertia would be undermined and that workers should be able to save from day one. There was also a suggestion that legislation should allow jobholders whose employer uses a waiting period to complain to the Regulator but, to what end, was not explained.

The Government's response to stakeholders

169. Waiting periods were introduced with employers in mind to provide a practical way of easing the administrative burden of automatic enrolment.

170. On the question of whether one week is long enough for employers to issue a notice, we acknowledge that there is a fine balance to be struck between providing a workable easement for employers and protecting individuals' pension savings. The proposal of one week was intended to protect this balance. However, the consultation has demonstrated that there are genuine practical reasons why employers would not be able to

comply with a one week notice deadline. Examples include employers with multi-site locations who would not be able to issue notices in time, and employers whose payroll is run towards the end of the month and so would not know until after a week has passed that someone was going to be eligible for automatic enrolment.

171. Because of the operational and compliance difficulties that a one week period would impose on employers, we have concluded that employers should have until the end of one month from the day after the starting day to provide a waiting period notice. This will provide a process that works in practice for employers. A period of two to three weeks would not always eliminate all of the inherent difficulties highlighted by the one week period. This change also provides greater consistency with other deadlines set out in the automatic enrolment framework.

172. Whilst this change will be welcomed by employers and their representatives, and should help to encourage compliance, we recognise that there will be concern about the potential erosion of the opportunity to opt in. This is particularly relevant to those with frequent job changes, who could be subject to a waiting period in every post.

173. Under the general opt-in process, which has been adopted for waiting periods, opt-in is effective from the beginning of the pay reference period following the date an employer receives a valid opt-in notice. Opt-in cannot be backdated as it would require employers to re-open payroll. This would create an additional burden which employers and their representatives have asked us not to build into the automatic enrolment process.

174. The Government will work to ensure that individuals are able to make the most of the right to opt in by working with our delivery partners and intermediaries to provide clear information to individuals and meaningful guidance to employers. Opting in could become a normal practice for those with frequent job changes, with opt in provided promptly by individuals in order to take full advantage, regardless of when the waiting period notice is given.

175. In keeping with the view of the vast majority of respondents, we propose to align the rules for the first and second waiting period, ensuring that employers have a period of one month to give a waiting period notice for both. We plan to evaluate employers' use of second and multiple waiting periods to ensure that they are being used in line with our policy intention.

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176. We propose to simplify the information provisions with the overall aim of minimising employer burdens, removing disparities, and ensuring that workers are given the information they need. These would be minimum

requirements so the employer is free to give more information if they wish to.

177. We are also proposing that the tailored notices should be simplified so that:

- Information on the right to opt in (Regulation 17 of the AE Regulations refer) would no longer state the value of contributions payable by the employer and the jobholder – instead it would, like the generic notice say that an employer contribution is payable.

- Information for workers joining pension saving (Regulation 21) would no longer tell the worker that they can choose how much to contribute to a scheme.

- Information for workers already in qualifying schemes (Regulation 33) would no longer give full scheme details as this is already known to the member.

178. In all these cases, the worker would be signposted to where they can get further information about pensions and retirement. We are working closely with partners to ensure that any subsequent redirection to The Pensions Advisory Service for complex questions about pensions and the Money Advice Service for help with budgeting and financial planning happens in a way that makes the experience as straightforward as possible for the individual.

179. We are developing an employer toolkit which will contain various products to help employers communicate with their workforce. There will be letter templates to help employers meet their statutory information requirements but also material which employers can choose to use to help their workers understand what is happening to them.

180. We also propose that the generic information should state that the opt-in and joining notices must be signed (or if an e mail, say that the worker personally submitted it). Without this, there could be disputes between employers and workers leading to further work for the employer.

181. On complexity, legal drafting and wording of the information notices, and presentation of information requirements, we do not believe that the process we have developed in consultation with our stakeholders adds complexity to waiting periods.

182. Some employers we spoke to preferred to provide tailored information to their workers. For those who do not, we have provided them with the alternative of a generic notice. The generic notice cannot be made any more generic because the Act requires an employer to enter a deferral

date. However, we propose to align the wording on the generic and tailored information and have incorporated an information appendix into the regulations to make the information requirements simpler and easier for employers to use and understand. We will ensure that letter templates are available in the employer toolkit for employers who wish to use either the generic or tailored information scenarios.

183. We have also considered the suggestion for a generic information notice for employers who do not use a waiting period which they can issue to workers who are not eligible for automatic enrolment. The current regulations do not bar an employer from providing a worker with additional information if they want to (without encouraging an individual to opt out), but where the regulations impose a requirement, the employer must comply with it. For example, regulations 7, 17, 21 and 33 impose timing requirements on an employer as do the draft waiting period regulations. Therefore, if section 3(2) of the Act does not apply to a worker, the employer can provide them with, for example, regulation 17 or 21 information at any time. We do not consider that it is necessary to prescribe this in regulations.

