

# THE REGULATORY FRAMEWORK FOR SOCIAL HOUSING IN ENGLAND FROM APRIL 2012

Annex B: Guidance notes on use of the  
regulator's powers

March 2012

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### **Context of this document**

This guidance forms part of the regulatory framework for social housing in England from April 2012. It updates previous guidance relating to the use of the regulator's powers.

# Index

This index shows the order in which individual guidance notes for certain specific powers within the Housing and Regeneration Act 2008 and Localism Act 2011 appear in this Annex, and references the sections of the Act to which they relate.

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## **Guidance note 1**

### **Guidance for constitutional consents (sections 212 to 214), restructuring and dissolution (sections 160 to 165)**

- 1.1 This document gives general advice and guidance on how the regulator may exercise the power to give consent to requests to rule changes made by industrial and provident societies, changes to objects by charities and article changes from companies. The specific provisions are set out in chapter six, sections 212 to 214 of the Act and relate only to non-profit registered providers. The provisions are included at the end of this note.

### **Proposals for using this power**

- 1.2 When considering applications for changes to constitutions, the regulator will balance a range of factors including the need to safeguard tenants' rights, relevant legislation, its duties as a public body, its fundamental objectives and the standards the regulator expects registered providers to meet.
- 1.3 The regulator's expectation is that non profit registered providers' objects will include the following clauses:
- not for profit
  - the provision of social housing
  - non distribution of assets to members

### **Dealing with 'group structures'**

- 1.4 Groups structures are not defined in the Act, but we treat registered providers as being in a group structure where any combination of two or more organisations are working together and where one, the parent, has constitutional control of the other(s), subsidiaries.
- 1.5 The term "subsidiary" and "associate" are defined in section 271 of the Act.
- 1.6 Applications for registered providers becoming or ceasing to be a subsidiary or associate of another body will be considered in the context of the regulator's fundamental objectives, the regulator's eligibility criteria and conditions for registration and the standards for social housing providers. Factors that the regulator will, therefore, take into consideration when appraising applications include:
- the overall business case
  - the level and quality of consultation with tenants and relevant stakeholders in particular local authorities and lenders
  - evidence that the new structure will improve services to current and future residents
  - rationalisation of stock holding and management issues
  - value for money of the proposal

- simple, clear and straight forward governance structures
- desirability of maintaining a choice of providers and competition in a region

## **Procedural guidance**

- 1.7 To help applicants in this process, the regulator has published a detailed procedural note for registered providers to follow when amending their constitutions. The note includes the specific requirements and arrangements for industrial and provident societies, registered companies and registered charities which are not also registered companies. The note includes details of:
- who the note applies to
  - what documentation we will require
  - where applications should be sent
  - how long it will take us to deal with your application
  - contact details
- 1.8 Chapter four of the Act includes some general provisions relating to non-profit registered providers. The following processes are only effective if the regulator has first consented:
- a. Restructuring and dissolution
  - b. Section 160: company arrangements and reconstructions
  - c. Section 161: company conversion into an Industrial and Provident Society
  - d. Section 162: Company winding up
  - e. Section 163: Industrial and Provident Society restructuring
  - f. Section 164: Industrial and Provident Society winding up
  - g. Section 165: Industrial and Provident Society dissolution
- 1.9 Although these processes are not governed by the requirement to issue guidance under section 215, the regulator considered it helpful to applicants to publish guidance on these processes so that they can see how they will work. As in the case with constitutional consents, the regulator has published a procedural note for registered providers to follow when applying for any of these processes.
- 1.10 When considering applications the regulator will have regard to residents' rights, relevant legislation, its duties as a public body, its fundamental objectives and the standards we expect registered providers to meet.
- 1.11 Applications for these processes will be considered in the context of any ring fencing arrangements and policy constraints the regulator has in place. Factors that we are likely to take into consideration when appraising applications include:
- the overall business case

- the level and quality of consultation with tenants and relevant stakeholders in particular local authorities and lenders
- evidence that the new structure will improve services to current and future residents
- rationalisation of stock holding and management issues
- value for money of the proposal
- simple, clear and straight forward governance structures

#### 1.12 Relevant sections of the Act:

##### **211 Non-profit providers only**

This group of sections applies only to non-profit registered providers.

##### **212 Industrial and Provident Society: change of rules**

1. This section applies to an Industrial and Provident Society.
2. An amendment of the society's rules requires consent if it:
  - (a) alters the society's objects
  - (b) makes provision about the distribution of assets to members, or
  - (c) enables the society to become, or cease to be, a subsidiary or associate of another body
3. An amendment of the rules which requires consent is effective only if the regulator has first consented.
4. The regulator may not consent to an amendment which it thinks would turn the society into a profit-making organisation.
5. The society must notify the regulator of an amendment of the rules which does not require consent.
6. In relation to an amendment which requires consent, the requirement in section 10(1) of the Industrial and Provident Societies Act 1965 (c 12) (sending copies of amendment of rules to FSA) is satisfied only if the copies are accompanied by a copy of the regulator's consent.
7. The preceding provisions of this section shall be treated as if they formed part of that Act as well as of this Act.
8. The Secretary of State may by order amend the list in subsection (2).

##### **213 Charity: change of objects**

1. This section applies to a registered charity which is not a registered company.

2. An amendment of the charity's objects is effective only if the Charity Commission has first consented.
3. Before giving consent the Charity Commission must consult the regulator.

#### **214 Companies: change of articles**

1. This section applies to a registered company.
2. An amendment of the company's articles of association requires consent if it:
  - (a) alters the company's objects
  - (b) makes provision about the distribution of assets to members, or
  - (c) enables the company to become, or cease to be, a subsidiary or associate of another body
3. An amendment of the articles of association which requires consent is effective only if the regulator has first consented.
4. The regulator may not consent to an amendment which it thinks would turn the company into a profit-making organisation.
5. The company must notify the regulator:
  - (a) of an amendment of the articles of association which does not require consent, or
  - (b) of a change to its name or registered office
6. In relation to an amendment which requires consent the requirement in section 30 of the Companies Act 2006 (c 46) (sending copy of resolution to registrar) is satisfied only if the copy is accompanied by a copy of the regulator's consent.
7. The Secretary of State may by order amend the list in subsection (2).



## **Guidance note 2**

### **Guidance on section 95(3): financial assistance**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power relating to the provision of financial assistance to a registered provider. This is a general power and is set out in chapter two and section 95(3) of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to non-profit or for-profit private registered providers but not local authority providers. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Background and context to the use of power**

- 2 A registered provider is expected to manage its business affairs to ensure that it remains viable in the short, medium and long terms. It should take appropriate steps to ensure that it has access to the finance necessary to meet its ongoing commitments. The regulator is not a funding body and does not hold budgets to enable it to act as one. Its powers to provide financial assistance are ancillary to its main powers, and the regulator considers that it would only propose their use in exceptional circumstances.

#### **The power**

#### **The circumstances in which the power can be exercised**

- 3 The power can be exercised where the regulator thinks it advances one or more of the economic regulatory objectives set out in the Act. It is restricted by the fact that financial assistance can only be given with the consent of the Secretary of State which in turn must have the approval of the Treasury. Financial assistance under this section can be in the form of a loan, a guarantee or an indemnity.
- 4 The regulator envisages seeking consent to use this power only in exceptional circumstances. Examples might be where tenants are in danger of losing their homes or their health and safety is at risk, or where temporary support protects existing public investment while a rescue plan is being developed. The regulator would only consider a case for such support where all other possible avenues for obtaining finance had been exhausted. Any case would have to demonstrate that assistance by the regulator would facilitate a strategy for permanent resolution of the underlying problem, and financial plans would have to make provision for repayment of any loan or recovery of a guarantee or indemnity given by the regulator.

## **Consultation**

- 5      Apart from the need to obtain the necessary consents, the Act does not require the regulator to consult relevant persons in exercising this power. However, depending on the particular circumstances of the case, the regulator is committed to any consultation that is necessary with relevant stakeholders such as lenders and local authorities.

## **Guidance note 3**

### **Guidance on giving a direction to the GLA**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power to direct the Greater London Authority (GLA) not to give financial assistance in connection with social housing to a specified registered provider of social housing. This power is set out in the Greater London Authority Act 1999 section 333ZG, which was inserted by section 187 of Part 8 Chapter 1 of the Localism Act 2011 (the Act). It may be exercised in relation to a registered provider in the specific circumstances set out in the section of this guidance describing the scope of the power. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Potential triggers to the exercise of the power**

- 2 The Greater London Authority Act 1999 section 333ZG(2), which was inserted by section 187 of Part 8 Chapter 1 of the Act sets out three specific circumstances in which the regulator may exercise the power to direct the GLA not to give financial assistance in connection with social housing to a specified registered provider. They are where:
  - the regulator has decided to hold an inquiry into the affairs of the provider under section 206 of the Housing and Regeneration Act 2008, and the inquiry has not been concluded
  - the regulator has received notice in respect of the provider under section 145 of the Housing and Regeneration Act 2008 (the moratorium powers)
  - the regulator has appointed an officer of the provider under section 269 of the Housing and Regeneration Act 2008 and the person has not vacated office
- 3 In circumstances where one or more of the actions that might trigger a Direction have taken place, the regulator will assess the most appropriate course of action and in particular, whether it is necessary to issue such a Direction to the GLA. If there is a significant risk to the public funding that the GLA has committed to the provider previously, or may commit to the provider in the future, the regulator may issue a Direction.
- 4 The regulator would not normally issue a Direction in relation to projects where the GLA has issued a grant confirmation and the provider has entered a contractual commitment. It will also take account of the potential impact on the provider's financial viability and on its services to its tenants.

## **Scope**

- 5 The power may be exercised in relation to:
- all providers including a non-profit private registered provider, a for-profit private registered provider or a local authority provider where an inquiry under section 206 of the Act is the trigger
  - registered providers, with the exception of local authority providers, where a notice under section 145 of the Act is the trigger
  - a non-profit private registered provider where the appointment of a new officer under section 269 of the Act is the trigger

## **The Direction**

- 6 A Direction may prohibit the GLA from giving assistance of a specified kind. However, a Direction may not prohibit grants to a provider where these are payable by the GLA in respect of statutory discounts given by the provider on disposals of dwellings to tenants. The regulator will review the need for the Direction on a regular basis, but it will remain in effect until the regulator has notified the GLA that it has been withdrawn.
- 7 The regulator will inform the provider and the GLA of the reasons for the Direction.

## **Guidance note 4**

### **Guidance on sections 107 and 108: information**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power on the collection of information and documents. This is a general power and is set out in chapter two sections 107 and 108 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to all registered providers. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Scope**

- 2 The power may be exercised in relation to all providers, including a non-profit private registered provider, a for-profit private registered provider and a local authority provider. It may also be exercised in relation to anyone who has applied to become a registered provider.

#### **Background and context to the use of the power**

- 3 The regulator needs to collect and hold reliable information so it can undertake its functions. The regulator will use this information to assess compliance with the standards framework. The regulator is committed to minimising the additional burden of its information requirements through the best use of information that is already available. This may include information produced by providers for public reporting or for internal management purposes. The regulator expects providers to produce the information and documents it requires on a regular and timely basis under this general power. However, it may be necessary for the regulator to exercise this power in circumstances where providers are unable or unwilling to provide the documents or information that the regulator requires routinely to carry out its functions, or where it believes there may have been a breach of the standards. This guidance sets out how the regulator would use the power in those circumstances.

#### **Potential triggers to the exercise of the power**

- 4 Sections 107 and 108 of the Act set out the circumstances in which the regulator may exercise the power to collect information. The regulator may, for a purpose connected with its functions, require a person to provide a document or information which it believes is, or may be, in the person's possession and which relates to:
  - the financial or other affairs of a provider
  - activities which are, or may be, carried out by a person who is,

or who has applied to become, a registered provider

5 The regulator is most likely to exercise the power where:

- there is a potential failure against a standard
- the provider has failed to produce the information and documents required on a routine basis by the regulator
- the provider is either slow or unwilling to produce additional information and documents requested by the regulator when the regulator has grounds to believe that there may be a problem with a provider's performance and needs to undertake further regulatory scrutiny
- the provider has failed to honour a voluntary undertaking to the satisfaction of the regulator
- the provider has failed to deal with previous regulatory interventions to the satisfaction of the regulator
- it is necessary to collect information or documents as part of the exercise of the regulator's wider regulatory or investigatory powers such as an inspection or an inquiry
- This is not an exhaustive list and the regulator may conclude that it is necessary to exercise the power in other circumstances to those set out above

### **The power**

#### **Who can be required to provide documents and information?**

6 The application of the provisions of sections 107 and 108 of the Act is not restricted to a provider. The regulator can require a document or information from any person who is, or may be, in possession of it. This may include any person who is, or has been an officer, member, employee or agent of a provider or anyone providing goods or services to a provider. A requirement may be imposed on a person other than a provider only if:

- the provider has been asked to produce a document or information but has failed to do so
- the regulator concludes that the provider is unable to produce it

7 The provisions of the Act do not require a person to produce anything which they would be entitled to refuse to disclose on the grounds of legal professional privilege in proceedings in the High Court.

8 The provisions of the Act do not require a banker to breach a duty of confidentiality owed to a person who is not the provider to whose affairs or activities the documents or information relate or a subsidiary of the provider or an associate of the provider.

## **Process**

### **A requirement**

- 9 The regulator will send a notice, or a requirement, to the provider which will:
- clearly state that the information is required under this power
  - specify the document or information required
  - the form and manner in which the document or information is to be provided, which may include the provision of a legible copy of information stored electronically
  - when and where the document or information is to be provided

### **Response**

- 10 The regulator expects the provider or other person to produce the document or information in accordance with the terms of the requirement. If the provider or other person does so, the regulator will acknowledge receipt. The regulator may copy or record the document or information produced.

### **Failure to comply with a requirement**

- 11 If a provider or other person fails to comply with a requirement without reasonable justification, the regulator will consider whether further action may be necessary. If a provider or other person is unable to produce the document or information, they may give the regulator a written explanation setting out the reasons for the failure to comply with the requirement. Any such representations will be considered by the regulator and taken into account in deciding whether or not to take further action.

### **Further action**

- 12 The regulator may apply to the High Court to make an order to remedy the failure to comply with a requirement. In such circumstances the regulator may seek to recover its costs.
- 13 The Act makes provision for the regulator or the Director of Public Prosecutions to bring proceedings, or to consent to proceedings if:
- a provider or other person fails without reasonable excuse to comply with a requirement
  - a provider or other person intentionally alters, suppresses or destroys a document or information to which a requirement relates
- 14 Where information has been altered, suppressed or destroyed, the regulator may consider using one or more of its other powers.

## **Guidance note 5**

### **Guidance on sections 144 to 159: insolvency etc**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator envisages the power relating to the potential insolvency of a registered provider working. This is a general power and is set out in chapter four sections 144 to 159 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to non-profit or for-profit private registered providers but not local authority providers. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Background and context to the use of the power**

- 2 Where a registered provider identifies a potential problem with, or threat to, its viability, for whatever reason, the regulator expects the provider to notify it immediately. The regulator will intervene as it sees fit with the objective of ensuring that viability is maintained. It may be possible to avert a potentially damaging situation without the need for formal insolvency powers to be employed. Many of the actions required in a potential insolvency are specified in the Act and the regulator does not have discretion as to their application.
- 3 The purpose of the insolvency power is to allow the regulator a period of time in which to seek a solution to the provider's viability problem, thereby protecting the interests of the provider's residents and safeguarding any public funds invested in the provider. The power should not be construed as implying that the regulator will underwrite the provider's financial position in any way. The regulator will make every effort to make proposals acceptable to the secured creditors for the future ownership and management of the provider's land, with a view to ensuring continued management of housing property by a registered provider. The future owner or manager might not be the existing provider. The regulator will attempt to ensure that the interests of all the provider's creditors are protected in any solution.

#### **The power**

#### **The circumstances in which the power can be exercised**

- 4 Section 145 of the Act specifies six actions, described as "steps", any one of which would trigger the use of the insolvency power. They are:
  1. Any step, of a kind prescribed for the purposes of this section by the Secretary of State, to enforce a security over land held by a registered provider.



2. The presenting of a petition for winding up a registered provider (but not if the regulator presents a petition under section 166 of the Act).
3. The passing of a resolution for the winding up of a registered provider (but not where the regulator's consent is required for a resolution under sections 162 and 164 of the Act).
4. A decision by the governing body of a registered provider to present a petition for its winding up.
5. The making of an administration order in respect of a registered provider which is a registered company.
6. The appointment of an administrator in respect of a registered provider that is a registered company.

### **The effect of action under section 145**

- 5 If an action under section 145 is taken in respect of a registered provider, a moratorium on the disposal of land by the provider begins. The initial period of moratorium is 28 working days. During a moratorium the regulator may:

- appoint an interim manager of the registered provider
- make proposals about the future ownership and management of the registered provider's land with a view to ensuring that the property will be properly managed by a registered provider

If the regulator makes proposals, those proposals only have effect if they are agreed by each of the provider's secured creditors, as the regulator is able to locate after making reasonable enquiries. The Act enables a manager to be appointed by the regulator to implement those proposals. The powers which may be conferred upon the manager are set out in the Act. The regulator has the power under section 158 of the Act to give financial or other assistance to a registered provider for the purpose of preserving its position pending the agreement of proposals, or to a registered provider or an appointed manager to facilitate the implementation of agreed proposals. Certain forms of financial assistance require the prior consent of the Secretary of State.

### **Notice to be given to the regulator**

- 6 The relevant provisions of the Act are triggered when a "step" is taken. Section 144 provides for notice to be given to the regulator before any such step is taken, otherwise the purported action is ineffective. The Act makes no provision as to when the prior notice must be given or the form that such a notice should take. However, receipt of prior notice might allow the regulator an opportunity of assisting in the resolution of the problem, thus rendering the actual taking of the step unnecessary.