184. In addition, we considered whether the assessment of jobholder status and automatic enrolment eligibility could occur solely at the beginning of a waiting period. This suggestion would mean that some workers could be automatically enrolled at the end of a waiting period when they are not eligible and undermines our policy of automatically enrolling people because of what they actually earn and when they actually earn it. It would also mean that the waiting period could not be used to avoid enrolling individuals who have an isolated pay spike. Even if the waiting period were invoked at this point, eligibility would already have been established and they would be automatically enrolled at the end of the waiting period regardless of their earnings at that point. This would not be right. The suggestion would also lead to confusing messages for both employers and individuals.

185. Other suggestions for technical or operational changes were either outside the vires of the Act, so are not possible to consider further, or would place additional burden on employers.

186. With regard to clarification about how agency workers will be affected by waiting periods, we have worked with stakeholders to understand in detail the differences between agency workers and conventional workers, and to ensure that agency workers are not adversely affected by waiting periods.

187. In the case of an agency worker, the agency is the employer (where there is a contract between the two) and may apply a waiting period from the date that an assignment begins. Where an agency worker has carried

out one assignment where a waiting period was applied, the agency may apply a further waiting period at the start of a new assignment if automatic enrolment has not previously occurred. If the first assignment triggered automatic enrolment because it lasted for longer than three months and the worker had sufficient earnings, it would not be appropriate for the agency to apply a waiting period at the start of a new assignment. The worker would have remained an active member of the agency's scheme unless they had chosen to opt out.

188. For clarity on whether a retrospective notice must be issued where a waiting period has been superseded by an automatic enrolment event, our policy intention is that an employer must issue a notice before using a waiting period. However, we acknowledge that this will not be practical for some employers, for example, those taking on large numbers of seasonal workers at short notice where there isn't sufficient time to plan and complete the full process before employment commences. We have recognised that a deadline of one week in which to issue the notice creates operational and compliance difficulties for employers and, as a result, have extended this deadline to one month. Where an employer is only using a short waiting period, it may be desirable to incorporate the information requirements of the waiting period notice with the enrolment information. This would all have to be provided within the one month deadline for the waiting period notice.

189. In response to the small minority of respondents who were not in favour of waiting periods, the optional waiting period is enshrined in The Pensions Act 2011. The vires only allow us to prescribe the form, content and timing of the notice that an employer must provide where a waiting period is used. It is not now an option to go forward into automatic enrolment without employers having the option of using a waiting period.

190. Waiting periods were designed to provide employers with an administrative easement and we believe we have got the balance right between reducing employer burden and protecting individuals' savings.

What the Government proposes to do

191. We propose to make the recommended prescribed period one month for both initial and any second waiting period.

192. We propose to simplify and align provisions in the generic and tailored information provisions.

Payment of contributions to the scheme

Draft regulations 31 and 32 of the Automatic Enrolment (Miscellaneous Amendments) Regulations 2011 amend regulation 16(1) of the Occupational Pension Schemes (Scheme Administration) Regulations 1996 and regulation 5(1) of the Personal Pension Schemes (Payments by Employers) Regulations 2000 respectively.

Background

193. Under current legislation, an employer must pass pension contributions deducted from workers' earnings to the scheme within a prescribed period. This period is 19 days commencing from the end of the month in which the amount is deducted from the earnings in question. For example, contributions deducted on 1 October would be required to be paid by 19 November.

194. Under the Pensions Act 2008, we made further provisions in regulations to extend the 19 day rule for contributions taken during the joining and opt out window. These contributions must be paid over to the scheme by the last day of the second month following the month in which the automatic enrolment date occurs.

195. The Making Automatic Enrolment Work review recommended that the automatic enrolment processes should be aligned with existing tax and National Insurance Contributions processes where practicable to streamline employer processes.

What the draft regulations said

196. Draft regulation 31 amends regulation 16(1) of the Occupational Pension Schemes (Scheme Administration) Regulations 1996 as amended by regulation 48 of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010.

197. This new period applies only to electronic payments of pension contributions deducted on behalf of active members of an occupational pension scheme to the trustees or managers of the scheme.

198. The prescribed period in this circumstance is 22nd day of the month following the month in which the pension contribution is deducted from the worker's earnings.

199. The regulation leaves the 19th day of the month unchanged for non-electronic payments of pension contributions deducted from the worker's earnings.

200. The regulation inserts a definition of electronic communications.

201. Draft regulation 32 amends regulation 5(1) of the Personal Pension Schemes (Payments by Employers) Regulations 2000 as amended by regulation 49 of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 in a similar manner.

The stakeholder response

202. Employers supported the alignment with HMRC's due date of the 22nd day of the month.

203. Where large providers accept payments both clerically and electronically there was a call to align everything to the same date for all contributions. Some providers thought that having two separate dates no matter how the contributions are remitted would cause unnecessary burdens on business requiring them to run two separate monitoring systems. They thought that the proposed change would incur additional cost for no obvious benefits.

204. One provider questioned the benefit of the change as the 19 day rule is well established.

205. To facilitate the refund process, providers felt that employers should also be able to use the extended rule for payment of contributions deducted during the joining window for contributions taken from jobholders who opt in and for entitled workers who ask to join pension saving.

The Government's response to stakeholders

206. The change to the 22 day rule to align with HMRC's 22 day rule addresses stakeholder calls to ease administrative burdens on employers. For employers who are largely new to workplace pension arrangements, we want them to be able to align the new administrative process with existing practices. We are also trying to future proof for a world where electronic payments will increasingly be the norm.

207. The prescribed period for payments made by the employer to the scheme is a deadline for payment not an administration window. The HMRC rule is that payments must be received by the 22nd day.

208. If the rule for pension payments allowed the employer to make non-electronic payments to a scheme no later than the 22nd day of the month then the scheme is not likely to receive payment until 25th day of the month[8]. In effect the proposed provision for receipt of both electronic and non-electronic payments is the same, by the 22nd day of the month, but non-electronic payments have to be received by the 19th day to allow time for processing.

209. Employers can use the extended rule for the payment of contributions to the scheme for jobholders who opt in. However there is an omission in the drafting of the relevant regulations which fails to make this clear and we are grateful to stakeholders who spotted the error.

210. Any arrangements for the refund of contributions for "entitled" workers who join pension saving are entirely a matter for scheme rules.

Proposal for change

211. We propose to amend Regulation 16(3) of the Occupational and Personal Pension Schemes (Scheme Administration) Regulations 1996 and Regulation 5(3)[9] of the Personal Pension Schemes (Payments by Employers) Regulations 2000[10] to cover opt-in and automatic re-enrolment and the defined benefit and hybrid transitional period.

[8] On the assumption that it usually takes three working days (including the day the cheque is paid in) for a cheque to be received at the other bank for payment.

[9] As amended by Regulations 48 and 49 of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulation 2010 respectively

[10] Refers to section 3 of the Pensions Act 2008 (the Act) as amended by section 30(3) and (5) of the Act

Miscellaneous technical amendments

Background

212. The Government also consulted on a range of technical amendments to the The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010.

What the draft regulations said

213. Regulation 27 amends regulation 38 (staged increase in appropriate age (pensionable age)) so that the appropriate age in the test scheme broadly reflects the accelerated timetable for changes to state pension age.

214. Regulation 28 amends regulation 47 (prescribed requirements for non-UK schemes). Regulation 47 applies to schemes that are not UK tax registered and prescribes alternative requirements.

215. Regulation 4 amends regulation 35. Regulation 35 applies to pension schemes with their main administration in an European Economic Area (EEA) member state used for automatic enrolment. It requires EEA defined contribution arrangements and certain defined benefits schemes in which a member accrues a sum of money with which purchase an annuity or secure a pension from the scheme to provide for at least 70 per cent of the funds to provide a jobholder with an income for life

216. Regulation 5 amends regulation 36. Regulation 36 applies to career average schemes. To qualify to be used by employers for their enrolment duties such schemes must provide for either the discretionary revaluation of the earnings on which the pension accrues or for revaluation at least at the minimum level which is based on Retail Price Index (RPI). The regulation has been amended to reflect changes from RPI to Consumer Price Index (CPI).

The stakeholder response

217. There were no responses to these proposals.

What the Government proposes to do

223. Following consultation, we propose that:

- the appropriate age (pension age) in the test scheme will increase to 66 from 6 April 2020 for schemes where the test scheme standard is used on or after that date;

- non-UK occupational pension schemes and personal pension schemes will not have to be UK tax registered provided that they meet alternative requirements prescribed regulation 47 of the Automatic Enrolment Regulations 2010;

- EEA occupational and personal pension schemes used for automatic enrolment will need to provide that 70 per cent of any funds accrued to the member will be used to provide an income for life; and

- To qualify to be used for an employer's enrolment duties, career average schemes will be required to provide for revaluation of the earnings on which the pension is based of at least the minimum level. The minimum level is now Consumer Price Index capped at 2.5 per cent. Schemes with the Retail Price Index encoded in their rules will be able to continue to use this as a measure of inflation proofing.