- 7 On receipt of a notice under section 144, the regulator will contact the person who gave the notice to gain an understanding of the problem. The regulator is likely to seek an early meeting with the registered provider to explore options for resolving the problem. The action to be taken will depend on the circumstances of the case, and may include use of another of the regulator's statutory powers, such as the power to make appointments to the governing body of the provider. At this stage it may also be necessary for the regulator and/or the provider to commission an independent accountant's review of the provider's financial position. The regulator will keep the person who gave the notice informed throughout the period of its discussions with the provider and, in particular, will advise that person immediately in the event that resolution does not appear to be possible.
- 8 Section 145 of the Act requires certain specified persons to notify the regulator when a defined step is taken in respect of a registered provider. The taking of a step triggers a moratorium on the disposal of land, which lasts until the expiry of 28 working days after the regulator receives the notice (section 146). Failure to give the notice does not invalidate the step itself but does affect the start of the moratorium. As the purpose of the legislation is to give the regulator an opportunity to seek a solution to the problems faced by the provider, it follows that early notification under section 145 is essential.
- 9 A notice under section 144 or section 145 should be served in writing on the Director of Regulation, The regulator of social housing, Maple House, 149 Tottenham Court Road, London W1T 7BN. The notice should state clearly the step under which the person is serving the notice and the reasons why this action is being taken. The regulator will give the Greater London Authority (GLA) a copy of any notice received under section 145 where it relates to a provider owning land in Greater London.

### **The moratorium**

- 10 The moratorium on disposal of land by the registered provider lasts at least 28 working days from the taking of a step as defined in paragraph five, and, once the moratorium is in place, the taking of a further step by another party would not start a new moratorium period. Section 146 makes provision for the regulator to extend the moratorium with the consent of the secured creditors. The regulator is likely to seek consent to extend a moratorium where it believes that it can make acceptable proposals under section 152 about the future ownership and management of the provider's land, but it requires more time to finalise those proposals.
- 11 Section 146 makes provision for the regulator to cancel a moratorium if it is satisfied that it is not necessary to make proposals, and also sets out requirements for the regulator to consult the person who took the original step and to notify relevant stakeholders. In some cases,

the regulator may find that the problem is capable of being resolved without the need to produce a formal proposal. An example might be where the provider arranges a partnership deal with another financially strong registered provider. The regulator will then assess the capability and capacity of the provider for continued ownership and management of the land, and, if it is satisfied in this respect, the regulator will cancel the moratorium.

- 12 It is possible that, despite the best efforts of the regulator and other stakeholders, the problems which first gave rise to the moratorium cannot be resolved. Alternatively, proposals put together by the regulator might not be agreed by the secured creditors. In those cases, the regulator is likely to stand aside and, at the end of the moratorium period, give formal written notice of this fact, including the reasons why proposals are not being pursued, to the provider and to its secured creditors. Those creditors will then be free to take action as they see fit (as will the provider itself). It should be noted that where a moratorium ends without any proposals being agreed, the taking of a further step within the next three years will not trigger another moratorium without the consent of the secured creditors of the provider (section 147).

### **Effect of a moratorium**

- 13 During a moratorium, the regulator's prior consent is required under section 148 to a disposal of the provider's land, clarified in the Act to include disposal of a present or future interest in rent or other receipts arising from the land. Section 149 outlines some exceptions where consent is not required, mainly covering specific types of lettings, 'right to buy' and 'right to acquire'. The Homes and Communities Agency (HCA) and the GLA are prevented under section 148 from giving the provider a Direction in relation to recovery of social housing grant or enforcing any such Direction previously given, during a moratorium.
- 14 Section 150 contains another exception to the section 148 consent regime by permitting a non-profit registered provider to dispose of a single dwelling without consent if the provider believes that the buyer intends to use the property as the buyer's principal residence.
- 15 As a general rule, the regulator will not give consent to disposals during a moratorium. However, the regulator will consider each request for disposal on its merits, and may agree to provide consent where it believes that it is reasonable to do so. The most likely situation where regulator consent would be forthcoming is where a disposal would stabilise or improve the provider's financial position, thus giving time to facilitate the development of proposals for an overall solution. The regulator would consult with the provider's secured creditors before issuing such consent, and would have regard to the position of creditors in general. Any such consent may be given subject to conditions which would be dictated by the circumstances of the particular case.

## **Interim manager**

- 16 Section 151 gives the regulator the power to appoint an interim manager of a registered provider during a moratorium. An appointment may relate to a provider's affairs generally or to specific affairs, and the terms and conditions of the appointment should be specified. An appointment lasts until the earliest of the end of the moratorium, or the agreement of proposals made by the regulator, or a date specified in the appointment. An interim manager may be given wide-ranging powers in relation to the provider's affairs, but the Act forbids an interim manager from disposing of land or granting security over land. There is no provision in the Act for meeting the costs of an interim manager. The regulator anticipates that those costs will be met by the provider, but in cases where this is clearly not possible the regulator may underwrite the costs of an interim manager.
- 17 The regulator envisages appointing an interim manager in all cases where the moratorium is triggered. The purpose is to assist in controlling the provider's affairs and to maintain services to tenants, while the regulator considers making proposals. The skills and expertise required of the interim manager and the powers conveyed in the appointment will be determined by the circumstances in each case. The regulator anticipates that an interim manager will be a senior housing executive, a professionally qualified person, or an insolvency practitioner. In most cases, the regulator expects to give the interim manager full executive powers over the provider's affairs, although this will depend on an assessment of the skills and expertise already available to the provider. The regulator will consult with the provider's secured creditors before making an appointment.
- 18 When it receives a notice under section 144 or section 145, the regulator will make an early assessment of the capacity and willingness of the registered provider's governing body to oversee its affairs during a moratorium. The regulator will consider taking steps to strengthen the governing body, probably by way of making statutory appointments under section 269 of the Act (see separate guidance on such appointments).

## **Making proposals**

- 19 Section 152 permits the regulator to make proposals about the future ownership and management of the registered provider's land with a view to ensuring that the property will be properly managed by a registered provider. The regulator must have regard to the interests of the provider's creditors as a whole and, so far as is reasonably practicable, avoid worsening the position of unsecured creditors. Section 152 also makes provision for protecting the status quo in respect of preferential creditors. Proposals may provide for the appointment of a manager under section 155 to implement all or part of the proposals (see paragraphs 29 to 33). Where the provider is a

charity, the regulator's proposals will not require it to act outside the terms of its trusts and will only provide for disposal of accommodation to another charity with similar objects.

- 20 In drawing up proposals, the regulator will have regard to the interests of all stakeholders. It is not possible to outline the precise form that proposals would take. The particular circumstances of each case will determine the regulator's strategy. The regulator will dedicate resources throughout the moratorium period in seeking to devise a rescue plan. Meetings will normally be arranged with the provider itself and its secured creditors. Under section 153, before making proposals, the regulator must consult with the provider and (so far as is reasonably practicable) its tenants, and with the Financial Services Authority or the Charity Commission as appropriate.
- 21 If the regulator makes proposals, it must, under section 153, send a copy of those proposals to the registered provider, such of the secured creditors as the regulator is able to locate after making reasonable enquiries, and to any appointed insolvency office holder. The regulator expects to be able to agree a list of secured creditors with the provider at an early stage and will take legal advice as appropriate to determine which creditors might be deemed to have secured status. The regulator must also make arrangements to bring proposals to the attention of the provider's members, its tenants, and its unsecured creditors.
- 22 Proposals can only be taken forward for implementation if they have been agreed by all of the identified secured creditors. The regulator expects that, through its prior engagement with the secured creditors, it will know what proposals are likely to be acceptable. Section 153 makes provision for modifications to be incorporated in the proposals in order to reach agreement.
- 23 If proposals are agreed, the regulator must send a copy of those proposals to the registered provider and its officers, the secured creditors, any appointed insolvency office holder, and the Financial Services Authority or the Charity Commission as appropriate. The regulator must also make arrangements to inform the provider's members, its tenants, and its unsecured creditors. Any subsequent amendments to proposals must follow the same process as that for the original proposals.
- 24 The regulator's objective in drawing up proposals will be to seek to avoid the formal insolvency of the registered provider, while recognising that it may be difficult to satisfy the competing interests of all stakeholders. The regulator will seek to ensure that any proposals do not cause a conflict of duties for any appointed insolvency holder. Preserving the independence of the provider will not be a primary consideration. In many cases where a moratorium is in place, other registered providers are likely to be able to assist with a solution. The

regulator will hold early discussions with such other providers as it believes may have the capacity and capability to provide the necessary assistance.

### **Effect of agreed proposals**

- 25 Under section 154 the regulator, the registered provider, its creditors, and any appointed insolvency office holder must implement agreed proposals. The directors, committee members, or trustees of the provider are required to co-operate with the implementation of agreed proposals, with the proviso that they should not commit a breach of a fiduciary or other duty to the provider. The regulator may take enforcement action through the courts against any persons who do not comply with their obligations in respect of agreed proposals.

### **Appointment of manager and related powers**

- 26 Section 155 enables the regulator to appoint a manager when proposals are agreed and those proposals must make provision for the payment of the manager's reasonable remuneration and expenses. This is a separate power from the power to appoint an interim manager of a registered provider during a moratorium. The regulator may give the manager general or specific Directions. If the provider is a charity, the regulator must notify the Charity Commission that a manager has been appointed. Section 156 lays down a non-exhaustive list of powers which may be conferred on the manager. In general, these powers enable a manager to carry on the business of the provider while proposals are implemented. They include a power to appoint a solicitor, accountant or other professional to assist the manager. A manager must, so far as is reasonably practicable, consult and inform the provider's tenants about an exercise of powers likely to affect them.
- 27 The regulator considers that the appointment of a manager will be necessary in most cases but will look at each case on its merit. The appointment details and the identity of the manager will be included in the agreed proposals. The skills and expertise required of the manager and the powers conveyed in the appointment will be determined by the circumstances in each case. The regulator anticipates that a manager will be an experienced senior housing executive, an experienced professional person, or an experienced insolvency practitioner. The manager may be the same person who acted as interim manager during the moratorium. The proposal will make provision for the payment of the manager's remuneration and expenses.
- 28 Section 157 gives the manager additional powers where the registered provider is an industrial and provident society. Under this provision, the appointment of a manager may confer on the manager power to take the legal steps necessary to amalgamate the society

with another industrial and provident society or to transfer its engagements.

- 29 The regulator believes that the power to amalgamate or transfer engagements is an effective power which is likely to find favour in making proposals. This is because the recipient registered provider would be chosen for its capacity and capability to resolve the problems. It would ensure that properties would be properly managed by a registered provider (as required under section 152), while the interests of tenants, public funding, and creditors would be protected.
- 30 The regulator would expect a manager to act expeditiously to ensure implementation of agreed proposals and to work closely with all interested parties to achieve this objective. A manager may apply to the High Court for Directions in relation to his or her actions, and High Court Directions would overrule any Directions given by the regulator on the same matter. The regulator would expect a manager to exercise the duty to consult or inform tenants where any actions are likely to affect their continuing rights, their rents, or the level of services being provided.

#### **Assistance by the regulator**

- 31 Section 158 permits the regulator to give financial or other assistance to a registered provider for the purpose of preserving its position pending the agreement of proposals, or to a registered provider or a manager to facilitate the implementation of agreed proposals. In particular, the regulator may lend staff and may arrange for payment of the manager's remuneration and expenses. The regulator's power to provide financial assistance is restricted by the need to obtain the consent of the Secretary of State to make grants or loans, to indemnify a manager, to make payments in connection with secured loans, or to guarantee payments in connection with secured loans.
- 32 The regulator expects agreed proposals to make provision for the payment of a manager's remuneration and expenses, but, in the unlikely event that without such provision a proposal would otherwise fail to be agreed, the regulator would consider underwriting the costs of a manager. The regulator does not expect to seek the consent of the Secretary of State to other forms of financial assistance as, generally speaking, to do so would mean public funds taking the place of existing creditors. The regulator believes that there may be exceptional circumstance where, for example, an additional line of temporary credit is needed during a moratorium, it may be necessary for the regulator to consider whether an approach to the Secretary of State is warranted.

#### **Applications to the court**

- 33 Once they are agreed, proposals are binding on the relevant parties as noted in paragraph 28. Section 159 makes provision for the

registered provider or a creditor of the provider to make application to the High Court where they think that action by a manager is not in accordance with the agreed proposals. It also allows any party bound by the proposals to make application to the High Court where it thinks that action by another bound party is in breach of the obligation to implement agreed proposals.

### **What the regulator expects from the provider**

34 The regulator expects a registered provider (including its officers and its directors, committee members or trustees) affected by sections 144 or 145 to:

- notify the regulator immediately where the provider identifies a potential problem with, or threat to, its viability, for whatever reason
- notify the regulator immediately where it has reason to believe that a step under section 144 or section 145 is about to be taken
- take legal and financial advice as to its trading position and duties under the Act and under insolvency legislation, to include specific advice to the provider's officers and its directors, committee members or trustees
- provide up-to-date details to the regulator of the provider's officers and its directors, committee members or trustees
- provide such information and assistance as the regulator requires in order to identify all the secured creditors of the provider
- provide details to the regulator of any insolvency office holder appointed in respect of the provider's affairs
- supply relevant details, to be agreed with the regulator, to enable the regulator to bring information to the attention of the provider's members, its tenants and its unsecured creditors
- co-operate with any interim manager appointed by the regulator, and provide facilities and information to assist the manager to discharge his or her specified duties
- supply relevant details, to be agreed with the regulator, to enable the regulator to bring information to the attention of the provider's members, its tenants and its unsecured creditors
- co-operate with any interim manager appointed by the regulator, and provide facilities and information to assist the manager to discharge his or her specified duties
- provide such information as the regulator requests, and access to relevant books and records, to enable an assessment of the provider's financial position to be undertaken
- co-operate fully with the regulator, and provide such support as the regulator requires, in the development of proposals for the future ownership and management of the provider's land
- co-operate fully with the regulator in its use of any other regulatory powers during the period of a moratorium



- co-ordinate a communications strategy on all matters relating to the use of these powers with the regulator, and ensure that no public statements are made without the regulator's agreement
- implement proposals agreed between the regulator and the secured creditors

## **Consultation**

35 The Act requires the regulator, in exercising its insolvency powers, to consult relevant persons at certain stages and also to notify other identified persons. The regulator also recognises that regard would have to be paid to a number of legitimate interests and would consult or inform accordingly. Consultees may include:

- secured creditors - any proposals made by the regulator under section 152 can only be implemented with the agreement of the secured creditors (see also paragraphs 24 and 25). The regulator will work closely with the secured creditors throughout the process envisaged by the Act. The regulator will hold an early meeting with the provider and the secured creditors to agree an action plan, which will include a communications strategy
- tenants - the regulator recognises that any situation where insolvency powers are triggered could cause anxiety for tenants and leaseholders, and the regulator will take all steps it can to mitigate that anxiety. The regulator will ensure that the regulator itself and any manager appointed as part of proposals comply with the legal requirements for consulting and informing tenants. The nature of consultation will depend on the circumstances of the case and the timescales involved. It will not be practicable in some situations to make direct contact with each individual tenant. The regulator will use various techniques to consult and inform tenants including where appropriate, liaison with recognised tenant representative groups, appointment of a tenant adviser, telephone help-lines, advertisements in local newspapers and tenant meetings
- the registered provider - the regulator will ensure that it complies with the legal requirements for consulting and informing the provider. The provider (including its officers and its directors, committee members or trustees) and its senior staff are likely to be involved fully from the outset. The regulator's expectations of the provider are outlined in paragraph 40
- any insolvency office holder - the regulator recognises that, in certain situations, an insolvency office holder could also be appointed in respect of the provider or its land. The regulator would want to facilitate the person appointed in the performance of his or her duties, and would hold an early meeting with that person to make appropriate arrangements. In cases where an insolvency office holder is in place, and the

regulator wishes to appoint an interim manager, the regulator will consider, in consultation with the relevant parties, whether it would be appropriate to appoint that person as the interim manager

- unsecured creditors - the regulator must make arrangements for bringing proposals (both before and after their agreement) to the attention of the unsecured creditors. The regulator will require the provider to give the regulator a list of unsecured creditors for this purpose. If, for any reason, it is not possible to obtain contact details for all unsecured creditors, the regulator will make arrangements for advertising the proposals in an appropriate publication such as the London Gazette
- other regulators - the regulator will ensure that it complies with the legal requirements for consulting and informing the Financial Services Authority and the Charity Commission as appropriate. In addition to its formal obligations, the regulator will keep these two bodies, as well as the Registrar of Companies (where the provider is a registered company), informed of the ongoing situation during a moratorium
- local authorities - the regulator recognises that local authorities in whose areas a registered provider operates may have various levels of interest in the provider's affairs. Where a local authority is a secured creditor its position is the same as other secured creditors as outlined above. In other situations, the regulator does not have a legal duty to consult or inform local authorities, but the regulator will endeavour to keep local authorities informed as appropriate to the particular circumstances of each case
- central government - the regulator will keep relevant persons at the Department of Communities and Local Government (DCLG) informed at all stages in the exercise of these powers and will agree with the DCLG on a case by case basis which other government departments should also be kept informed
- cross border regulators - where the regulator's insolvency power is triggered in respect of a registered provider which undertakes business activities or has operating subsidiaries in Scotland or Wales, the regulator will notify the Scottish Housing Regulator or the Welsh Assembly Government as appropriate.

### **Recommendation to the Homes and Communities Agency**

- 36 Under section 92J of the Housing and Regeneration Act 2008, inserted by section 178 and Schedule 16 Part 1 paragraph 2 of the Localism Act 2011, the regulator can make recommendations to the Homes and Communities Agency (HCA) about the exercise of the HCA's functions (which for the purposes of this section do not include the functions of the regulator). In circumstances where it has received notice under section 145, the regulator will consider whether to make such a recommendation to the HCA. If the regulator decides to do so, the HCA must publish the recommendation and its response to it

such manner as the HCA thinks fit. The circumstances of each case will be different and the regulator will be mindful of its objective of protecting public funds. However, as a general rule the regulator will not make a recommendation to the HCA where to do so might worsen the financial position of the provider thus hastening the onset of insolvency.

### **Direction to the Greater London Authority**

- 37 Under the Greater London Authority Act 1999 section 333ZG, which was inserted by section 187 of Part 8 Chapter 1 of the Localism Act 2011, in circumstances where the regulator has received notice in respect of a registered provider under section 145, it may give a Direction to the GLA, which prohibits the GLA from giving financial assistance to the provider. As noted in paragraph nine above the regulator will give the GLA a copy of any notice received under section 145. The circumstances applicable to each case will be different and the regulator will be mindful of its objective of protecting public funds. However, as a general rule, the regulator will not give a Direction to the GLA where to do so would worsen the financial position of the provider thus hastening the onset of insolvency. Therefore, the regulator envisages the use of the power to direct the GLA being restricted to financial assistance where a contractual commitment has not been entered into by the provider. In the absence of Directions from the regulator, the GLA is free to take its own decisions about continued funding. At the outset of a moratorium relating to a provider owning land in Greater London, the regulator will meet with the GLA to gain a full and detailed understanding of the position of the provider in respect of existing and proposed GLA financial assistance, and to ensure that the GLA is aware of the circumstances of the case. Further advice and guidance about the regulator's approach to the use of this power is set out in the relevant guidance note.