(ii) The draft Automatic Enrolment (Miscellaneous Amendments) (No. 2) Regulations 2011

(The final draft of these regulations will be renamed The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2012)

Certification

Draft Regulation 3 of the Automatic Enrolment (Miscellaneous Amendments) (No. 2) Regulations 2011 inserts Part 7A and Regulations 32A-32K into the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010.

Background

1. Certification is designed as an administrative easement for employers who calculate their pension contributions from the first pound, rather than on qualifying earnings. The regulations and guidance are for those certifying money purchase, personal pension and money purchase elements of hybrid schemes.

2. The Certification Regulations introduce a new and simplified certification test, in response to employers' concerns about the potential complexity of the previous requirements. To meet the new test, an employer will need to offer a defined contribution pension arrangement that provides for:

    - Tier 1 – a contribution of at least 9 per cent of pensionable earnings of which 4 per cent must come from the employer;
    - Tier 2 – a contribution of at least 8 per cent of pensionable earnings of which 3 per cent must come from the employer. At least 85 per cent of earnings in respect of all of the jobholders covered by the certificate must be pensionable; or
    - Tier 3 – a contribution of at least 7 per cent of earnings of which at least 3 per cent must come from the employer.

3. If an employer chooses to use either of the tier 1 or tier 2 tests they need to use a definition of pensionable pay that is at least equal to basic pay. The regulations set out a definition of basic pay. That is no the same as the definition of qualifying earnings set out in section 13(3) of the Pensions

Act 2008, which employers will need to use if they are not using certification but are paying contributions under the standard section 20 or section 26 quality requirements.

What the draft regulations said

4. New regulation 32A provides that, subject to regulation 32H, a scheme to which the certification provisions in section 28 of the Pensions Act 2008 apply satisfies the relevant quality requirements in relation to the employer's relevant jobholders, if there is a certificate in force in relation to the employers and those jobholders.

5. New regulations 32B to 32D set out the prescribed alternative requirements for:

   - money purchase schemes which have their main administration in the UK or an EEA State other than the UK;
   - personal pension schemes where the operation of the scheme is carried on in the UK or an EEA State other than the UK; and
   - money purchase elements of hybrid schemes which have their main administration in the UK or an EEA State other than the UK.

6. These specify in detail for each type of pension scheme the three tier certification test, which requires that the scheme satisfies at least one of the three tiers (set out above) for all of the relevant jobholders.

7. New regulation 32D extends the certification requirements in regulation 32B to the money purchase provisions of a hybrid scheme.

8. New regulation 32E sets out who may give the certificate, the requirement to consider the certification guidance and the timing of the certificate. The certificate may be in place for up to 12 months, by which time it must either be renewed or alternative arrangements to meet the qualifying criteria made.

9. New regulation 32F sets out that the certificate must be in writing and what it must contain. This covers which part of the scheme it applies to (if more than one), which jobholders it relates to, which alternative requirement is used (32B, 32C or 32D) and the certification period.

10. New regulation 32G provides for the steps that the employer must take to renew their certificate. This involves considering whether the relevant requirements for the certification test were met in the last period, an

assessment of any change required to meet the test going forward and making and retaining a record of that assessment for six years.

11. New regulation 32H sets out the circumstances in which a certificate can be treated as void. If the Pensions Regulator is of the view that there were not reasonable grounds for a person to be of the opinion that the scheme was able to satisfy the relevant quality requirement or the applicable alternative requirement and the scheme did not meet the certification test requirements, the Regulator may serve notice requiring the employer to pay the shortfall between contributions that were payable under the scheme and those that were payable under the certification test or relevant quality requirement. If contributions payable under that notice are not paid to the trustee or provider within the specified deadline, the scheme will be treated as not having met the quality requirements.

12. New regulation 32I provides for phasing to be used by employers choosing to use certification so that contributions may be gradually improved to up to the full level of contributions required.

13. Employers operating certain EEA schemes will be able to use them for certification. New Regulation 32J sets out the requirements for those EEA schemes. Such schemes can be occupational pension schemes within the definition of section 18(b) of the Pensions Act 2008 or personal pension schemes to which section 27 of the Act applies. The requirements are broadly similar to those for UK schemes.

14. New regulation 32K defines certain terms used within new regulations 32B, including 32B and 32C as applied by new regulation 32D.

The stakeholder response

15. We estimate that 80 per cent of the responses to the consultation commented on our proposals for the revised certification test. Overall, respondents were content with the proposed certification test and felt that it would be make it simpler to fulfil their duties, particularly where they already have schemes in place.

16. We asked stakeholders whether the definition of pensionable earnings in the draft regulations achieved an appropriate balance between a workable definition for employers and protecting individuals. This was the area which the majority of respondents commented on. Respondents emphasised the need for the basic pay definition to support definitions of pensionable pay in use by employers. There was widespread concern that certain non-pensionable allowances should not be included. Many respondents mentioned car allowances. Other allowances that were raised

by one or two respondents include relocation, travel, shift and housing allowances.