## **Guidance note 6**

### **Guidance on section 166: winding up petition by the regulator**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power relating to petitioning for the winding up of a registered provider. This is a general power and is set out in chapter four section 166 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to registered providers with some exceptions that are set out in the section below on scope. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Scope**

- 2 The power may be exercised in relation to a non-profit registered provider which is a registered company or an industrial and provident society. It cannot be applied to a local authority provider, a for-profit provider or to a registered charity, which is not a registered company.

#### **Background and context to the use of the power**

- 3 Where problems are identified with a provider, the regulator may intervene to assist the provider to resolve those problems. The regulator expects that most cases will be resolved through timely and effective intervention. However, in circumstances where problems cannot be resolved and where particular circumstances exist, the regulator can petition the court under the Insolvency Act 1986 to wind up a registered provider. The regulator expects this power to be used only in rare and exceptional circumstances.

#### **The power**

##### **The circumstances in which the power can be exercised**

- 4 The power can only be exercised on any of three grounds as follows:
  - that the provider is failing properly to carry out its objects
  - that the provider is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986
  - that the regulator has previously directed the provider under section 253 of the Act to transfer all its land to another person

##### **Failure to properly carry out objects**

- 5 Under section 112 of the Act, in order to be eligible for registration with the regulator, a body which is not a local authority must be a provider

of social housing or intend to become a provider of social housing. The regulator therefore considers that carrying out objects in the context of section 166 relates solely to the provision of social housing.

### **Inability to pay debts**

- 6 Section 123 of the Insolvency Act 1986 sets out the meaning of a company's inability to pay its debts. The regulator considers it unlikely that it would use this ground to petition for the winding up of a provider. This is because the prime responsibility for complying with the law in such a situation rests with the provider's officers, directors, committee members or trustees and with its senior staff. Also it is up to the creditors of a provider to take whatever action is open to them to enforce payment of monies due to them. Action taken by the provider or its creditors could trigger the use of the regulator's insolvency power contained in sections 144 to 159 of the Act (see separate guidance on that power).

### **Where land has been transferred**

- 7 Where all of the land of a provider is transferred to another person following a Direction by the regulator under section 253, the provider will remain as a constituted body, although it will not be able to function as a registered provider. In that case, unless the provider's members take action to dissolve the body in accordance with its constitution, the regulator may petition the court to wind up the provider.

### **The effect of an exercise of the power**

- 8 It is for the court to decide whether or not to grant the petition to wind up the provider. If it does, the court will give responsibility for winding up the provider to the official receiver. The regulator will give all the information and assistance the official receiver requires. The regulator will consider whether it is necessary to use any of its other enforcement powers in order to facilitate a winding up. When the official receiver confirms to the regulator that a winding up is complete the regulator will remove the provider from its register and will liaise with other regulatory bodies as appropriate regarding removal from their registers.

### **Consultation**

- 9 The Act does not require the regulator to consult relevant persons in exercising its power under section 166. In the limited circumstances which the regulator envisages using the power, there are unlikely to be any significant legitimate interests remaining. The regulator is committed to as full consultation as is possible with any relevant stakeholders.

## **Guidance note 7**

### **Guidance on section 167: transfer of property**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power relating to the transfer of property following the dissolution or winding up of a registered provider. This is a general power and is set out in chapter four section 167 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to registered providers with some exceptions, which are set out in the section below on scope. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Scope**

- 2 The power may be exercised in relation to a non-profit registered provider which is a registered company or an Industrial and Provident Society. It cannot be applied to a local authority provider, a for-profit provider or to a registered charity, which is not a registered company.

#### **Background and context to the use of the power**

- 3 The principles behind the constitutional and operating frameworks of non-profit providers are such that any assets held by them should be applied in furtherance of their own objects or the objects of similarly constituted bodies. As any assets remaining after a provider ceases to exist cannot be distributed to its members the Act provides assurance that those assets will continue to be used for their intended, or similar, purposes.

#### **The power**

#### **The circumstances in which the power can be exercised**

- 5 The power can only be exercised where a non-profit registered provider is dissolved under the Industrial and Provident Societies Act 1965 or is wound up under the Insolvency Act 1986. The power overrides anything contained in the Industrial and Provident Societies Act 1965, the Insolvency Act 1986, the Companies Act 2006 or the constitution of the provider.

#### **The effect of an exercise of the power**

- 6 Any surplus property that is available after satisfying the provider's liabilities must be transferred to the regulator or, if the regulator

directs, to a specified non-profit registered provider. Where the provider that is dissolved or wound up is a charity, its surplus property can only be transferred to another charity that has similar objects to those of the transferring charity. The Act gives the regulator the power to decide whether the objects of the two charities are similar. The regulator will consult with the proposed recipient charity, and will take advice from the Charity Commission as necessary, before making a decision on similarity of objects.

- 7 The regulator considers that the legal processes for dissolution and for winding up will ensure that all assets and liabilities of a provider are properly identified such that the regulator will not need to undertake a separate process to satisfy itself in that regard.
- 8 The Act also gives the regulator the power to discharge liabilities of a provider in order to avoid the sale of the provider's land and instead secure a transfer of that land. The regulator does not envisage using this power as to do so would mean public funds taking the place of existing creditors. There may be exceptional circumstances, for example if tenants are in danger of losing their homes, where the regulator would consider a case for providing financial assistance. The regulator would only consider such a case where all other possible avenues for meeting the liabilities had been exhausted.

### **Directing a transfer of surplus property**

- 9 Where the regulator holds surplus property transferred to it under section 167 (and under previous legislation) the regulator may transfer such property to other non-profit registered providers in accordance with criteria determined by the regulator and made available from time to time. In general, surplus property will be used to facilitate strategies for the resolution of serious problem cases, and in some cases may take the form of direct financial assistance.

### **Consultation**

- 10 The Act does not require the regulator to consult relevant persons in exercising its power under section 167. As the provider which owned the property will be dissolved or wound up there are unlikely to be any significant legitimate interests remaining. The regulator is committed to as full consultation as is possible with any relevant stakeholders.

## **Guidance note 8**

### **Guidance on sections 199 to 200: survey**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power to carry out a survey. This is a regulatory power and is set out in chapter six sections 199 to 200 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to all registered providers. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Scope**

- 2 The power may be exercised in relation to all providers, including a non-profit private registered provider, a for-profit private registered provider and a local authority provider.
- 3 The term "premises" is not defined in the Act, but the regulator will only exercise the power to carry out a survey in relation to social housing, that is to homes or dwellings. The term "dwelling" is defined in section 275 of the Act as "a house or flat or other building occupied or intended to be occupied as a separate dwelling", and "includes any garden, yard, outhouse or other appurtenance". The regulator considers that common parts will fall within this definition.

#### **Background and context to the use of the power**

- 4 A provider is responsible for ensuring that it achieves the standards set by the regulator. A provider has primary responsibility for ensuring that its tenants live in good quality accommodation which is repaired and maintained to the highest standards. The regulator expects providers to have good quality information on the condition of its social housing stock. It may be necessary for the regulator to step in and exercise this power when it suspects that a provider is failing to maintain its premises in accordance with the standards under section 193 of the Act.

#### **Potential triggers to the exercise of the power**

- 5 Sections 199 and 200 of the Act set out the circumstances in which the regulator may exercise the power to carry out a survey. The regulator may arrange for a survey of the condition of identified homes by an authorised person.
- 6 Indicators of a potential breach of the standards could include:



- a potential generic problem in design, construction or condition which may impact across the provider's social housing stock where there are reasonable grounds to suspect there has been or there is a risk of a serious detriment to tenants.
- a failure by the provider to honour a relevant voluntary undertaking to the satisfaction of the regulator
- a failure by the provider to deal with previous relevant regulatory interventions to the satisfaction of the regulator
- a survey is necessary as part of the exercise of the regulator's wider regulatory or investigatory powers such as an inspection or an inquiry

## **Process**

### **Who can carry out a survey?**

- 7 A survey can be carried out by anyone who is authorised by the regulator. An "authorised person" may be a member of the regulator's staff, or any other person who has been authorised in writing by the regulator for the purposes of carrying out a survey under this power. The regulator will ensure that the authorised person is qualified for the intended purpose of the survey.

### **Authority to carry out the survey**

- 8 The regulator will give the authorised person written authority to carry out the survey. The regulator will send a copy of this authority to the provider. When carrying out the survey, or seeking to enter premises in order to carry out the survey, the surveyor must produce a copy of the authorisation if requested to do so by the occupier of the premises. The surveyor may enter the premises at any reasonable time to carry out the survey.

## **Notice**

- 9 The Act places obligations on both the regulator and the provider in relation to giving notice of the survey:
- the authorised person must give the provider at least 28 days notice
  - the provider must give each occupier of the premises at least seven days notice

## **Report**

- 10 After carrying out a survey, the surveyor must produce a written report for the regulator. The regulator will send a copy of the report to the provider.

## **Costs**

- 11 The Act makes provision for the regulator to require the provider to pay some or all of the costs of the survey and report. This is discretionary, but the regulator will usually seek to recover the full cost of the survey and report from the provider, having taken into account the outcome of the report and the circumstances of the provider.

## **Sanctions**

- 12 The Act makes provision for the regulator or the Director of Public Prosecutions to bring proceedings in circumstances where:
- a provider fails without reasonable excuse to comply with the requirement to give each occupier of the premises at least seven days notice of a survey
  - a provider, or an officer of a provider, obstructs an authorised person in exercising the power to carry out a survey

## **Guidance note 9**

### **Guidance on sections 201 to 203: inspection**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise its power on inspection. This is a regulatory power and is set out in chapter six and sections 201 to 203 of the Housing and Regeneration Act 2008 (the Act). These sections of the Act are subject to amendment by the Localism Act. The power may be exercised in relation to all registered providers. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Background and context to the use of the power**

- 2 The regulator may commission an inspection to establish whether a provider is compliant with our standards and regulatory requirements. In considering whether or not to commission an inspection, the regulator will take account of the different thresholds for intervention that apply to the economic and to the consumer standards, including whether or not the serious detriment test is met in relation to consumer standards. The regulator will decide the scope of, and produce the brief for, each inspection. The brief will set out the matters to be investigated and the methodology to be followed. The inspection will focus on those areas where concerns have been identified and will provide a clear, evidence-based assessment of compliance with our standards and regulatory requirements.

#### **Potential triggers to the exercise of the power**

- 3 Section 201 of the Act specifies that the regulator may arrange for a person to inspect:
  - a provider's performance of its functions in relation to the provision of social housing, or
  - the financial or other affairs of a provider
- 4 The regulator is most likely to exercise the power of inspection where a provider might be non-compliant with one or more of the standards applicable to it, and the regulator needs to establish whether there is an actual failure and, if there is, the level of severity associated with the failure in order to consider whether further action might be necessary. Examples of the circumstances in which the regulator might commission an inspection include:
  - evidence of a breach of one or more economic standards

including indicators of financial problems or poor financial management

- evidence of a breach of one or more consumer standards where there are reasonable grounds to suspect there has been or there is risk of serious detriment to tenants
- where we have grounds to suspect that an agreed programme of self-improvement to resolve previously identified concerns has failed to achieve compliance with the standards or is not being progressed in a timely way
- Evidence of impropriety (including fraud)
- whistle blowing involving allegations of a serious nature

## **Scope**

- 5 The power of inspection may be exercised in relation to a private registered provider including a non-profit registered provider and a for-profit registered provider where the inspection relates to economic standards under section 194 of the Act and to all providers including a non-profit registered provider, a for-profit registered provider and a local authority provider where the inspection relates to consumer standards under section 193 of the Act. An inspection of the social housing activities of a local authority provider will include liaison with managing agents where management services are provided by an arm's length management organisation (ALMO), a tenant management organisation (TMO), or other manager under contract.

## **The power**

### **Who can conduct an inspection?**

- 6 The regulator may appoint any person to conduct an inspection. The regulator will ensure that the inspector is qualified for the intended purpose of the inspection. An inspector is most likely to be:
- an appropriate professional expert, or
  - a member of the regulator's staff if the Secretary of State consents on either a general or specific basis

### **The inspection brief**

- 7 It is for the regulator to decide whether an inspection is needed and its scope, taking into account the particular circumstances of the provider. The regulator will ensure that the inspection is focussed on any potential failure of a standard. The regulator will produce the brief for the inspection. While the nature of the brief will vary depending on the circumstances of the case, it will be bespoke to the specific presenting concerns at the provider and will focus on investigating whether or not the provider is compliant with the standards. The brief will usually include:

- the matters to be investigated
- the methodology to be followed
- the proposed dates for the start and completion of the inspection which is most likely to be carried out at short notice
- the reporting arrangements
- fees and cost control arrangements

### **Notification and initial contact with the provider**

- 8 The regulator's general approach to regulatory engagement with providers means that in most cases any concerns will have been discussed with the provider before the regulator considers whether to commission an inspection. Cases where it might not be appropriate to do so include those where the regulator has to act speedily in order to protect tenants or the taxpayer. Once the regulator has decided to commission an inspection and has given the brief to the commissioned inspector, it will notify the provider of:
  - the reason it has commissioned the inspection
  - the standard(s) to which the inspection relates
  - the brief for the inspection
- 9 The regulator will agree the arrangements for the inspection with the inspector and the provider based on the particular circumstances of the case. The regulator will expect the inspector to then make contact with the provider in order to agree the detailed practical arrangements associated with the inspection, including confirmation of dates and any requirements for information or access that might be necessary.
- 10 The regulator expects the provider to give all the background information required for the inspection to the inspector on a timely basis. The regulator will give support to the inspector in circumstances where it is necessary to use the powers to obtain specified information and documents in the Act. The regulator will provide any supporting information it holds to the inspector. The inspector will ensure that the inspection is delivered in a timely, efficient and cost-effective way that minimises the administrative impact on the provider while ensuring that it fully investigates the matters that led to the inspection being commissioned. The regulator will monitor the inspector's progress in order to achieve these outcomes.

### **An inspector's powers**

- 11 The inspector will be authorised in writing by the regulator to exercise the powers of an inspector which are set out in Section 203 of the Act. In summary these are to:
  - require a person to provide specified documents or information. The regulator would expect a provider, or its agents, to produce

information and documents when requested to do so by the inspector as listed in section 107(1) (see separate guidance note on section 107 of the Act). Where the provider does not do so, the inspector may by notice require the information and documents to be produced

- enter premises occupied by the provider at any reasonable time
- inspect, copy or take away documents found on the premises. This includes all relevant documents held by the provider, including documents stored on computers
- inspect any computer on which documents have been created or stored
- require any person, including any person having charge of a computer, to provide such facilities or assistance as the inspector reasonably requests

### **The inspection report**

- 12 The Act requires the inspector to produce a written report. The report will in particular set out the inspector's opinion on whether or not the provider is compliant with our standards and regulatory requirements. The inspector will be required to provide evidence to support their opinion. Where an inspector identifies serious concerns, the regulator would normally expect them to make recommendations for remedial action.
- 13 The regulator will ensure that a copy of the report is given to the provider together with its own assessment of the outcome of the inspection. The Act makes provision for both the regulator and the inspector to have discretion to publish the report, and the regulator will take into account all relevant factors in coming to a decision on publication, including all legal requirements and commercial confidentiality. Where the regulator decides that it would be appropriate to publish an inspection report, it will determine the basis on which it is published having taken account of the views of the inspector and the provider.

### **Follow-up action**

- 14 The regulator will consider the inspection report, decide whether or not there has been a breach of a standard or our regulatory requirements and, if there has, whether or not it is sufficiently serious to warrant follow up action by the provider. Different thresholds may apply in such circumstances depending on whether or not the serious detriment test is met in relation to consumer standards. Where an inspection demonstrates a failure against a standard or mismanagement in the affairs of a provider, the regulator may consider further action against the provider, including the possible exercise of one or more of its enforcement powers. In considering the outcome of the inspection, the regulator may assess any wider implications for the management and governance of the provider. The

regulator will ensure that inspection findings are reflected in any published regulatory judgement where they are material and its overall assessment of the provider is changed as a result of them. The regulator will expect any remedial action that is necessary to be implemented swiftly by the provider.

### **The costs of an inspection**

- 15 The Act makes provision for the regulator to pay for an inspection. It also makes provision for the Secretary of State by order to authorise the regulator to charge fees for inspections. The Secretary of State has not made such an order, so the regulator cannot charge fees for inspections. The DCLG and regulator may consult about charging fees at a future date.

### **Sanctions for failing to co-operate with an inspector**

- 16 The Act makes provision for the regulator or the Director of Public Prosecutions (or someone else with their consent) to bring proceedings in circumstances where a person without reasonable excuse obstructs an inspector exercising the powers set out in section 203 (4-8) of the Act.

### **What the regulator expects from the provider**

- 17 The regulator expects a provider that is subject to inspection to:
- co-operate fully with the regulator and the inspector
  - give access to premises, staff and tenants to the inspector when requested
  - provide information and documents to the inspector on a timely basis
  - provide facilities and assistance to the inspector when requested
  - not to publicly comment on the findings of an inspection until the report is in the public domain

## **Guidance note 10**

### **Guidance on sections 206 to 209: inquiry** **Guidance on section 210: extraordinary audit**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the powers on inquiry and extraordinary audit. These are regulatory powers and are set out in chapter six and sections 206 to 209 and section 210 of the Housing and Regeneration Act 2008 (the Act). They may be exercised in relation to all registered providers, subject to the exceptions applying to local authorities and for-profit providers that are set out in the section headed “scope” below. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator’s approach.

#### **Scope**

- 2 These powers may be exercised in relation to all providers including a non-profit private registered provider, a for-profit private registered provider (in relation to its social housing) and a local authority provider (in relation to its social housing).
- 3 An extraordinary audit of the accounts and balance sheet of a local authority provider may only cover the extent to which they relate to the provision of social housing.
- 4 These powers may be exercised in relation to a registered charity only if the charity has received public assistance. The term “public assistance” is defined in section 274 of the Act, but in summary, it means that the registered charity must have received certain specified loans or grants from public sources or had property transferred to it by a local authority. An inquiry into a registered charity may only relate to its social housing activities. An extraordinary audit of the revenue accounts of a registered charity may only cover the extent to which they relate to its social housing activities. If an inquiry is held into a registered charity, the regulator will notify the Charity Commission in accordance with section 209 of the Act.
- 5 During the course of an inquiry, the inquirer may consider the affairs of a body which at the relevant time was a subsidiary or associate of a registered provider. The terms “subsidiary” and “associate” are defined in section 271 of the Act, but in summary, they include any organisation falling within the meaning of “subsidiary” in either the Companies Act 2006 or the Friendly and Industrial and Provident Societies Act 1968; any organisation where the provider has the power to appoint or remove all or a majority of the board of directors; or any organisation where the provider holds more than half in nominal value of the company’s equity share capital.



## **Background and context to the use of the powers**

- 6 The provider is responsible for ensuring that the organisation is properly governed, is viable, and achieves the standards set by the regulator. In circumstances where the affairs of a provider may have been mismanaged, it may be necessary for the regulator to step in and use the power to hold an inquiry. An extraordinary audit may be required as part of an inquiry. The regulator will commission the inquiry and appoint one or more inquirers. Although the regulator must appoint one or more independent persons to conduct the inquiry, the inquiry is conducted on behalf of the regulator, with the inquirer(s) presenting findings on matters specified by the regulator, which may include making recommendations. The report of a statutory inquiry will be considered by the regulator, which will decide on any action that may need to be taken, including the possible use of any of the regulator's powers.

## **Potential triggers to the exercise of the power**

- 7 Sections 206 to 209 of the Act specifies that the regulator may hold an inquiry if it suspects that the affairs of a provider may have been mismanaged. The term “mismanaged” in relation to the affairs of a provider is defined in section 275 of the Act as:
- managed in contravention of a provision of part two of the Act or of anything done under part two of the Act
  - otherwise conducted improperly or inappropriately
- 8 The regulator is most likely to exercise the power to hold an inquiry in circumstances where it suspects mismanagement, for example:
- there may have been a failure against one or more economic standards
  - there may have been a failure against one or more consumer standards where there are reasonable grounds to suspect there has been or there is a risk of a serious detriment to tenants
  - the provider may have failed to honour its commitments set out in a voluntary undertaking
  - the provider may have failed to comply with an order or Direction made by the regulator or to resolve problems that led to previous regulatory interventions
  - the provider may have been involved in activities that might endanger the security or interests of tenants or put the social housing funds or assets of the provider at risk
  - the provider may have been involved in the misuse or misapplication of public, charitable or other assets or funds
  - there may have been a failure to operate within the provider's constitution, governing instrument or standing orders, which has been detrimental to the provider, its tenants or its operations
  - the provider may have knowingly given false information to the

- regulator or to other organisations
- the provider may have been involved in persistent unlawful discrimination or other breaches of legislation
- the provider may have been involved in unlawful or unacceptable conflicts of interest, including breaches of charity law
- the shareholding membership of a non-profit private provider may have failed to act in the best interests of the provider or of its tenants

This is not an exhaustive list and the regulator may conclude that it is necessary to exercise the power in other circumstances to those set out above.

- 9 The regulator is most likely to exercise the power to hold an extraordinary audit in circumstances where it considers that:

- there may have been a material mis-statement in the accounts
- the accounts have been qualified
- a private registered provider's solvency is in doubt
- there may have been a fraud
- auditors have raised matters of serious concern, for example in their management letter

## **The powers**

### **Who can conduct an inquiry?**

- 10 An inquirer must be independent of the regulator. An inquirer is deemed to be independent in circumstances where they and the members of their family:
- are not members, employees or consultants of the regulator
  - have not been members or employees of the regulator within the previous five years
- 11 The term "consultant" is defined in section 206 of the Act as an individual providing a service to the regulator otherwise than by virtue of employment with the regulator or an appointment as an inquirer. For the avoidance of doubt, the regulator takes this to mean that an individual consultant who is providing services to the regulator when the regulator decides to hold an inquiry cannot be appointed as an inquirer, but an individual consultant who has provided services to the regulator previously and who has completed the work associated with that commission may be appointed as an inquirer.
- 12 The regulator will appoint an inquirer on the basis of the skills and experience required in the circumstances of each individual case.

### **Process**

- 13 The process for an inquiry is set out in detail below.

## **Costs**

- 14 The regulator will meet the cost of the inquiry on terms to be agreed with the inquirer. Section 207 of the Act specifies that a local authority may contribute to the cost of any inquiry should it wish to do so.

## **Extraordinary audit**

- 15 Section 210 of the Act specifies that where an inquiry is being held, or has been held, the regulator may require the provider to allow its accounts and balance sheet to be audited by a qualified auditor appointed by the regulator.

## **Who can conduct an extraordinary audit?**

- 16 The Act defines the term “qualified auditor” as a person eligible for appointment as auditor of the provider’s ordinary accounts. The regulator will ensure that the auditor is qualified for the intended purpose of the extraordinary audit.

## **Process**

- 17 The auditor will be appointed and briefed by the regulator. The provider subject to the inquiry, and others, will be notified in the same way as for an inquiry. See those sections of this guidance headed appointing an inquirer, briefing an inquirer and notification of an inquiry. The regulator will determine the matters to be audited during the extraordinary audit and the form of the report. The regulator will agree a work plan, timetable and costs of the extraordinary audit with the auditor. On completion of the extraordinary audit, the auditor will report to the regulator on such matters and in such form as determined by the regulator.

## **Costs**

- 18 The Act specifies that the provider subject to the inquiry must pay the costs of the extraordinary audit including the auditor’s remuneration (section 210 (5)).

## **Appointing an inquirer**

- 19 Before appointing an inquirer, the regulator will seek proposals from the prospective inquirer in relation to the possible methodology, likely time input and fees, overall timetable as well as estimated cost. The prospective inquirer will be asked to identify any additional support that is needed to facilitate the inquiry including professional services. The regulator will consider the prospective inquirer’s proposals and will direct the parameters for the inquiry, including the proposed methodology; the likely time input by the inquirer; the likely time input by other professional services; spending limits for specific items; overall timetable; overall budget; format, content and frequency of reports.

- 20 The regulator will appoint one or more individuals as inquirers, and they will conduct the inquiry. The regulator will ensure that the inquiry has access to all the skills necessary to meet the inquiry brief, including, where appropriate, specialists such as lawyers or forensic auditors. The regulator and the inquirer will consider the most appropriate method of procuring the services of such individuals: they may be appointed as an additional inquirer; alternatively the inquiry may choose to buy in their services. Where the inquiry buys in services, the persons providing the service will not be an inquirer, but will undertake work for and on behalf of the inquiry under the direction of the inquirer. In all such cases, the regulator will approve the terms under which such individuals are appointed, including fee levels and the budget for the work to be undertaken. The regulator will ensure that the inquirer, and persons or organisations providing services to the inquiry do not have any actual or potential conflicts of interest which might be prejudicial to their involvement. The regulator may appoint an additional inquirer during the course of an inquiry if it is necessary to do so.
- 21 The regulator will nominate a named member of staff to commission the inquiry on its behalf and to fulfil the client role to the inquiry. The regulator will also nominate a named member or members of staff as the main point or points of contact between the regulator and the inquirers, and, where necessary, between the regulator and the provider during the course of the inquiry. The regulator may also provide administrative support or other facilities to the inquiry. Where such support is in place, the member of staff providing it will not be the same person as one of the nominated points of contact.

### **The inquiry**

- 22 An inquirer is independent of the regulator, but conducts the inquiry on behalf of the regulator. The inquirer:
- shall determine the procedure for an inquiry
  - may make interim reports
  - shall make a final report on matters specified by the regulator
- 23 Section 208 of the Act sets out the powers of an inquirer in relation to evidence. In summary these are:
- to require a person to provide specified documents or information. The regulator would expect a provider, or its agents, to produce information and documents when requested to do so by the inquirer. The inquirer may by notice require the information and documents to be produced. The notice will specify the document or information required, the form and manner in which the document is to be provided and when and where the document or information is to be provided. This power applies to the documents and information set out under sections 107 and 108 of the Act, and a failure to comply with such a requirement is subject to the same sanctions that are available under those sections. Further advice and guidance about

the regulator's approach to this power is set out in the relevant guidance note

- such a notice might require evidence to be given on oath and the inquirer may administer oaths for that purpose
- to take evidence on oath
- serve a notice on an appropriate person directing him or her to attend [the inquiry] at a specified time and place in order to give evidence or produce specified documents in their control or custody that are relevant to the inquiry

### **The inquiry brief**

- 24 The regulator will draft the brief for the inquiry. The contents will vary depending on the circumstances of the case. This is not an exhaustive list, but the brief will include:

- the regulator's powers
- the inquirer's powers, responsibilities and duties
- the general approach to the conduct of the inquiry
- information about the provider and its operations
- background to the regulator's concerns
- the regulator's principal concerns
- the parameters of the inquiry including the specific matters and time period that is to be investigated
- the timetable for the inquiry
- financial considerations
- the arrangements for reporting to the regulator, including any requirement by the regulator to provide interim reports
- the regulator's expectations of the inquirer
- how success against the brief will be monitored and measured
- any other matters that the regulator may consider to be relevant to a particular inquiry

- 25 The regulator will keep the brief under very close review during the course of the inquiry. If it becomes necessary to amend or extend the brief or allow additional time for the inquiry, the regulator will agree a revised brief to the inquirers and provide a copy to the provider.

### **Briefing the inquirer**

- 26 The regulator will provide both written and oral briefings to the inquirer covering both the inquiry process and key background on the provider. The inquirer will be given all relevant information and documents about the provider's affairs and the specific areas for investigation that it is aware of or has in its possession. Since the circumstances of and the reasons for an inquiry will vary from case to case, it is not possible to provide an exhaustive list of documents, the following material is likely to be made available to the inquirer, depending on the nature of the provider:

- the provider's constitution
- the most recent audited accounts and auditor's management letter
- business plan
- financial returns provided to the regulator
- performance information and compliance statement provided to the regulator
- any relevant voluntary undertaking given to the regulator
- the most recent regulatory judgement produced by the regulator
- the most recent annual viability review produced by the regulator
- key correspondence between the regulator and the provider
- any documents directly relevant to the matters to be investigated
- any other relevant background material

### **Notification of an inquiry**

27 Depending on the nature of the issues that are subject to an inquiry, it may not be possible to give a provider advanced notice of the decision to undertake an inquiry. However, the regulator will notify the provider in writing and may also arrange a meeting to explain the reasons for the inquiry, the process that will be followed and the anticipated timetable. The notification will usually include:

- a copy of the order appointing the inquirer
- the brief for the inquiry
- the powers of the inquirer
- a copy of these guidance notes
- the terms of any public statement that the regulator requires the provider to make
- a draft news release to announce the inquiry
- the proposed lines of communication between the regulator and the provider

28 The provider will be asked to notify its key stakeholders. The regulator will notify other relevant organisations that it has decided to hold an inquiry. These may include:

- DCLG
- the Financial Services Authority or the Charity Commission as appropriate
- Homes and Communities Agency or GLA as appropriate
- a local authority in its capacity as the strategic housing authority for any area in which the provider operates where the inquiry is into the affairs of a private registered provider
- an appropriate body that represents the provider
- secured creditors

The regulator will keep relevant organisations informed of the progress of the inquiry as necessary. In doing so it will seek to balance the expectations of such organisations to be properly and fully informed against the disclosure of

qualified, sensitive or privileged material.

- 29 The regulator will issue a news release to announce the inquiry. The provider will usually be given an opportunity to comment on the factual accuracy of any such news release.

### **Conduct of an inquiry**

- 30 It is for the inquirer working to the brief and within the parameters, timetable and budget set by the regulator to determine the procedure for the conduct of the inquiry. The inquirer is expected to establish matters of fact relating to the particular matters under investigation. If any matter of concern not within the brief comes to the inquirer's attention during the course of the inquiry, the inquirer should seek instructions from the regulator on whether or not the matter should be followed within the inquiry. If the regulator agrees, it will issue a revised brief to the inquirer and to the provider.
- 31 The inquirers have wide-ranging powers to obtain information and documents from the provider, its subsidiaries, from associated organisations and from current and former officers, members, employees and agents including any professional advisers or persons acting for or on behalf of the provider. Any person failing to comply with such an order from the inquirers is liable to be prosecuted. The inquirers may take copies of any books, accounts or documents produced. Where an extraordinary audit is being carried out, inquirers may make an order for such information with a view to passing it on to the auditor.
- 32 The regulator will expect an inquiry to be conducted in accordance with the principles of natural justice. The inquirers may interview anyone who may have been involved in the matters under investigation. Any person interviewed may, if he or she wishes, be accompanied by a representative, provided that that person is not also someone who has been or is to be interviewed by the inquirers. Where appropriate, those interviewed may be asked to give evidence under oath, to make a declaration of the truth or to agree and sign written statements. Neither the regulator, nor the inquiry, will pay for any person or their representative to attend the inquiry. No payment will normally be made for loss of earnings or professional fees or out of pocket expenses.
- 33 The inquirer will be asked to provide regular reports on the progress of the inquiry to the regulator, including in particular, progress in terms of timetable and budget. If the inquirer anticipates that the previously agreed timetable or budget is likely to be exceeded, the inquirer should inform the regulator and seek guidance about whether the regulator is minded to grant an extension and/or is prepared to authorise additional expenditure. If the regulator agrees it will issue a revised brief to the inquirer and to the provider.

### **An interim report**

- 34 The inquirer may make one or more interim reports to the regulator, or as

required by the regulator. If as a result of an inquirer's interim report, the regulator is satisfied that the affairs of the provider have been mismanaged, the regulator may exercise any of its enforcement powers. Including those that are available during or following an inquiry. See the separate guidance notes on these powers.

### **The final report**

- 35 Section 207 of the Act makes provision for the inquirer to make a final report on matters specified by the regulator.
- 36 The regulator will expect the inquirer to send the final report, or relevant extracts, in draft form to any individual who is likely to be criticised in the final report in order to give them the opportunity to respond to those criticisms. A copy of the final report will also be sent to the provider. The inquirer should give the relevant parties a reasonable amount of time to respond. The regulator will expect the inquirer to demonstrate that the views of those individuals responding have been taken into account in making the final report. Where responses are received after the deadline set by the inquirer, it will be a matter for the discretion of the inquirer whether or not they will be taken into account.
- 37 While the form and content of the final report will vary from case to case, in compiling the final report, the regulator will expect the inquirer to record:
- findings about the matters for investigation set out in the inquiry brief
  - the facts of the case
  - the conclusions the inquirer has drawn from those facts, including specific conclusions as to whether or not there has been mismanagement, and, if there has, who was responsible for it
  - any facts about which there was dispute
  - any material conflicts of evidence
  - how the inquirer has taken account of any responses to the draft final report from relevant parties in making the final report
- 38 Where the inquirer wishes to make suggestions for improving the performance of the provider or that of providers generally, or wishes to comment on matters outside their brief, these should be discussed first with the regulator and, if agreed, recorded in a separate letter to the regulator.

### **Consideration of the final report and representations**

- 39 The regulator will consider the facts of the case as set out by the inquirer in the final report. It may not agree with some or all of the inquirer's conclusions or may form different conclusions from the evidence. The regulator may refer the report back to the inquirer at any point in order to seek clarification on, or a supplementary report about, some specific part or parts or the whole of the report. Where this reveals that the report contains an error of fact, the regulator will consider whether the error was sufficiently material to change the findings detailed in the report.



- 40 The regulator will complete its consideration of the report as soon as it is reasonably practicable to do so. The regulator will notify the provider of the provisional timetable in which it is expected to consider the report. This will include the date of any relevant formal meeting, or meetings and the anticipated deadline for the receipt of any written representations from the provider.
- 41 The purpose of any formal meeting, or meetings, is to consider all the relevant material and to decide:
- whether the board is satisfied, as the result of an inquiry, that the affairs of the provider have been mismanaged
  - if they have been mismanaged, whether any person or group of persons contributed to the mismanagement
  - if they have been mismanaged, whether the board is minded to exercise any of its enforcement powers in the Act
  - whether the regulator requires the provider to take any remedial action in relation to issues raised in the report
- 42 If the regulator concludes that the affairs of the provider have not been mismanaged, or if it is satisfied that only minor remedial action is required, the inquiry will usually be concluded.
- 43 Once the board has made its findings, the provider will be informed as soon as possible in writing, setting out the reasons for the decisions. If the regulator concludes that there has been mismanagement, the regulator will inform the provider and any individuals who appear to have contributed to it. They will also be advised of any enforcement action that the regulator is minded to take. Copies of the final report, or relevant extracts, will be sent to the provider or to individuals or to third parties (referred to subsequently in this guidance as "relevant persons") and they will be invited to make representations to the regulator. Any such invitation is entirely at the discretion of the regulator, and will only be extended to an individual or an organisation that appears to the regulator to have a direct and relevant interest in the governance, management and operations of the provider.
- 44 The regulator would usually expect the relevant persons to make written representations. In addition, the regulator may be prepared to consider oral representations made in person. The purpose of the representations is to offer the relevant persons an opportunity to correct matters of fact or to refute the contents of the final report.
- 45 Where the relevant persons wish to make written representations they will be asked to submit them by a specified deadline. It is in the best interests of the relevant persons to provide material by the deadline since this will give the regulator sufficient time to give it careful consideration before the meeting. Where representations are received after the deadline, the regulator will use its best endeavours to take it into account, but it cannot guarantee to do so. The regulator will not usually grant requests for additional time to submit written representations, although it may be prepared to do so if exceptional

circumstances can be demonstrated.

- 46 Where the regulator is prepared to consider oral representations, the relevant persons will be invited to do so at a formal meeting. The regulator will not usually grant requests to postpone such a meeting, although it may be prepared to do so in exceptional circumstances. The regulator may set a time limit for the provider, the individual or the third party to make their representations.
- 47 Anyone making oral representations may be accompanied by a legal adviser or other representative if they so wish, provided that the person has not previously been interviewed by the inquirers, and the regulator has been notified in advance that they will be attending. The regulator will not pay for any person or their representative to attend the meeting. No payment will be made for loss of earnings, or professional fees or out of pocket expenses, other than if exceptional circumstances can be demonstrated.
- 48 The regulator will determine how a meeting at which oral representations are to be made is to be conducted. The regulator may arrange for a verbatim transcript of the representations to be made. If it does so, a copy will be sent to those making the representations or their representatives. When the regulator is satisfied that the relevant persons have had a reasonable opportunity to state their case, it will conclude its consideration of the report in private session. The regulator will notify the relevant persons of the outcome of the board meeting, including the reasons for its decision, as soon as it is practicable to do so.
- 49 At the conclusion of the inquiry, the provider, and all the organisations notified of the start of the inquiry will be notified of the conclusions reached and any action taken by the regulator.