17. We also asked for views on whether the maximum certification period should be one year. This was proposed to ensure that pension savers' interests were safeguarded by ensuring that those who missed out on minimum contributions in one certification period could have any shortfall made up during the next year. Generally, stakeholders felt that this approach was reasonable.

18. However, some respondents argued that there was further scope for deregulation. Specifically, they said that employers certifying on the basis of tiers 1 and 3 of the test (which require a contribution of 9 per cent of pensionable pay and 7 per cent of all pay, respectively) should have a longer certification period, ideally of three years or more rather than one, provided that neither the contribution rate nor the definition of pensionable pay is reduced.

19. In discussion with employers and their representatives, we have become aware that some employers have capped pensionable pay. One respondent also made this point in their written submission.

The Government's response to stakeholders

20. Pensionable pay varies across employers making it difficult to find an exact fit for employers without disadvantaging individual savers. Through discussions with employers, we have identified that most employers calculate their pension contributions on basic pay. Therefore the definition of pensionable pay used in the certification test must be equivalent to at least basic pay.

21. We want to maximise jobholders' contributions by ensuring that they are saving at a level that puts them on course for their aspired standard of living in retirement. At the same time we are committed to minimising the burdens on business. We believe that the revised definition of basic pay meets these twin aims and we have set out below some of the pay items generally included in basic pay and those that can be excluded.

22. We have considered proposals for a longer certification period and agree that there is a case for a three year certification period for tiers 1 and 3 of the test, as this would appropriately balance safeguards for scheme members with deregulation. However, our view is that the longest validity period for tier 2 of the test should be 18 months. This is because, if errors occur, it is most likely to be where the employer uses tier 2 (which requires the employer to ensure that pensionable pay is at least 85 per cent of total

pay). An 18 month certificate would enable any error to be identified and rectified more quickly.

23. We do not think we should enable different validity periods for the different certification tests, as this would make it significantly more complex to communicate the policy and more complex for employers to understand. We intend therefore that the longest validity period for all tiers of the test should be 18 months.

24. We have become aware that some employers have capped pensionable pay or contributions. The regulations as they were proposed contained a solution to this, as it is possible for employer to exclude individuals from the certificate if they know those individuals are likely to hit the cap and therefore not receive the full percentage under the certification test. However, we recognise that this would have been potentially burdensome for employers and might have required them to anticipate individual pay patterns in advance. In view of this, we have made it clear in the regulations that employers can use certification in conjunction with a contributions cap, provided they are certain that those affected will receive at lest minimum contributions on band earnings (i.e. qualifying earnings under section 20 of the Pensions Act 2008).

What the Government proposes to do

25. The definition of basic pay set out in 32K of the draft regulations has been amended to reflect the policy intention which is for a definition of basic pay that includes:

- a jobholder's earnings before any deductions;
- holiday pay, and;
- the statutory benefits such as sick pay, maternity pay, paternity pay and adoption pay delivered through the payroll.

26. Draft regulation 32K also describes the general type of allowance that does not need to be included in basic pay. These generic descriptions are designed to address the fact that employers have many different allowances. Being overly prescriptive risks inadvertently including in the definition of basic pay allowances that might properly be excluded. The generic descriptions of allowances excluded from the definition of basic pay as set out in Regulation 35K cover:

- bonuses
- overtime
- commission

- car allowances
- clothing allowances
- meal allowances
- shift allowances
- allowances for health and safety such as fire warden, first aid, key holder
- relocation allowance.

This is not an exhaustive list of items that can be excluded from basic pay. In establishing how to treat different pay items employers will need to consider the descriptions in regulation 32K, which are included in the certification guidance with examples.

27. The certification period has been extended from 12 months to 18 months. This approach will have the added benefit of enabling employers to align their renewal with their re-enrolment dates.

28. Employers or schemes operating a pensionable pay or contributions cap can use certification provided that any jobholders affected by the cap do not receive contributions lower than the equivalent of 8 per cent of qualifying earnings of which at least 3 per cent must come from the employer.

29. A key tenet of the employer compliance regime is for TPR to help non-compliant employers to become compliant where they are willing. The draft regulations enable employers to terminate a certificate early, if the Regulator becomes involved because there were no reasonable grounds for the certificate to be issued. We have made a technical change so that it is also possible for TPR to reduce the period of the certificate. These two things combined will ensure that employers are able to put things right going forwards and that TPR will be able to clearly communicate the actions that need to be taken for them to do this.