### **Publication of an inquiry report**

- 50 Section 207 of the Act sets out the regulator's power to publish all or part of an interim or final report. While the regulator is, in principle, committed to publishing all inquiry reports in full, it recognises that some reports may contain some material where publication might not be in the public interest or might compromise the safety of individuals or might deter others from coming forward with information. The regulator will always consider whether publication is in the public interest. If it is, the regulator will consider the most appropriate form for publication which could be:
- the full report
  - a summary of the report
  - any representations made by the provider or by any individual
- 51 Where the regulator does intend to publish material, it will notify the provider and any relevant individuals of its intention to do so. The regulator will issue a news release to announce the publication of the report.

## **Expectations**

### **What an inquirer can expect from the regulator**

52 The regulator will:

- brief the inquirer and agree appropriate contractual arrangements, including as to costs, for the inquiry
- agree appropriate liaison and reporting arrangements with the inquirer
- consider reports on the progress of the inquiry and respond in a timely manner to any requests for amendments to the inquiry brief
- give reasonable consideration to any requests made by the inquirer
- pay due regard to the standards in public life and the regulator's economic objectives, to avoid the imposition of an unreasonable burden (directly or indirectly) on public funds, and to guard against the misuse of public funds

### **What the regulator expects from an inquirer**

53 During the course of the inquiry, the regulator expects the inquirer to:

- carry out the inquiry in accordance with the brief and this guidance
- strive to ensure that the inquiry is completed within the timetable and costs agreed with the regulator
- ensure that parties are given a fair opportunity to correct or contradict any relevant statement prejudicial to their interests
- conduct the inquiry fairly, expeditiously and proportionately in accordance with the rules of natural justice and without incurring unreasonable expenditure
- agree the nature and cost of the involvement of any support staff and other professional staff with the regulator at the outset, and in advance of any such expenditure being incurred
- to provide value for money and "best value" in conducting the inquiry
- at all times to be mindful that the regulator is a public body, and that the regulator's economic objectives include the need to avoid the imposition of an unreasonable burden (directly or indirectly) on public funds, and to guard against the misuse of public funds

### **What the regulator expects from the provider**

54 During the course of the inquiry, the regulator expects officers, members, staff and agents of the provider to:

- co-operate fully with the inquiry
- respond positively and in a timely manner to all reasonable requests from the inquirers
- comply with any timetable set by the inquirer
- co-ordinate its communications strategy on all matters relating to the inquiry with the regulator, and to give the regulator the opportunity to

comment on the content and timing of any news releases or other public statements

- at all times to be mindful that the regulator's economic objectives include the need to avoid the imposition of an unreasonable burden (directly or indirectly) on public funds, and to guard against the misuse of public funds

### **Recommendation to the Homes and Communities Agency**

- 55 Under section 92J of the Housing and Regeneration Act 2008, inserted by section 178 and Schedule 16 Part 1 paragraph 26 of the Localism Act 2011, the regulator can make recommendations to the Homes and Communities Agency (HCA) about the exercise of the HCA's functions (which for the purposes of this section do not include the functions of the regulator). In circumstances where it has decided to hold an inquiry, the regulator will also consider whether to make such a recommendation to the HCA. If the regulator decides to do so, the HCA must publish the recommendation and its response to it in such manner as the HCA thinks fit.

### **Direction to the Greater London Authority**

- 56 Under the Greater London Authority Act 1999 section 333ZG, which was inserted by section 187 of Part 8 Chapter 1 of the Localism Act 2011, in circumstances where the regulator has decided to hold an inquiry, it may give a Direction to the Greater London Authority (the GLA) which prohibits the GLA from giving financial assistance to the provider. In circumstances where it has decided to hold an inquiry, the regulator will also consider whether to issue such a Direction to the GLA. The regulator will review its approach on a regular basis until the inquiry is concluded. Further advice and guidance about the regulator's approach to the use of this power is set out in the relevant guidance note.

### **Powers exercisable during or following an inquiry**

- 57 The Act gives the regulator a range of powers which can only be exercised during or following an inquiry. The powers are to:
- direct a transfer of management (sections 249 and 250)
  - direct a transfer of land (sections 253 and 254)
  - make and execute an instrument of amalgamation for an industrial and provident society (section 255)
  - direct restrictions on dealings, including the powers to suspend or remove an officer, employee or agent of a provider, to direct a bank not to part with money or security and to restrict payments and transactions (sections 256 to 265)
  - to censure a local authority employee (order and sections 269A and 269B)

Further advice and guidance about the regulator's approach to the use of these powers is set out in the relevant guidance notes.

- 58 The regulator may decide to exercise any of its enforcement or general powers during or following an inquiry. Further advice and guidance about the regulator's approach to the exercise of these powers is set out in the relevant guidance notes.

## **Guidance note 11**

### **Guidance on sections 219 to 225: enforcement notices**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator proposes to exercise the power on enforcement notices. This is an enforcement power and is set out in chapter seven sections 219 to 225 of the Housing and Regeneration Act 2008 (the Act). This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Scope**

- 2 The power may be exercised in relation to all providers including a non-profit registered provider, a for-profit registered provider and a local authority provider.

#### **Background and context to the use of the power**

- 3 A provider is responsible for ensuring that it manages itself effectively, achieves the standards set by the regulator, and engages positively with the regulator's regulatory framework. Where a failure against a standard or other problem has been identified, the regulator expects providers to respond in a prompt and effective manner. It may be necessary for the regulator to step in and exercise this power when a provider fails to do so.

#### **Potential triggers to the exercise of the power**

- 4 Section 220 of the Act includes ten specific circumstances in which the regulator may exercise the power of enforcement notices. They are:
  1. Where the registered provider has failed to meet an economic standard or failed to meet a consumer standard and there are reasonable grounds to suspect there has been or there is a risk of serious detriment to tenants.
  2. Where the affairs of the registered provider have been mismanaged.
  3. Where the registered provider has failed to comply with an earlier enforcement notice.
  4. Where the registered provider has failed to publish information in accordance with a requirement under section 228(3) or 240(3) of the Act.
  5. Where the interests of tenants of the registered provider require protection.
  6. Where the assets of the registered provider require protection.
  7. Where the registered provider has given an undertaking under

- section 125 of the Act and failed to comply with it.
8. Where the registered provider has failed to pay an annual fee under section 117(2) of the Act.
  9. Where an offence under part 2 of the Act has been committed by a registered provider.
  10. Where the registered provider has failed to comply with an order made by an ombudsman appointed by virtue of section 124 of the Act.
- 5 Except in cases where urgent action is required, the regulator will attempt to secure the voluntary agreement of the provider to take the necessary action before issuing an enforcement notice. In reaching a decision to issue a notice, the regulator will have regard to the willingness, capacity and resources available to the provider to undertake the necessary action.

### **Process**

- 6 When a problem is identified, the regulator will bring it to the notice of the provider and seek information on the provider's intended response. The regulator will take account of this intended response in considering whether an enforcement notice is needed. If the regulator considers that an enforcement notice is required it will be issued in writing to the provider.
- 7 When issuing an enforcement notice the regulator will:
- specify the grounds on which an enforcement notice is given
  - specify the action the regulator requires the registered provider to take
  - specify when the action is to be taken
  - specify what information the registered provider must provide to the regulator to demonstrate that the required action has been completed
  - explain that a registered provider who is given an enforcement notice may appeal to the High Court
  - explain that the regulator may withdraw the enforcement notice by giving notice to the registered provider
  - explain that if a registered provider does not comply with the enforcement notice the regulator may consider exercising other regulatory or enforcement powers
- 8 The regulator expects the provider to:
- take prompt and effective action in accordance with the Direction in the enforcement notice
  - provide evidence to demonstrate its achievement of the actions specified in the notice
  - co-operate fully with the regulator

co-ordinate its communications strategy on all matters relating to enforcement with the regulator, and to give the regulator the opportunity to comment on the content and timing of any news releases or other public statements..

### **Notification**

- 9 When the regulator issues an enforcement notice it will send a copy of it to:
- the Greater London Authority where it relates to a provider owning land in Greater London
  - the Secretary of State where it relates to a local authority provider



## **Guidance note 12**

### **Guidance on sections 226 to 235: penalties**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power on penalties. This is an enforcement power and is set out in chapter seven and sections 226 to 235 of the Housing and Regeneration Act 2008 (the Act). This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Scope**

- 2 The power may be exercised in relation to a non-profit registered provider, or a for-profit registered provider. It may not be exercised in relation to a local authority.

#### **Background and context to the use of the power**

- 3 This power allows the regulator to penalise failure on the part of registered providers by the imposition of fines.

#### **Potential triggers to the exercise of the power**

- 4 Section 227 of the Act includes six specific circumstances in which the regulator may exercise the power on imposing penalties. They are:
  1. Where the registered provider has failed to meet an economic standard or failed to meet a consumer standard and there are reasonable grounds to suspect there has been or there is a risk of serious detriment to tenants.
  2. Where the affairs of the registered provider have been mismanaged.
  3. Where the registered provider has failed to comply with an enforcement notice.
  4. Where the registered provider has given an undertaking under section 125 of the Act and failed to comply with it.
  5. Where the registered provider has failed to pay an annual fee under section 117 (2) of the Act.
  6. Where an offence under part 2 of the Act has been committed by a registered provider.
- 5 In considering whether to penalise a provider, the regulator will take into account all relevant circumstances of the case, including the provider's financial position and any potential detrimental imposition on its tenants. It will also consider whether a penalty is the most appropriate response in each case, or if it should use one or more of

its other powers.

## **Process**

### **Warning**

- 6 Before a penalty notice is issued, the regulator will give the provider a 'pre-penalty warning'. This will warn the provider that the regulator is considering imposing a penalty and will set out the grounds on which the regulator believes the penalty can be imposed.
- 7 The pre-penalty warning will include any details the regulator is able to give concerning the likely amount of the penalty. It will provide details of how the provider can make representations to the regulator. It will indicate whether or to what extent the regulator would accept a voluntary undertaking instead of, or in mitigation of, a penalty. The warning will also include details of the enforcement of the proposed penalty.
- 8 The pre-penalty warning will be copied to the Greater London Authority (GLA) where it relates to a provider owning land in Greater London and any other persons the regulator thinks appropriate, in particular any person who provided information as a result of which the pre-penalty warning is being issued.

### **Representations**

- 9 The regulator will specify a period in the pre-penalty notice during which the provider may make representations concerning the imposition of the proposed penalty or its amount. This period will be of at least 28 days and will begin on the date the pre-penalty notice is received by the provider. We will normally send such notices by recorded delivery and we will work on the basis that the provider receives the documents the day after they are sent. At the end of the period, the regulator will consider any representations and decide whether to impose the penalty.

### **Imposition**

- 10 A penalty is imposed by the regulator giving a penalty notice to the provider. The notice will set out the grounds on which the penalty is imposed, the amount, payment method, payment period, the interest to be charged on any late payment and the means of appeal. The notice may require the provider to publish information about the penalty and may set out the manner of that publication.

### **Notifying the GLA**

- 11 When a penalty is imposed the regulator will send a copy of it to the

GLA where it relates to a provider owning land in Greater London.

### **Amount**

- 12 Penalties for an offence under part two of the Act may not exceed the maximum amount of fine that a magistrates' court could impose for the relevant offence, and the notice will confirm that the penalty falls within the current limit. For all other instances the penalty imposed may not exceed £5,000 or other maximum amount as ordered by the Secretary of State.

### **Destination**

- 13 Money received by way of a penalty will be paid to the Homes and Communities Agency (HCA) to be used at its discretion for investment in social housing. Before making such payment, the regulator may deduct a sum representing its direct and indirect costs and expenditure in administering the penalty. The regulator will establish and publish a methodology for calculating these deductions.

### **Enforcement**

- 14 The penalty will be treated as a debt owed to the regulator. If payment is not made by the date specified in the notice the regulator may charge interest on the debt from that date and may impose one or more additional penalties in accordance with any regulations that may be made by the Treasury.
- 15 The regulator may include a provision in the penalty notice allowing a discount if the penalty is paid on or before the specified date. The regulator will establish and publish a methodology for calculating any discounts.

### **Appeal**

- 16 The regulator has developed a protocol which allows a provider to appeal against its decisions on the use of some enforcement powers. In addition, a provider who is given a penalty notice may appeal to the High Court against the imposition of the penalty, its amount, or both.

## **Guidance note 13**

### **Guidance on sections 236 to 245: compensation**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power on the award of compensation. This is an enforcement power and is set out in chapter seven and sections 236 to 245 of the Housing and Regeneration Act 2008 (the Act). This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Background and context to the use of the power**

- 2 This power allows the regulator to award compensation to a victim of a failure on the part of a registered provider.

#### **Potential triggers to the exercise of the power**

- 3 Section 237 of the Act includes two specific circumstances in which the regulator may exercise the power on awarding compensation. They are:
  1. Where the registered provider has failed to meet an economic standard or failed to meet a consumer standard and there are reasonable grounds to suspect there has been or there is a risk of serious detriment to tenants.
  2. Where the registered provider has given an undertaking under section 125 of the Act and failed to comply with it.
- 4 The regulator is most likely to find it appropriate to exercise the power in circumstances where a breach of the standards has resulted in serious detriment to a tenant, or tenants, as a result of a failure against a standard, or if the provider has failed to pay compensation that has been awarded by an ombudsman.

#### **Scope**

- 5 The power may be exercised in relation to a non-profit registered provider or a for-profit registered provider. It cannot be applied to a local authority.
- 6 Awards of compensation may be made to persons who have suffered as a result of the failure provided that they are tenants of the provider.
- 7 If the housing ombudsman has already awarded compensation to a particular person on a particular matter, the regulator may not award

compensation to that person on that matter unless the provider has not made the payment directed by the ombudsman.

## **Process**

### **Warning**

- 8 Before a compensation notice is issued, the regulator will give the provider a 'pre-compensation warning'. This will warn the provider that the regulator is considering awarding compensation and will set out the grounds on which the regulator believes the compensation can be awarded.
- 9 The pre-compensation warning will include any details the regulator is able to give concerning the likely amount of the award. It will provide details of how the provider can make representations to the regulator. It will indicate whether or to what extent the regulator would accept a voluntary undertaking instead of, or in mitigation of, an award. The warning will also include details of the enforcement of the proposed award. Before issuing a pre-compensation warning, the regulator will consult with the relevant ombudsman.
- 10 The pre-compensation warning will be copied to the Greater London Authority (GLA) where it relates to a provider owning land in Greater London and any other persons the regulator thinks appropriate, in particular any person who provided information as a result of which the pre-compensation warning is being issued.

### **Representations**

- 11 The regulator will specify a period in the pre-compensation notice during which the provider may make representations to the regulator concerning the proposed award of compensation or its amount. This period will be of at least 28 days and will begin on the date the pre-compensation notice is received by the provider. At the end of the period, the regulator will consider any representations and decide whether to impose the compensation.

### **Award of compensation**

- 12 Compensation is awarded by the regulator giving a compensation notice to the provider and the person(s) to be compensated. The regulator will establish and publish a methodology for determining when an award of compensation would be appropriate and for setting the level of compensation to be awarded.
- 13 The notice will set out the grounds on which the award is made, the amount, to whom it must be paid, the payment period, the interest to be charged on any late payment and the means of appeal. The notice may require the provider to publish information about the award and

may set out the manner of that publication.

### **Impact**

- 14 When considering whether to award compensation or the amount of compensation to be awarded, the regulator will take account of information it has on the financial situation of the provider and the likely impact of the award on the provider's ability to provide services.
- 15 The regulator will aim to avoid jeopardising the financial viability of the provider, preventing the provider from honouring financial commitments or preventing the provider from taking action to remedy the matters on the grounds of which the compensation might be awarded.

### **Enforcement**

- 16 The award will be treated as a debt owed to the person to whom it is awarded. If payment is not made by the date specified in the notice, the regulator may charge interest on the debt from that date and may impose additional compensation.

### **Appeal**

- 17 The regulator has developed a protocol which allows a provider to appeal against its decision on the use of some enforcement powers. In addition, a provider who is given a compensation notice may appeal to the High Court against the award of compensation, its amount, or both.

## **Guidance note 14**

### **Guidance on sections 251 to 252: appointment of manager**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power of appointment of a manager. This is an enforcement power and is set out in chapter seven and sections 251 to 252 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to non-profit private registered providers and for-profit private registered providers. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Scope**

- 2 The power may be exercised in relation to non-profit registered providers and for-profit registered providers. It may not be exercised in relation to a local authority provider.

#### **Background and context to the use of the power**

- 3 A provider is responsible for ensuring that it manages itself effectively, achieves the standards set by the regulator, and engages positively with the regulator's regulatory framework. In some circumstances it may be necessary to appoint a manager to a provider.

#### **Potential triggers to the exercise of the power**

- 4 The Act sets out the specific circumstances in which the regulator may exercise this power. These are:
  1. Where the registered provider has failed to meet a standard.
  2. Where the affairs of the registered provider have been mismanaged in relation to social housing.
- 5 The regulator is most likely to exercise the power in circumstances where it considers that the provider:
  - is facing critical financial viability problems that require urgent action to remedy
  - is failing to address serious deficiencies in the delivery of services where there are reasonable grounds to suspect there has been or there is a risk of serious detriment to some or all of a provider's tenants
  - requires additional leadership and/or staffing resources to deliver essential organisational change

- 6 Key factors in a decision to appoint a manager will include the regulator's assessment of the seriousness of the problem, the need for additional professional support, and the provider's willingness and ability to take effective action without the need for the regulator to use this power.

### **Appointment process**

- 7 Before making an appointment, the regulator will give the provider a warning notice. This notice will explain that the regulator is considering exercising this power, set out the grounds on which that action is proposed and explain its effects. The warning notice will specify a period during which the provider may make representations to the regulator. That period will commence on the date the registered provider receives the notice and will be for no less than 28 days. We will normally send such notices by recorded delivery and we will work on the basis that the documents are received by the provider the day after they are sent.
- 8 The warning notice will indicate whether or to what extent the regulator would accept a voluntary undertaking instead of, or in mitigation of, the appointment of a manager.
- 9 The regulator will send a copy of the warning notice to the Greater London Authority (GLA) where it relates to a provider owning property in Greater London and any other persons the regulator thinks appropriate, in particular any person who provided information as a result of which the warning notice is issued.

### **Terms of appointment**

- 10 The regulator will normally require the registered provider to appoint the manager. In exceptional cases, for example where it has serious concerns about the performance of the governing body, the regulator may appoint the manager itself.
- 11 Managers will be individuals, rather than corporate bodies, although the individual may work for a corporate body. The individual will be selected by the regulator on the basis of relevant professional experience. The appointment may relate to the provider's affairs generally in regard to social housing or in relation to a specific aspect of social housing.
- 12 The manager's terms and conditions (including remuneration, which will be paid by the provider) will be specified by the regulator and included in the notice of appointment. In setting the remuneration level, the regulator will have regard to market rates for the specified work and the financial circumstances of the provider.
- 13 The manager will have any power specified in the notice of



appointment and any other additional power he or she requires to achieve the purposes of the appointment. Where the manager considers that additional powers are required he or she will discuss and agree these with the regulator.

- 14 The regulator may require the manager to report to it on the affairs specified in the appointment notice.

#### **Notification to the GLA**

- 15 When a manager is appointed, the regulator will notify the GLA where the appointment relates to a provider owning property in Greater London.

#### **Appeal**

- 16 The regulator has developed a protocol which allows a provider to appeal against its decision on the use of some enforcement powers. In addition, a provider may appeal to the High Court against the appointment of a manager or a requirement to appoint.

## **Guidance note 15**

### **Guidance on sections 253 and 254: transfer of land**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power relating to the transfer of the land of a registered provider. This is an enforcement power and is set out in chapter seven sections 253 and 254 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to registered providers with some exceptions, which are set out in the section below on scope. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Scope**

- 2 The power may be exercised in relation to a non-profit registered provider which is a registered company or an industrial and provident society. It cannot be applied to a local authority provider or to a registered charity. It can be applied to a for-profit provider only in relation to its social housing and associated land.

#### **Background and context to the use of the power**

- 3 Where the regulator suspects that the affairs of a registered provider may have been mismanaged, the regulator may hold an inquiry in accordance with section 206 of the Act. As part of an inquiry, the regulator may require the provider's accounts and balance sheet to be audited by a qualified auditor appointed by the regulator in accordance with section 210 of the Act. If, as a result of such an inquiry or audit, the regulator is satisfied that the affairs of the provider have been mismanaged in relation to social housing or is satisfied that a transfer of the provider's land would be likely to improve the management of the land, the regulator may require the provider to transfer specified land to the regulator or to another registered provider. Further advice about the regulator's approach to the exercise of the power to hold an inquiry is set out in the relevant guidance note.

#### **The power**

#### **The circumstances in which the power can be exercised**

- 4 The power can only be exercised as a result of the regulator's conclusions following an inquiry under section 206 of the Act. Under section 254 of the Act, the regulator can only require a provider to transfer land having first obtained the consent of the Secretary of State to both the transfer of that land and to the terms of the transfer.

## **The transfer**

- 5 A transfer of land may be to the regulator or to another specified registered provider. The purpose of a transfer is to ensure that the land will be properly managed. Therefore, a transfer of land is likely to be to another registered provider which has the capability and the capacity to ensure proper management in the future. As a general rule, the regulator will not require transfers of land to be made to the regulator itself. In the unlikely situation that a transfer to the regulator became necessary, the regulator would treat this as a temporary measure pending onward transfer to a registered provider. The regulator can only dispose of land transferred to it under section 253 to a registered provider and, if the original transfer was from a non-profit provider, a disposal must be to another non-profit provider.
- 6 The regulator will select a suitable recipient registered provider for a transfer of land. In making its selection, the regulator will have regard to the quality and management of services to residents provided by the potential recipient, the quality of its governance systems, its financial viability, general regulatory compliance and management and financial capacity.
- 7 A for-profit provider can only be required to transfer its social housing and associated land. Social housing has the meaning given to it by section 68 of the Act. The Act gives the regulator the power to decide what land belonging to a for-profit provider is associated with social housing. The regulator would expect social housing and associated land to be readily identifiable within the assets of a for-profit provider, and would expect to agree these with the provider at an early stage in any transfer process.
- 8 A non-profit provider can only be required to transfer its land to another non-profit provider. An unregistered charity can only be required to transfer its land to another charity that has similar objects to those of the transferring charity. The Act gives the regulator the power to decide whether the objects of the two charities are similar. The regulator will consult with the two charities, and will take advice from the Charity Commission as necessary, before making a decision on similarity of objects. This provision does not apply to registered charities.

## **The terms of transfer**

- 9 Section 254 makes provision for determining the price of a transfer of land and the terms on which the transfer takes place. The price at which a transfer will take place will not be less than the amount certified by the District Valuer (which has the meaning in the General Consents to Disposals 2010) to be the amount the land would fetch if sold by a willing seller to another registered provider. The onus is

therefore on the District Valuer to prepare a valuation of the land to be transferred and to decide on the appropriate valuation methodology to be applied to reach that valuation. The regulator will commission, and pay for, valuations on transfers of land under section 253. At an early stage in the commission, the regulator will meet with the Valuer and agree the Valuer's information and other requirements for the work necessary to prepare a Valuation. The regulator will expect the registered provider to co-operate with the Valuer in supplying relevant information and facilitating access to manual and computerised records, as well as physical assets, in accordance with the Valuer's requirements.

- 10 The terms of a transfer of land under section 253 will be specified by the regulator in the requirement to make the transfer. Those terms must include provision for the payment of any debts or liabilities in respect of the land, whether or not those are secured on the land. The details of the terms will depend on the circumstances of the case, and, in particular, the amount of land to be transferred. Where a transfer of all of a provider's land takes place, the terms of the transfer will make provision for all assets and liabilities of the provider to be passed to the recipient provider. The terms will ensure that the transfer is as close as possible to a complete transfer of engagements, leaving the transferor behind as a shell organisation only. The regulator will make provision for the solvent winding-up of the transferor to be undertaken as soon as is practicable after the transfer has been completed. Section 166 of the Act gives the regulator the power to petition the court for the provider to be wound up under the Insolvency Act 1986 where a transfer of the provider's land has taken place under section 253.
- 11 Where a partial transfer of land takes place, the terms of the transfer will make provision for payment of any debts or liabilities associated with the land being transferred. The regulator expects the provider to co-operate fully in enabling the regulator to identify those debts and liabilities and, where relevant, to agree to also transfer cash or other assets, or an appropriate portion thereof, held by the provider in respect of the land. The regulator will seek to reach an equitable solution in the allocation or apportionment of assets and liabilities and, in particular, will seek to avoid giving preferential treatment to any creditor who is not lawfully entitled to such treatment. The regulator reserves the right to use its power under section 201 to inspect the provider's financial or other affairs to inform the regulator's task of setting the terms of the transfer.
- 12 The regulator recognises the rights of secured creditors in respect of any security held over land that the regulator proposes to transfer from one registered provider to another, and that the secured creditors will need to give their consent to a transfer. The regulator will take appropriate steps with the provider to identify all relevant secured creditors, and will consult with the secured creditors about the

proposed transfer and the terms of the transfer.

### **The consent of the Secretary of State**

- 13 The regulator can only require a provider to transfer its land if the Secretary of State (SoS) has first given consent to the transfer and to the terms of the transfer. The regulator recognises that the decision for the SoS is not the same one as the decision for the regulator and therefore the SoS will need to be fully informed about the details of the case as well as the process followed by the regulator in undertaking its responsibilities. The regulator will agree working arrangements with the Department of Communities and Local Government for the handling of any applications for SoS consent.

### **Consultation**

- 14 The Act does not require the regulator to consult relevant persons in exercising its power under section 253. However, the regulator recognises that it would be appropriate to have regard to a wide range of legitimate interests and is, therefore, committed to as full consultation as is possible with a number of different stakeholders. Those stakeholders may include:
- tenants - the regulator recognises that any situation where land is transferred could cause anxiety for tenants and leaseholders, although their legal rights would not be affected. The regulator will take all steps it can to mitigate that anxiety. The regulator will ensure that tenants are consulted and informed, as far as is reasonably practicable, prior to a final decision on a transfer of land that affects them. The nature of consultation will depend on the circumstances of the case and the timescales involved. It will not be practicable in some situations to make direct contact with each individual tenant. The regulator will use various techniques to consult and inform tenants including where appropriate, liaison with recognised tenant representative groups, appointment of a tenant adviser, telephone help-lines, advertisements in local newspapers and tenant meetings
  - secured creditors - the regulator will work closely with the secured creditors throughout the exercise of the power to require a transfer of land
  - Homes and Communities Agency and Greater London Authority – the regulator will consult the HCA and the GLA (in relation to providers with land in Greater London) to ensure that the objective of protecting invested public funds is secured as far as possible
  - the registered provider - the regulator will ensure that the provider (including its officers and its directors, committee members or trustees) and its senior staff are consulted and informed as appropriate throughout. The regulator expects the

provider to co-operate in achieving an effective and timely outcome in the interests of all of its stakeholders

- the proposed recipient registered provider - the regulator will work closely with the proposed recipient provider throughout the exercise of the power
- other regulators - the regulator will consult and inform the Financial Services Authority, the Charity Commission and the Registrar of Companies as appropriate
- local authorities - the regulator recognises that local authorities in whose areas a registered provider operates, may have various levels of interest in the provider's affairs. Where a local authority holds security over land to be transferred, its position is the same as other secured creditors as outlined. In some cases a local authority may need to provide consent to a transfer of contracts or undertakings. The regulator will consult with and keep local authorities informed as appropriate to the particular circumstances of each case
- central government - the regulator will keep relevant persons at the Department of Communities and Local Government informed at all stages in the exercise of these powers

## **Guidance note 16**

### **Guidance on section 255: amalgamation of an Industrial and Provident Society**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power on the amalgamation of an Industrial and Provident Society. This is an enforcement power and is set out in chapter seven and section 255 of the Housing and Regeneration Act 2008 (the Act).
- 2 This power is separate from, and will be used in different circumstances to, the regulator's power to consent to a (voluntary) amalgamation proposed by two or more providers as set out in various parts of sections 160 to 169 of the Act.
- 3 This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out proposals for the objectives and principles that underpin the regulator's approach.
- 4 This power can only be used after an inquiry and/or extraordinary audit and this document should be read in conjunction with the guidance on those powers.

#### **Scope**

- 5 The power may be exercised only in relation to a non-profit registered provider which is an Industrial and Provident Society. It may not be exercised in relation to a for-profit provider, a local authority provider or a non-profit registered provider which is not an Industrial and Provident Society.

#### **Background and context to the use of the power**

- 6 Where the regulator suspects that the affairs of a registered provider may have been mismanaged, the regulator may hold an inquiry in accordance with section 206 of the Act. As part of an inquiry, the regulator may require the provider's accounts and balance sheet to be audited by a qualified auditor appointed by the regulator (section 210).

#### **Potential triggers to the exercise of the power**

- 7 Section 255 of the Act includes two specific circumstances in which the regulator may exercise the power on amalgamation. They are where, as a result of an inquiry under section 206 or an audit under section 210, the regulator is satisfied that:

1. The affairs of a non-profit registered provider which is an industrial and provident society have been mismanaged in relation to social housing, or
  2. The management of social housing owned by a non-profit registered provider which is an Industrial and Provident Society would be improved if the provider were amalgamated with another Industrial and Provident Society.
- 8 The power can only be exercised as a result of the regulator's conclusions in these two areas following an inquiry under section 206 or an audit under section 210.
- 9 If, as a result of an inquiry or audit, the regulator is satisfied that the affairs of the provider have been mismanaged in relation to social housing or is satisfied that an amalgamation of the provider with another industrial and provident society would be likely to improve the management of social housing, the regulator may make and execute an instrument on behalf of the provider which provides for its amalgamation with another industrial and provident society.
- 10 Under section 255, the regulator can only make and execute an instrument amalgamating the two industrial and provident societies having first obtained the consent of the Secretary of State.

### **Process**

- 11 In considering its findings following a statutory inquiry or extraordinary audit, the regulator will decide whether to exercise the power to amalgamate an Industrial and Provident Society.
- 12 The regulator will seek the consent of the Secretary of State to the proposed amalgamation. Following receipt of the consent of the Secretary of State to the amalgamation, the regulator will follow the outline process below in executing the board's decision.
- 13 For ease of reference, in the remainder of this document the provider subject to the statutory inquiry or extraordinary audit will be referred to as RP1, the provider with which RP1 will be amalgamated will be referred to as RP2 and the resultant organisation referred to as RP3.
- 14 In general, the regulator will expect RP2 to take the lead on business and operational planning for RP3. The regulator expects RP1 to work positively with the regulator and RP2 in taking the amalgamation forward.
- 15 RP3 must be an Industrial and Provident Society, registered by the regulator and designated as a non-profit registered provider. Pending registration by the regulator, RP3 shall be treated as registered and designated as a non-profit provider.



## **Selection of RP2**

- 16 The regulator will select organisation RP2. In identifying a suitable, willing organisation and making its selection, the regulator will have regard to the quality and management of services to residents provided by potential RP2 organisations, the quality of their governance systems, their financial viability, general regulatory compliance and management and financial capacity.

## **Due diligence and business planning**

- 17 RP2 will be expected to conduct due diligence as it sees fit on RP1.
- 18 RP2 will be expected to prepare a business plan for RP3 and to submit that for consideration by the regulator.
- 19 RP2 will be expected to develop a plan to establish RP3 and to submit that for consideration by the regulator.

## **Consultation**

- 20 The regulator expects RP1 and RP2 to conduct appropriate consultation regarding the amalgamation with their residents, lenders and local authorities in which they work.
- 21 Where necessary RP1 and RP2 will need to obtain the formal consent of their lenders to the proposed amalgamation.
- 22 The regulator will agree with RP2 and RP1 which organisation will undertake which aspects of consultation.

## **Governing instrument (rules)**

- 23 The regulator will invite RP2 to draft a set of rules for RP3. These will be expected to be based on the most up to date version of model rules for industrial and provident societies and will need to be approved by both RP1 and RP2. The regulator will provide comments and in principle agreement to the new rules before they are considered by the regulator.

## **Agreement to the amalgamation by the regulator**

- 24 The regulator will receive a report setting out the detail of the proposed amalgamation and covering the outcome of consultation and due diligence, business and operational planning for RP3, views of lenders and local authorities and the new rules for RP3. If the regulator agrees to the detail of the proposed amalgamation, it will seek the consent of the Secretary of State to that proposal.

## **Registration of the amalgamation**

- 25 Following receipt of the Secretary of State's consent to the proposal, the regulator will prepare an instrument of amalgamation and send a copy of it to the Financial Services Authority (FSA). The copy will be sent for registration within 14 days of the date of execution. A copy registered after that 14 day period is valid. The FSA will register the instrument (the amalgamation does not take effect until it is registered by the FSA). The regulator will advise RP3 of the FSA's registration of the instrument of amalgamation.

## **Guidance note 17**

### **Guidance on sections 256 to 265: powers available during or following an inquiry**

#### **Purpose**

- 1 This document gives general advice and guidance on the powers that the regulator may exercise during or following an inquiry. These are enforcement powers that are set out in chapter seven and sections 256 to 265 of the Housing and Regeneration Act 2008 (the Act). These powers do not apply to local authorities.
- 2 This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.
- 3 These powers can only be used after an inquiry and/or extraordinary audit and this document should be read in conjunction with the guidance on those powers.

#### **Scope**

- 4 The powers in sections 256 to 261 may be exercised only in relation to non-profit registered providers. They do not apply to for-profit registered providers or a local authority provider.
- 5 The powers in sections 262 to 265 apply to all registered providers except local authorities.

#### **Background and context to the use of the power**

- 6 Where the regulator suspects that the affairs of a registered provider may have been mismanaged, the regulator may hold an inquiry in accordance with section 206 of the Act. As part of an inquiry, the regulator may require the provider's accounts and balance sheet to be audited by a qualified auditor appointed by the regulator (section 210).

#### **Potential triggers to the exercise of the power**

- 7 The Act sets out the circumstances in which the regulator may exercise this power and they are set out below.
- 8 Following receipt of an interim or final inquiry report, the regulator may conclude that it is necessary to use one or more of the powers available.
- 9 In particular, the regulator may conclude that it is necessary to

- suspend or remove officers, employees or agents of the registered provider in order to ensure the proper conduct of the inquiry and/or the proper management of the provider's functions, including the delivery of services to its tenants. It may also conclude that it is necessary to restrict the dealings of the registered provider in order to protect its assets and the public investment.
- 10 Where a person is removed from their position following a statutory inquiry or extraordinary audit, the regulator may conclude that it would not be appropriate for that person to serve as an officer of another provider and so the regulator may disqualify that person.

## **The powers**

### **Restrictions on dealings during an inquiry**

- 11 Section 256 of the Act includes two specific circumstances in which the regulator may exercise the power on restrictions on dealings during an inquiry under section 206 of the Act into a non-profit registered provider. They are:
1. Where the regulator has reasonable grounds for believing that the affairs of the non-profit registered provider have been mismanaged and that its assets or the interests of its tenants require protection.
  2. Where the regulator is satisfied that, as a result of an inquirer's interim report under section 207 of the Act, the affairs of the non-profit registered provider have been mismanaged.

### **Restrictions on dealings following an inquiry**

- 12 Section 257 of the Act includes two specific circumstances in which the regulator may exercise the power on restrictions on dealings following an inquiry under section 206 of the Act into a non-profit registered provider. They are:
1. Where the regulator is satisfied that, as a result of an inquiry under section 206 of the Act, the affairs of the non-profit registered provider have been mismanaged.
  2. Where the regulator is satisfied that, as a result of an audit under section 210 of the Act, the affairs of the non-profit registered provider have been mismanaged.

### **Suspension of officers, employees or agents during an inquiry**

- 13 Section 259 of the Act includes two specific circumstances in which the regulator may exercise the power on suspension during an inquiry under section 206 of the Act into a non-profit registered provider. They are:
1. Where the regulator has reasonable grounds for believing that

the affairs of the non-profit registered provider have been mismanaged and that its assets or the interests of its tenants require protection.

2. Where the regulator is satisfied that, as a result of an inquirer's interim report under section 207 of the Act, the affairs of the non-profit registered provider have been mismanaged.