The Scottish Police Services Authority and the Scottish Crime and Drug Enforcement Agency

Draft regulation 6 inserts a new Part 15 (Special occupations) after regulation 50 of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010

Background

30. Police officers could not be captured by the automatic enrolment as they are “office holders” and do not fall within the definition of “worker” under section 88 of the Pensions Act 2008 (the Act). So section 95(1) of the Act makes special provision to bring police officers and police cadets within the scope of automatic enrolment.

31. As the legislation currently stands, police officers directly recruited by the Scottish Police Services Authority (SPSA) to work for the Scottish Crime and Drug Enforcement Agency (SCDEA) will not fall within section 95(1) of the Act. Despite its name the SPSA is not a police authority or local policing body and therefore it cannot be the “employer” for the purpose of section 95(2) of the Act.

32. This leaves police officers directly appointed to the SCDEA outside the scope of automatic enrolment because they do not have worker status as defined by section 88 of the Act.

33. Police officers seconded to work to the SPSA itself are in the same situation. They cease to be officers of their home police force on appointment to the SPSA and they do not have worker status as defined by section 88 of the Act.

34. The new provision extends the definition of “worker” to these two groups of police officers.

What the draft regulations said

35. New draft regulation 51 provides that the provisions of Part 1 of the Pensions Act 2008 apply to police members appointed by the Scottish Police Services Authority who would not otherwise fall within the definition of worker, such that they are treated as a worker employed by the Scottish Police Services Authority under a worker’s contract.

36. New sub-paragraph 51(2)(a) defines a police member as a person appointed as a police member of the Scottish Crime and Drug Enforcement Agency under paragraph 7(1) of Schedule 2 to the Police, Public Order and Criminal Justice (Scotland) Act 2006 as a result of paragraph 7(2)(c) of that Schedule.

37. New sub-paragraph 51(2)(b) also defines a police member as a person serving as a member of staff of the Scottish Police Services Authority as a result of paragraph 10(2) of Schedule 1 to that Act.

The stakeholder response

38. No stakeholders commented on this area.

The Government's response to stakeholders

39. The proposed regulations stand as amended.

Seafarers and offshore workers

Background and policy intent

40. Seafarers are people working in any capacity on board a ship or hovercraft. Offshore workers are people working in oil and gas extraction and related activities in the UK territorial sea, UK continental shelf, or in the UK sector of a cross-boundary field.

41. These groups were excluded from automatic enrolment under Sections 96 and 97 respectively of the Pensions Act 2008. This was to allow time for full consideration of the potentially complex legal issues that arose concerning how these groups should be covered by these provisions.

42. We proposed that seafarers and offshore workers who are working, or ordinarily work in the United Kingdom (UK) should be automatically enrolled. This means that we would be treating this group in the same way as land based workers. Relevant case law supports the view that a seafarer's employment base will determine where they are ordinarily working. The employment base is likely to be determined by several factors including where a tour of duty begins and ends. We would expect case law in this area to develop over time.

43. Offshore workers would be treated as if they are ordinarily working in the UK if they are working in the UK territorial sea, UK continental shelf, or in the UK area of a cross-boundary field.

What the draft legislation said

44. Regulation 6 of the draft Automatic Enrolment (Miscellaneous Amendments) (No 2) Regulations 2011 inserts new Regulation 52, which provides that the relevant provisions of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 apply to seafarers.

45. The draft Automatic Enrolment (Offshore Employment) Order 2011 provides that those in offshore employment should be treated as if they are working, or ordinarily work in the UK for the purposes of automatic enrolment if they are working in the UK territorial sea, UK continental shelf, or in the UK area of a cross-boundary field.

Stakeholder response to consultation

46. Stakeholders were generally supportive of the proposals to automatically enrol seafarers and offshore workers. However, some stakeholders were concerned that the ordinarily working test was too broad for seafarers. There was some support for a more specific test with the criteria set out in legislation. Suggested criteria included whether the seafarer is ordinarily resident in the UK, where they join and leave the ship, and where they are subject to tax. It was also suggested that where the ship is registered, where the employer is incorporated/established and where the employment is based should be set out as criteria on the face of the legislation. There was also a suggestion that the test should be consistent with legislation setting out liability for the payment of National Insurance Contributions (NICs).

47. Some stakeholders were also concerned that the ordinarily working test would not capture the right group of people. For example that it might catch seafarers without a strong link to the UK, such as those without a permanent base in, or ties to, the UK, and those who have no intention of retiring to the UK. They thought it against the spirit of the reforms to expect foreign seafarers who have a minimal connection to this country to make UK pension contributions. There were also concerns that UK seafarers working abroad and who fully intend to retire to the UK might not be captured by the test.

48. Many stakeholders sought clarity and guidance on how an ordinarily working test might work in practice. There was concern that otherwise the term “ordinarily working in the UK” would only be properly understood once case law had been developed.