### **Removal or suspension of officers, employees or agents following an inquiry**

- 14 Section 260 of the Act includes two specific circumstances in which the regulator may exercise the power on removal or suspension following an inquiry under section 206 of the Act into a non-profit registered provider. They are:

1. Where the regulator is satisfied that, as a result of an inquiry under section 206 of the Act, the affairs of the non-profit registered provider have been mismanaged.
2. Where the regulator is satisfied that, as a result of an audit under section 210 of the Act, the affairs of the non-profit registered provider have been mismanaged.

### **Disqualification of a removed person**

- 15 Section 262 of the Act includes two specific circumstances in which the regulator may exercise the power on disqualification of a removed person. They are:

1. Where a person has been removed under section 260 of the Act.
2. Where a person has been removed under paragraph 24(2)(a) of schedule 1 of the Housing Act 1996, section 30(1)(a) of the Housing Associations Act 1985 or section 20(1)(a) of the Housing Act 1974 (other similar provisions).

### **Process**

#### **Restrictions on dealings**

- 16 The regulator may order a bank or other person holding money or securities on behalf of the non-profit registered provider not to part with them without the regulator's consent. Before issuing an order, the regulator will take all reasonable steps to give notice to the non-profit registered provider and the person to whom the order is made.

- 17 The order may restrict:

- the transactions that may be entered into by the non-profit registered provider or
- the nature and amounts of payments that may be made by the

### non-profit registered provider

- 18 The order may in particular stipulate that transactions or payments may not be entered into or made without the regulator's consent. The regulator may only make an order in respect of a registered provider that is a registered charity if that provider has received (financial) public assistance.
- 19 An order made following an inquiry has effect until revoked by the regulator. An order made during an inquiry has effect until the end of a period of six months beginning on the day the inquirer's final report is made. The regulator may revoke the order before that time or extend it for a further period of up to six months.
- 20 The bank or person to whom the order is made will be informed that if they contravene the order, they will commit an offence and may be prosecuted.

### **Suspensions and removals**

- 21 During an inquiry, the regulator may, by order, suspend any officer, employee or agent of the non-profit registered provider who the regulator thinks has contributed to the failure or mismanagement.
- 22 Suspension ceases at the end of the period of six months beginning on the day the inquirer's final report is made. The regulator can revoke the order before the end of that period.
- 23 Following an inquiry, the regulator may, by order, remove any officer, employee or agent of the non-profit registered provider who the regulator thinks has contributed to the failure or mismanagement. Pending a decision whether to remove such a person the regulator may suspend them for a specified period of up to six months.
- 24 Before making an order to remove an officer, employee or agent of the non-profit registered provider, the regulator will take all reasonable steps to give at least 14 days notice to the person and the registered provider.
- 25 The regulator may only suspend or remove an officer, employee or agent of a registered charity if the charity has received public assistance. The regulator will notify the Charity Commission if it suspends or removes an officer, employee or agent of a registered charity.
- 26 Where a person has been suspended or removed the regulator may give Directions to the non-profit registered provider about the performance of the suspended/removed person's functions or any other matter arising from the suspension/removal. The regulator may appoint a person to perform the suspended/removed person's

functions.

### **Disqualification**

- 27 If a person has been removed (not suspended) as an officer under section 260 they are disqualified from acting as an officer of any registered provider except local authorities (for the avoidance of doubt this covers non-profit registered providers and for-profit registered providers).
- 28 The regulator may waive disqualification either generally or in relation to a particular registered provider or class of registered providers. A waiver will only be granted following an application by the disqualified person. The regulator will notify the person if any aspect of their disqualification has been waived.
- 29 The regulator will maintain a register of disqualified persons that shows the details of any waivers and which is available for inspection by the public.
- 30 If a disqualified person acts as an officer for a registered provider, the person's acts are not invalid by reason of the disqualification only.
- 31 A person who acts as an officer while disqualified is committing an offence and may be prosecuted.
- 32 A person who acts as an officer while disqualified and who receives payment or other benefits from the registered provider may be required by the regulator to repay the sum or a specified amount representing the whole or part of the value of the benefit. If the person fails to comply with a requirement to repay, the non-profit registered provider may recover the sum or specified amount as a debt.

## **Guidance note 18**

### **Guidance on sections 266 to 268: removal of officers**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power on the removal of an officer. This is an enforcement power and is set out in chapter seven and sections 266 and 267 of the Housing and Regeneration Act 2008 (the Act). It may be exercised only in relation to a non-profit registered provider and excludes local authorities. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.
- 2 This document does not cover the power on the suspension or removal of an officer during or following an inquiry which is set out in sections 259 to 265 of the Act. There is separate advice and guidance on this power.

#### **Scope**

- 3 The power may be exercised only in relation to an officer of a non-profit registered provider. It cannot be applied to a local authority provider or to a for-profit registered provider.
- 4 The term "officer" is defined in section 270 of the Act.
- 5 This power may be exercised in relation to an officer of a registered charity only if the charity has received public assistance. The term "public assistance" is defined in section 274 of the Act, but in summary, it means that the registered charity must have received certain specified loans or grants from public sources or had property transferred to it by a local authority.

#### **Background and context to the use of the power**

- 6 In general, the regulator expects a provider's constitution to make provision for removal where an officer fulfils one or more of the criteria specified in the Act, and for the provider to take action against an officer when it is appropriate to do so within the terms of its constitution.

#### **Potential triggers to the exercise of the power**

- 7 Section 266 of the Act includes seven specific circumstances, or cases, in which the regulator may exercise the power on the removal of an officer. The regulator may remove a person who:



1. Has been adjudged bankrupt.
  2. Has made an arrangement with his or her creditors.
  3. Is subject to a disqualification order or a disqualification undertaking under the Company Director's Disqualification Act 1986 or equivalent legislation in Northern Ireland.
  4. Is subject to an order under section 429 (2) of the Insolvency Act 1986 relating to disabilities on revocation of a county court administration order.
  5. Is disqualified under section 72 of the Charities Act 1993 from being a charity trustee.
  6. Is incapable of acting by reason of mental disorder.
  7. Is impeding the proper management of the provider by reason of absence or failure to act.
- 8 The regulator is most likely to step in and exercise this power when a person is impeding the proper management of the provider through absence or failure to act, particularly in circumstances where the regulator considers that:
- the absence of officers means that the governing body fails to hold quorate meetings
  - the failure to act puts at risk the financial viability of the provider or the services to tenants in accordance with the standards set by the regulator
- 9 The regulator may decide to step in where there is clear evidence one or more of the criteria specified in the Act applies, and where a provider has not taken action in a timely manner. It may be necessary for the regulator to step in and exercise this power against more than one officer of a provider.

## **Process**

### **Notice**

- 10 Before making an order under section 266, the Act requires the regulator to take all reasonable steps to give at least 14 days notice to both the officer and the provider.
- 11 While it is not required to do so by the Act, in circumstances when it gives notice of removal, the regulator will seek representations from both the officer and the provider and, if any are received, it will take account of them in making its decision.

### **Appeal**

- 12 The regulator has developed a protocol which allows a provider to appeal against its decision on the use of some enforcement powers. In addition, an officer removed under this section of the Act may appeal to the High Court.

### **The power to appoint a new officer**

- 13      The regulator may exercise its power to appoint a new officer under section 269 to replace an officer removed under section 266.

## **Guidance note 19**

### **Guidance on section 269: appointment of new officers**

#### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power on the appointment of a new officer. This is an enforcement power and is set out in chapter seven and section 269 of the Housing and Regeneration Act 2008 (the Act). It may be exercised only in relation to a non-profit registered provider and excludes local authorities. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

#### **Scope**

- 2 The power may be exercised only in relation to an officer of a non-profit registered provider. It cannot be applied to a local authority provider or to a for-profit registered provider.
- 3 The term "officer" is defined in section 270 of the Act.
- 4 This power may be exercised in relation to an officer of a registered charity only if the charity has received public assistance, as defined in section 274 of the Act. In summary, this means that the registered charity must have received certain specified loans or grants from public sources or had property transferred to it by a local authority. The power to appoint an officer to a registered charity may be exercised only if the regulator has consulted the Charity Commission.

#### **Background and context to the use of the power**

- 5 The provider is responsible for ensuring that the organisation is properly governed and viable, and achieves the standards set by the regulator. In circumstances where there has been a failure against a standard or where a provider has been mismanaged, the regulator will assess the most appropriate course of action. We will consider the willingness of members of the provider's governing body to contribute positively to a timely resolution of the presenting problems and whether they have the capability, expertise and skills in sufficient depth to achieve a satisfactory outcome. If the regulator concludes that they do not, it may appoint officers to the governing body.
- 6 The appointment of officers is intended to give the provider a range of relevant additional skills and expertise to assist in addressing the regulator's concerns. It is a supportive action designed to act as the catalyst for the changes necessary to resolve the failure or mismanagement.

## Potential triggers to the exercise of the power

- 7 Section 269 of the Act includes three specific circumstances in which the regulator may exercise the power on the appointment of new officers. They are:
1. To replace an officer removed under section 266 of the Act, that is the removal of an officer without an inquiry.
  2. Where there are no officers.
  3. Where the regulator thinks an additional officer is necessary for the proper management of the provider's affairs.
- 8 The regulator is most likely to appoint an additional officer because it is necessary to do so for the proper management of the provider's affairs, particularly where in the opinion of the regulator one or more of the following circumstances apply:
- the provider's affairs have been mismanaged
  - there has been a failure against one or more economic standards
  - there has been a failure against one or more consumer standards where there are reasonable grounds to suspect there has been or there is a risk of a serious detriment to tenants
  - the provider has failed to deal with previous regulatory interventions to the satisfaction of the regulator
  - the governing body lacks the skills and experience to run the business
  - there has been a lack of proper control by the governing body
  - there has been a failure to effectively challenge the executive team by the governing body, and that failure has been detrimental to the business
  - it is necessary to replace an officer suspended or removed during or following an inquiry
  - it is necessary to replace an officer removed in accordance with the provisions of section 266 of the Act, that is in certain specified circumstances such as bankruptcy
  - where there are no officers
  - the case raises matters of wider significance or concern to the social housing sector

This is not an exhaustive list and the regulator may conclude that it is necessary to exercise the power in other circumstances to those set out above.

- 9 When the regulator exercises its power to remove an officer under section 266, it will always consider whether it is necessary to replace the officer who has been removed. It will make its decision in the light of the circumstances of the provider. In particular, it will assess the

level of risk associated with the provider and whether the governing body has the capability, expertise and skills in sufficient depth to achieve the proper management of the provider's affairs in the light of that regulatory risk assessment.

- 10 It is most unusual for there to be no officers on the governing body of a provider, so the regulator expects to have to exercise its power to appoint a person as an officer in these circumstances on very rare occasions. The trigger for such action is clear.

### **The power**

#### **The restrictions on the number of appointed officers**

- 11 The regulator may appoint more than one officer to the governing body of a provider. The Act specifies that in general the use of this power overrides any restriction on eligibility or numbers of officers imposed by the provider's constitution. However, this is balanced by a restriction that in most circumstances the number of appointed officers must be a minority of officers of the provider. The regulator may appoint more than a minority of the officers of a provider only if:

- the provider has fewer officers than required by its constitution
- the provider's constitution does not specify a minimum number of officers

- 12 The regulator will decide how many appointments to make based on the circumstances of the case and the constitution of the provider. The regulator will review the number of appointed officers from time to time and may adjust the number where it concludes that the circumstances of the case make it necessary to do so.

#### **The period and the terms of an appointment**

- 13 The Act requires the order appointing an officer to specify the period for which, and the terms on which, office is to be held. The regulator will usually appoint officers for an initial period of six months. The regulator will review the need for the appointments and may extend the period of office or may withdraw the appointed officers at any time, depending on the circumstances of the case. An appointed officer can resign at any time within the rules of the provider. In these circumstances, the regulator will decide whether to replace an appointed officer who has resigned. The terms on which an appointed officer holds office will be set out in the order making the appointment.

#### **The rights, powers and obligations of an appointed officer**

- 14 The Act specifies that an appointed officer has the same rights, powers and obligations as any other officer of the provider's governing body.

## **Recommendation to the Homes and Communities Agency**

- 15 Under section 92J of the Housing and Regeneration Act 2008, inserted by section 178 and Schedule 16 Part 1 paragraph 26 of the Localism Act 2011, the regulator can make recommendations to the Homes and Communities Agency (HCA) about the exercise of the HCA's functions (which for the purposes of this section do not include the functions of the regulator). In circumstances where it has appointed an officer, the regulator will also consider whether to make such a recommendation to the HCA. If the regulator decides to do so, the HCA must publish the recommendation and its response to it in such manner as the HCA thinks fit.

## **Direction to the Greater London Authority**

- 16 Under the Greater London Authority Act 1999 section 333ZG, which was inserted by section 187 of Part 8 Chapter 1 of the Localism Act 2011, in circumstances where the regulator has appointed an officer to the governing body of a provider, it may give a Direction to the Greater London Authority (GLA) which prohibits the GLA from giving financial assistance to the provider. In circumstances where it has appointed an officer, the regulator will also consider whether to issue such a Direction to the GLA. The regulator will review its approach on a regular basis until the person appointed has vacated office, at which point the Direction to the GLA will be withdrawn. Further advice and guidance about the regulator's approach to the use of this power is set out in the relevant guidance note.

## **Who can be an appointed officer?**

- 17 The Act places no restrictions on who can be an appointed officer. They could be drawn from any source. The regulator will always try to match the best and most suitable people to the provider and to the particular circumstances of each case. The regulator will appoint people with relevant knowledge, skills and expertise. They should have the interpersonal and relationship management skills to operate effectively on the governing body and to represent the provider at the highest level in its dealings with other bodies.
- 18 An appointed officer could be a member of staff of the regulator, although the regulator is only likely to appoint its staff in exceptional circumstances such as where there are no officers.
- 19 The regulator has established an appointed officer panel, a pool of expert individuals who are available to act as appointed officers. In identifying individuals to act as an appointed officer to the governing body of a particular provider, the regulator will always consider whether any individuals on the panel would be suitable. However, the regulator accepts that restricting its options to individuals on the panel

might not be appropriate in some circumstances. For example, this might be because the number of people on the panel with the required skills who are prepared to serve in the area in which the provider operates is limited. Consequently, the regulator may also consider appointing suitable individuals who are not on the panel. Our overriding objective will be to identify the most appropriate people for the case.

### **Notification and initial contact**

- 20 The regulator will notify the provider about the appointments by a letter addressed to the chair or company secretary or other suitable person. The regulator will serve an order on the provider for each appointed officer and the orders will be copied to the appointed officers. The regulator will issue a news release to announce the appointed officers. The provider will usually be given an opportunity to comment on the factual accuracy of any such news release.
- 21 The regulator will hold a meeting with the appointed officers to brief them and to provide them with all the background material they will need to carry out their duties. As a minimum, such background material is likely to include:
- the provider's constitution
  - the most recent audited accounts and auditor's management letter
  - the most recent regulatory judgement
  - the most recent annual viability review
  - key correspondence between the regulator and the provider
  - the terms of any public statement that the regulator requires the provider to make
  - a draft news release to announce the appointed officers
- 22 The regulator will hold a meeting with the provider, usually with its governing body and senior staff, in order to:
- introduce the appointed officer(s)
  - explain the role of the appointed officer(s), their relationship with the provider and with the regulator and the regulator's expectations of appointed officers
  - explain the regulator's expectations of the provider
  - explain the implications of the provider's regulatory status and the actions that the regulator expects the provider to take to overcome the failure or problem
  - agree lines of communication between the regulator and the appointed officers and between the regulator and the provider

## **Expectations**

### **What appointed officers can expect from the regulator**

- 23 The regulator will:
- agree appropriate liaison and reporting arrangements with appointed officers at the outset, including nominating a member of the regulator's staff as the main point of contact for all aspects of the appointments
  - provide support to appointed officers, and meet them from time to time in order to check progress and ensure that the underlying concerns are resolved to the satisfaction of the regulator
  - provide an indemnity to appointed officers to the effect that any individual appointed officer who has acted honestly and in good faith will not have to meet out of their own personal resources any personal civil liability which is incurred in execution or purported execution of their appointed officer functions save where the person has acted recklessly

### **What the regulator expects from appointed officers**

- 24 The regulator expects an appointed officer to:
- work in the best interests of the provider
  - act in the knowledge that they have the same rights, powers and obligations as any other officer of the provider's governing body, and to exercise their judgement accordingly
  - work within the constitution, code of conduct, standing orders, policies and procedures of the provider or, where these are not properly documented, to exercise their judgement to comply with generally accepted good practice
  - take an objective approach to implementing any strategy or action plan
  - be circumspect about making any public comments about the provider or about their role as an appointed officer and to generally act within the provider's rules on confidentiality
  - refer any news enquiries to the provider and to generally act within the provider's communications strategy
  - maintain contact with the regulator, to keep it informed of key developments and to provide it with feedback on the progress of its regulatory strategy and action plan

### **What the regulator expects from the provider**

- 25 The regulator expects the officers and staff of the provider to:
- co-operate fully with the regulator
  - co-operate with an appointed officer



- facilitate the full involvement of an appointed officer in the affairs of the provider
- provide copies of all documents, codes of conduct, standing orders, policies and procedures relevant to their membership of the governing body to an appointed officer
- send copies of all notices, agendas and papers for meetings to an appointed officer
- consult an appointed officer about the dates and times of meetings that they will be required to attend
- inform any other relevant authority, for example Companies House in the case of a registered company, that an appointed officer has joined the governing body as it is required to do when any new member joins the governing body
- provide details of the liability insurance cover it provides for all members of its governing body to an appointed officer, and to inform the insurers that an appointed officer has joined the governing body if it is required to do so under the terms of the insurance
- admit the appointed officer to membership and issue a share certificate where the provider has a shareholding membership
- reimburse an appointed officer for all reasonable expenses they incur in accordance with the established policy and practice for all members of the governing body
- offer to pay appointed officers where the provider pays members of its governing body. It will be for each appointed officer to decide whether or not to accept the offer
- co-ordinate its communications strategy on all matters relating to an appointed officer or to special measures with the regulator, and to give an appointed officer and the regulator the opportunity to comment on the content and timing of any news releases or other public statements

## **Guidance note 20**

### **Guidance on sections 247, 248 & 250A**

#### **Management tender**

##### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power to require a provider to tender its management functions. This is an enforcement power and is set out in chapter seven and sections 247, 248 and 250A of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to all registered providers. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

##### **Scope**

- 2 The power may be exercised in relation to all providers including a non-profit registered provider, a for-profit registered provider and a local authority provider.