49. There was some concern that because the employers of many seafarers and offshore workers are based abroad, this would make the reforms difficult to enforce, and stakeholders sought clarity on this issue. It also was suggested that it should be made voluntary for employers based abroad to enrol their workforce, and, as is the case for National Insurance Contributions, they should not have to pay an employer contribution. Another stakeholder asked whether, in practical terms, legislation can impose a mandatory employer contribution for companies based abroad.

50. One stakeholder said that the policy was at odds with the established legal framework for international shipping and that it would undermine flag state

jurisdiction and rights of innocent passage. Another said that automatically enrolling non-UK nationals on non-UK ships could potentially breach international sea laws.

51. Some stakeholders wanted to know how the reforms would impact on the Maritime Labour Convention due to come into force internationally in 2013, and one wanted maritime pilots to be excluded from the reforms as they would not be covered by this convention.

52. One stakeholder was concerned that employers might oppose the rights of foreign workers being included in the reforms arguing that any exclusion would be in breach of the Charter of Fundamental Rights of the European Union (2010/C83/02) and they sought assurances that our legislation would fully protect such workers.

53. There were also some requests for companies employing seafarers and offshore workers to be staged in later to give them the same time to prepare for the reforms as land based employers and to allow for the fact that the shipping industry is currently facing other costs such as addressing environmental and safety issues.

54. There was some concern that the inclusion of non-UK residents in the reforms did not take into account how the marketing of contract based pension schemes works, leading to a conflict between the employer duty and the pension provider being able to offer a suitable product. Cross border issues were also raised, for example, where employees from overseas are working in the UK and paying foreign social security contributions under a cross-border agreement should automatic enrolment contributions be payable because social security contributions are already being paid in another country.

Government response and proposals

55. We have considered carefully stakeholder views on making the ordinarily working test more specific. Although specifying nationality or residence may give a reliable indicator of where a person may retire, using this as an eligibility test would bring risk of legal challenge on the grounds of discrimination in favour of UK nationals. The UK has an obligation to ensure that the provisions of the Pension Act 2008 apply without discrimination between nationals of different EU and EEA member states, pursuant to the Treaty establishing the European Union.

56. It would also not be appropriate to specify the country of registration of the ship**,** as this could create incentives for ‘flagging out’ (registering ships elsewhere than in Great Britain) which could have a detrimental effect on the UK shipping industry.

57. We have considered the merits of basing the test on National Insurance legislation. However, this would mean different policies for those on land and sea making implementation particularly difficult for employers of seafarers and land based workers. It would also be impracticable because of the complexity of the NICs regime and the fact that these could change over time.

58. We recognise that the global nature of the shipping industry means that not all British seafarers would be covered by the reforms and some foreign seafarers who do not intend to settle here may be caught. However, we consider that, overall, the proposed test is the most suitable for seafarers and offshore workers, and indeed for automatic enrolment generally. This is because, given the diversity of employment arrangements, it is very difficult to define with absolute prescription the types of workers we want to capture without leaving loopholes for the policy to be evaded. A more prescriptive test could for example, give incentives for companies to change the terms of their contracts to avoid automatically enrolling their staff. And if we were to use a different test for seafarers, we would not be treating them consistently with land-based workers and peripatetic workers in other industries.

59. We do, however, recognise that it would be helpful for employers to have additional information on how the ordinarily working test might work in practice for seafarers. We are currently working with the Pensions Regulator which will issue guidance on the meaning of ordinarily working shortly..

60. In the meantime, employers may find helpful the following factors which we consider a court may take into account when determining whether a seafarer is ordinarily working in the UK, as well as two factors which we think likely to be irrelevant. **This is not intended to be exhaustive, nor does it represent a statement of the law and so can not be relied upon as such**.

Factors that may be taken into account in determining whether a seafarer is ordinarily working in the UK:

- Where they begin and end their tours of duty;
- Where the seafarer is subject to income tax and National Insurance contributions.

Factors which are not likely to be relevant:

- Nationality;
- Where the ship is registered.

61. As far as enforcement is concerned, whilst some seafarers work abroad, this is also the case for some land based workers. The Pensions Regulator aims to pursue compliance irrespective of whether the employer is based within or outside the UK.

62. We would not wish to make automatic enrolment voluntary for seafarers and offshore workers working for companies based abroad. We want to be able to give as wide a group of individuals as possible the opportunity to save for a pension, and it would be unfair if a seafarer or offshore worker was denied access to pension saving simply because of where their employer is based.

63. The automatic enrolment provisions will apply to the employer in respect of seafarers as individuals ordinarily working in the UK and **not to the ship**. The ordinarily working test creates a link between the seafarer and the UK unrelated to whether the seafarer's vessel enters UK waters. Thus it is possible to apply domestic UK legislation to the seafarer without offending the UK's obligations under international law.

64. Nor would automatic enrolment and the provisions of Part 1, Pensions Act 2008 conflict with customary international law by interfering with the "internal economy" of foreign flagged vessels, whilst in our internal waters. Our view is that automatic enrolment and Part 1 of the Pensions Act 2008 will not impact the internal economy of vessels and will not therefore contravene this custom.

65. The Maritime Labour Convention has not yet been ratified by the UK. The Maritime Coastguard Agency is preparing full impact assessments setting out the arguments for legislative and non-legislative approaches. The Convention does not make provision in relation to seafarers' workplace pensions, and if ratified should not impact the policy to automatically enrol seafarers into pension saving.

66. We have considered concerns that seafarers may be excluded from the scope of automatic enrolment on account of the fact that they are not British nationals. As indicated above we are of the view that a seafarer's nationality will not determine their employer's legal obligations to them as regards pensions automatic enrolment.

67. It would not be appropriate to move staging dates for employers of seafarers as that would be unfair on other industries, who may say that they have an equally good case for being staged in later. Staging in by sector would run counter to the Government's established policy of staging in by size. We have resisted similar calls from the employment agency sector for a common staging date. The Government has now made a commitment that no employer with fewer than 50 people in its PAYE scheme should be brought into automatic enrolment before May 2015.

68. We are staging companies in by size of PAYE scheme as that is the most robust way of identifying employers. Since it is not possible to tell from this data which industry people are working in or where they work, staging by

size is considered the most appropriate way forward. Where employers do not have a PAYE scheme, they will have a staging date in 2017.

69. Some new legislation already includes a sunset or review clause, which can take a number of different forms. The Government has agreed that sunsetting will now be mandatory for new regulation introduced by Whitehall departments, where there is a net burden (or cost) on business or civil society organisations.

70. Therefore, subject to exceptions, the provisions relating to persons working on vessels and persons in offshore employment will cease to have effect on 1 July 2020. The exceptions are those persons who are jobholders and active members of a qualifying scheme and those persons whose employer is required to make the arrangements under section 5(2) (by virtue of section 5(1A) or (1B)), section 7(3) and 9(2) of the Act. Before I July 2018, the Secretary of State must review the operation of the provisions and publish a report of his conclusions.

71. We have a regulation making power in the Pensions Act 2011 to exclude certain cross border employment from the automatic enrolment duty and intend to publish a consultation setting out specific proposals shortly.

Impact

72. Our initial estimate of the impact of bringing seafarers and offshore workers within the workplace pension reforms was set out in the consultation stage Impact Assessment. In addition, the Department explicitly outlined the key estimates and the assumptions underlying them within the consultation document itself and requested further evidence from stakeholders to support an accurate assessment of the costs and benefits.

73. Several representatives of employer and worker bodies submitted information in response to this request which the Department has welcomed. That information largely related to the assessment of the number of seafarers and offshore workers eligible for automatic enrolment. Several illustrations were also received from one stakeholder showing varying costs to the employer of providing a pension. Information was also received clarifying the location of firms.

74. The final Impact Assessment discusses how the new information received from stakeholders has been incorporated and used to refine the Department's estimate of the policy impact. The final Impact Assessment is available from the DWP website: www.dwp.gov.uk/consultations/2011/workplace-pension-reform-2011.shtml

Summary

75. We do not propose to make any changes to the ordinarily working test for seafarers and offshore workers. Nor do we propose to change the staging dates for these groups. However we will continue to work with the Pensions Regulator on the scope for developing guidance on how the ordinarily working test might work in practice for seafarers and offshore workers.

The Automatic Enrolment (Offshore Employment) Order 2012

No responses were received on this draft instrument.

The Automatic Enrolment (Compromise Agreements) Order 2012

No responses were received on this draft instrument.

5. List of respondents

Associated British Foods PLC
Association of British Insurers
Association of Consulting Actuaries
Aegon
Association of Member-Directed Pension Schemes (AMPS)
Aon Hewitt
Association of Pension Lawyers
Ambassadors Theatre Group
Aviva
Capita Hartshead
Confederation of British Industry
Chamber of Shipping
Chartered Institute of Personnel and Development
Chartered Institute of Payroll Professionals
Compass group
Co-operative Group
Engineering Employers' Federation
Fidelity
First Actuarial
FriendsLife
Federation of Small Businesses
Hargreaves Lansdown
Hearing Loss
Hogan Lovell
Hymans Robertson
Institute of Chartered Accountants in England and Wales (ICAEW)
International Financial Data Services
International Maritime Contractors Association (IMCA)
ITW Ltd
Jaguar Land Rover
JLT Benefit Solutions Ltd
Legal & General
Law Society of Scotland
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