##### **Background and context to the use of the power**

- 3 A provider is responsible for ensuring that it achieves the standards set by the regulator. This requires the control and management of risk across all parts of the provider's operations and good service delivery to its tenants. Management services might be delivered by the provider directly, or by an agent or a contractor working under an agreement or a contract, including services delivered for a local authority by an Arms Length Management Organisation (ALMO) or a Tenant Management Organisation (TMO). The provider is responsible for managing itself, its employees, its agents and its contractors effectively.
- 4 The regulator expects a provider to be proactive in responding to any organisational or service delivery problem before it reaches a critical stage. The provider has primary responsibility to review the performance of its employees, agents and contractors and, where under-performance or some other problem is identified, to take the action it considers necessary to improve performance or resolve the problem. This could include action against an agent or contractor under the terms of the relevant agreement or contract, or, if the provider considers it appropriate to do so, the termination of that agreement or contract. In circumstances where a provider does decide to instigate changes to its management arrangements, the regulator will expect it to take effective action to maintain continuity of services and ensure that new arrangements are put in place in a timely manner.
- 5 In circumstances where there has been a failure against a standard

applicable to it, or where the affairs of a provider have been mismanaged in relation to its social housing, the regulator may consider exercising those enforcement powers that relate to the management of a provider. Those powers are:

- the power to require a management tender (which is covered in this guidance note) where the regulator will specify the process for selection, but the provider will select the new manager, or
- the power to require a management transfer (which is covered in a separate guidance note) where, in certain circumstances following a statutory inquiry, the regulator, with the consent of the Secretary of State, will select the new manager

### **The power of management tender**

- 6 The power of management tender is set out in sections 247, 248 and 250A of the Act. The regulator may require a provider to put out to tender some or all of its management functions in relation to some or all of its social housing. The regulator may exercise the power of management tender if it is satisfied that:

- a registered provider has failed to meet a standard applicable to it, or
- the affairs of a registered provider have been mismanaged in relation to social housing

- 7 In such circumstances, the regulator may issue a requirement to a provider. A requirement is a direction which sets out certain actions that the provider must take in order to tender out the specified management functions. In particular, the requirement will specify a process that the provider must implement to invite applications to undertake the relevant management functions and to select and appoint a new manager.

### **Potential triggers to the power of management tender**

- 8 The two specific circumstances in which the regulator may exercise its discretion to use the power to tender management functions are set out in paragraph six of this guidance. The regulator is most likely to consider using this power where one or more of the following circumstances apply:

- there has been persistent poor performance in some or all of a provider's social housing management functions
- there has been persistent poor performance in the delivery of services where there are reasonable grounds to suspect there has been or there is a risk of a serious detriment to tenants
- the provider is unable or unwilling to bring about necessary improvements through its own voluntary action
- the provider has failed to deal with previous relevant regulatory interventions to the satisfaction of the regulator
- the provider has failed to honour a relevant voluntary undertaking

to the satisfaction of the regulator

These are illustrative examples of circumstances which might lead the regulator to consider whether there has been any failure against a standard or any mismanagement that is sufficient to satisfy the pre-conditions that may trigger the use of the power. This is not an exhaustive list and the regulator may conclude that it is necessary to consider exercising the power in other circumstances to those set out above.

- 9 When exercising the power of management tender, the regulator's main objectives will be to improve the management of social housing and to secure better services for tenants. The regulator's approach will depend on the circumstances of the case, and on its assessment of the provider's willingness to contribute positively to a timely resolution of the presenting problems and capacity to achieve any necessary improvements or changes in the relevant management functions. The regulator is only likely to exercise the power of management tender when there are no appropriate and reasonable alternatives, or when it considers that the provider is unable to take action to resolve management failures through voluntary means.

### **Additional provisions for local authority providers**

- 10 Section 250A of the Act sets out some additional statutory provisions which apply where the regulator exercises the power of management tender in relation to a local authority provider. These are that:
- the regulator can exercise the power of management tender even if the local authority already has a management agreement covering the same management functions in place
  - the local authority may not give effect to a new or separate management agreement relating to those management functions of the authority that are the subject of the regulator's requirement in the period that the requirement is in force
  - any duty the local authority may have to consult on changes to the exercise of any relevant management functions does not apply in circumstances where the authority is acting in respect of a requirement imposed by the regulator
  - a requirement imposed by the regulator is not a management agreement within the definition set out in section 27 of the Housing Act 1985, but the local authority remains responsible for anything done or not done by or to the new manager as if the requirement was a management agreement, except where the terms of any relevant management agreement provide otherwise or in relation to criminal proceedings against the new manager
- 11 In addition, the provisions of The Housing Management Agreements (Break Clause) (England) Regulations 2010 (the Regulations) imposed an obligation on all local authority providers to include a break clause in any management agreement entered into after 1 April 2010. This is

intended to ensure that local authority providers have a suitable break clause that allows the management agreement to be terminated and the management functions tendered in circumstances where a requirement to tender management functions is imposed by the regulator.

- 12 The position may not be clear in relation to any management agreements that were in place before 1 April 2010. Although many will include a clause providing for termination where there is serious under-performance, it is possible that some will not. It would not be tenable to defer a requirement to tender management functions until an existing management agreement had expired or had reached a previously agreed review point. In such circumstances, it would be for the provider to take any steps it considers necessary to comply with the requirement put in place by the regulator.

### **Additional expectations for private providers**

- 13 The additional statutory provisions outlined in paragraphs ten to 12 do not apply to either a non-profit or a for-profit private provider. In general, the regulator expects such providers to ensure that any agreements or contracts with third parties for management services are specified to ensure compliance with relevant regulator standards. In addition, providers are expected to make provision for regular and periodic monitoring against agreed standards of performance and include provision for penalties or termination where agreed standards of performance are not achieved. In circumstances where the regulator imposes a requirement to tender management functions, the regulator expects the provider to review its options in relation to its existing arrangements for the delivery of the relevant management functions, to take any steps it considers necessary to comply with the requirement and to ensure that the new manager can perform its duties regardless of any agreement or contract previously in place.

### **Best practice in procurement**

- 14 The Act requires the regulator to ensure that best procurement practice consistent with any applicable procurement law is embedded into the tender process. The regulator will set out its initial proposals for achieving these outcomes at an early stage in the process, and will invite the provider to make its own proposals on how its existing procurement policies and procedures might contribute to such outcomes. It is in the best interests of both the provider and the regulator to identify the most efficient and effective tender process, and the regulator would expect the provider to co-operate with it in order to do so. The process to select the new manager will be carried out by the provider, so the provider will carry any risk associated with compliance with any relevant statutory procurement requirements.

## **The potential for increased costs**

- 15 It is possible that the management tender process may result in efficiencies or savings that might benefit the provider and its tenants. However, such efficiencies or savings are not specific objectives of the process and the provider should not assume that they will result from it. Neither should the provider assume that the tender process and new management arrangements will be cost neutral. The regulator will expect the provider to draw up financial projections and budgets based on the requirement and to make reasonable assumptions about any possible additional or increased costs. The nature and extent of these will depend on the particular circumstances of the case and on the provider's existing arrangements for the delivery of services in those management functions that are the subject of the requirement. Factors that may result in additional or increased costs could include:
- the costs associated with the administration of the tender process
  - the costs of any expert or legal advice the provider considers it necessary to commission in relation to the tender process
  - the costs associated with resolving any outstanding matters in relation to the previous standards of performance in the relevant management function
  - the costs associated with addressing previous under-investment or under-performance in the management function by the provider;
  - an improved or extended specification for the future delivery of the management function to balance any previous under-investment or poor performance
  - a new liability for Value Added Tax (VAT) in circumstances where a non-profit or a for-profit private provider that previously used its own staff to deliver the management function (where there would be no liability for VAT) subsequently purchases that management function from a third party (where there would be a liability for VAT)
- 16 Any additional or increased costs must ultimately be borne by the provider. In considering whether or not to impose a requirement for a management tender, the regulator will take account of any representations made by the provider in respect of the potential adverse impact on its management costs and its overall business. The regulator may work with the provider in order to explore how best to manage and mitigate these, but it will remain the provider's responsibility to decide on and take any action it considers necessary in order to do so.

## **Process**

### **Notice**

- 17 If the regulator is minded to exercise this power, it must give the provider notice and seek representations in accordance with the provisions set out in section 248 of the Act. The notice must:

- set out the grounds on which the regulator might take action
- warn the provider that the regulator is considering action
- explain the effect of section 248 of the Act
- specify a period of at least 28 days beginning on the day the provider receives the notice in which the provider may make representations to the regulator
- refer the provider to the provisions of section 125 of the Act, by which the provider may give a voluntary undertaking to the regulator. The regulator must indicate whether, and to what extent, it would accept a voluntary undertaking instead of, or in mitigation of, any action to require the provider to tender management functions

18 The Act specifies that the regulator must send a copy of the notice to:

- the Greater London Authority (GLA) in a case where the requirement would be imposed on a provider owning land in Greater London
- the Secretary of State, in a case where the requirement would be imposed on a local authority provider
- any other persons or organisations the regulator thinks appropriate depending on the circumstances of the case

### **The possible use of other enforcement powers**

19 The Act specifies that the regulator may combine this notice with one or more notices relating to the possible use of certain other enforcement powers. In particular, the Act makes reference to:

- a pre-penalty warning (section 230 of the Act)
- a pre-compensation warning (section 242 of the Act)
- a management transfer (section 250 of the Act)
- an appointment of a manager (section 252 of the Act)

20 In circumstances where the regulator decides to issue more than one notice it will do so in accordance with the terms of each relevant section of the Act and of each relevant guidance note on the use of the specific power. It follows that the regulator will only do so where the circumstances of the case make it appropriate and where the specific power is applicable to the particular type of provider. In addition, the regulator may also consider whether it would be appropriate to exercise any of its other enforcement powers either singly or in combination.

### **Seeking views on a requirement**

21 The Act specifies that in imposing a requirement to tender management functions, the regulator must have regard to views of:

- relevant tenants: the regulator recognises that in any situation where some or all of the provider's management functions might be subject to tender, tenants may have concerns about the potential impact on the services they receive. The regulator will ensure, as far as it is reasonably practicable to do so, that tenants are informed about the proposed changes and the potential implications for both them and the provider. The nature of the information given to tenants will depend on the circumstances of the case and the timescales involved. It may not be practicable in all situations to make direct contact with each individual tenant, and, in seeking tenants' views, the regulator may work through the provider or any recognised tenant representative groups or an appointed tenant adviser
- the registered provider: the regulator recognises that in any situation where some or all of the provider's management functions might be subject to tender, those involved in the delivery of the functions, including employees, agents and contractors may have concerns about how the proposals might impact on the provider, on their organisations or on them as individuals. The regulator will seek the views of the provider. The regulator will expect the provider to keep its employees, agents and contractors fully informed about how the requirement to tender management functions might impact on them throughout the process. Since the regulator is not required to have regard to the views of the provider's employees, agents or contractors, it will not seek their views and, if any such views are offered, it will not take them into account in reaching its decision
- the GLA where the requirement relates to a provider owning land in Greater London
- the Secretary of State, in a case where the requirement is to be imposed on a local authority provider
- any relevant local authority in circumstances where the regulator thinks it appropriate to do so. The regulator will seek the views of the local authority in its strategic housing role in the area in which the registered provider that is subject to the requirement operates. However, the regulator will not usually seek the views of a local authority in its strategic role if it is considering the use of this power against the same local authority in its landlord role. In such circumstances, the regulator will usually only seek the views of the local authority in its role as the registered provider

22 The regulator will seek views on the proposed requirement from relevant people and organisations at the most appropriate point in the process. This could be at the same time as the regulator sends notice to the provider or at a later date. The regulator's over-riding objective will be to provide all the information relevant to the particular circumstances of the case, so that respondents are as fully informed as possible when giving their views.



## **Considering views, representations and voluntary undertakings**

- 23 Before making its decision on whether or not to impose a requirement, the regulator will consider all the views submitted to it by those individuals and organisations listed in paragraph 21. While the regulator must have regard to these views, it will not necessarily be bound by them. In particular, it may not be possible to reconcile all the various views in circumstances where some of them suggest a fundamentally different approach to others. The regulator's approach will depend on the nature of the various views submitted to it, on the specific circumstances of each case and on whether the regulator is satisfied that any necessary improvements or changes to relevant management functions will be achieved in a timely manner.
- 24 The regulator will also consider any representations and any proposals for voluntary undertakings submitted by the provider in response to the notice in accordance with its general approach to such undertakings set out in the regulatory framework for social housing in England from April 2012. The acceptability, or otherwise, of any such undertaking will depend on the circumstances of the case. The regulator will consider the provider's capacity to honour the undertaking and whether the terms of the undertaking are sufficient to bring about the necessary improvements to relevant management functions in a timely manner.
- 25 Where the regulator is satisfied with the proposed terms of the voluntary undertaking, it may decide not to impose the requirement with immediate effect, but to allow the provider a period of time to implement its proposals. In such circumstances, the regulator will monitor and review the provider's progress on a regular basis and at key milestones in order to assess whether or not the provider has honoured the undertaking. The regulator will give reasons for any decisions it makes in relation to such monitoring or review. In circumstances where the regulator subsequently concludes that a provider has failed to honour the undertaking or has failed to deliver any obligations at key milestones, it may decide to impose the requirement to tender management functions without delay.
- 26 Alternatively, where the regulator is not satisfied with the proposed terms of the voluntary undertaking, it may decide to impose the requirement without delay. The regulator is likely to take such action where it considers that the terms of the undertaking are unsatisfactory or insufficient to resolve the problems or where urgent or immediate action is necessary.

### **The requirement**

- 27 In circumstances where the regulator decides to impose a requirement, the regulator will specify a process that the provider must implement to:
- invite applications to undertake the relevant management functions

- select from the applications
  - appoint a new manager
- 28 The requirement will set out the extent of the services that the provider must put out to tender. The terms of an individual requirement will vary from case to case and will be dependent on a combination of factors, including in particular the nature and the extent of both the management functions and the housing stock to which the requirement applies. A requirement may include some or all of the provider's management functions and some or all of its social housing stock. It could be limited to specific services or to specific parts of the social housing stock, for example, to tackle management problems on a single estate.
- 29 The requirement must also include provision:
- about the persons that will make up the panel with responsibility for selecting the new manager, including specific provision for ensuring that tenants' interests will be represented on the panel
  - for ensuring that the procurement process follows best practice and is consistent with any applicable procurement law
  - about the terms and conditions on which the new manager is to be appointed including specific provision for setting, monitoring and enforcing standards of performance and for the resources that are to be made available or applied to the management function that is the subject of the requirement
- 30 The regulator will notify the provider about a requirement by a letter addressed to the Chief Executive or other suitable person. The regulator will set out proposals for how it intends to liaise with the provider, monitor progress against the requirement and ensure that the specified process is followed. The regulator will expect the provider to effectively manage the transition from its existing manager to the new manager and to implement the change in a timely manner.
- 31 The regulator will publicise the action that it takes in accordance with its policy on public statements.

### **Notification of a requirement**

- 32 The regulator will inform those individuals and organisations that provided views on the proposed requirement about the regulator's final decisions on the matter. The Act specifies that in circumstances where the regulator imposes a requirement to tender management functions, it must send a copy of it to:
- the GLA in a case where the requirement is to be imposed on a provider owning land in Greater London
  - the Secretary of State, in a case where the requirement is to be imposed on a local authority provider

## **Appeal**

- 33 The provider may appeal to the High Court against a requirement to tender management functions.

## **Complying with a requirement**

- 34 The regulator will expect the provider to keep it informed about progress and to demonstrate compliance with the terms of the requirement at certain specified points in the process. These milestones will have been set out in the requirement, and are most likely to occur when the short-list of applicant managers is agreed, when the new manager is selected and when the new manager is appointed. The regulator will review the information submitted by the provider to demonstrate compliance and will wish to satisfy itself that the provider is taking the appropriate action in all the circumstances of the case. Where the provider does not do so, the regulator will review its options and may consider exercising any of its regulatory, enforcement or general powers or taking other action against the provider.

## **Expectations**

### **What the provider can expect from the regulator**

- 35 The regulator will:
- agree appropriate liaison and reporting arrangements including nominating a member of regulator staff as the main point of contact for all aspects of the enforcement and management tender processes
  - give notice of possible enforcement action, seek the views of the provider and consider any representations or any voluntary undertaking offered by the provider
  - in circumstances where a requirement is imposed, review progress at agreed points in the process

### **What the regulator expects from the provider**

- 36 The regulator expects the provider to:
- co-operate with the regulator at all stages of the management tender process
  - take any step it considers necessary to comply with the terms of any requirement that is imposed by the regulator
  - take any steps it considers necessary to ensure that the new manager can perform its duties
  - ensure an effective transition between managers and maintain continuity of service during the process
  - draw up financial projections and budgets based on the requirement and to make reasonable provision for any possible

additional or increased costs

- commission and pay for any expert advice or legal advice it considers necessary in relation to either the tender or associated processes, including any specific matters of concern to the provider or its staff: such matters will depend on the specific circumstances of the case but may include, among other things, any obligations it may have in relation to pensions, taxation, the Transfer of Undertakings (Protection of Employment) Regulations 1987, the Public Contract Regulations 2006 or the European Union Public Procurement Directive 2004
- comply with best procurement practice and any applicable procurement law
- keep its employees, agents and contractors informed about how the requirement might impact on them and ensure that they co-operate with the regulator in relation to the requirement
- provide information and documents in relation to the requirement when requested, keep the regulator informed about progress generally and demonstrate compliance with the terms of the requirement at certain specified points in the process or when requested by the regulator
- co-ordinate its communications strategy on all matters relating to a requirement to tender management functions and to give the regulator the opportunity to comment on the content and timing of any news releases or other public statements

## **Guidance note 21**

### **Guidance on sections 249, 250 & 250A**

#### **Management transfer**

##### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power to require a provider to transfer management functions. This is an enforcement power and is set out in chapter seven and sections 249, 250 and 250A of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to all registered providers. This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

##### **Scope**

- 2 This power may be exercised in relation to all providers including a non-profit registered provider, a for-profit registered provider and a local authority provider.

##### **Background and context to the use of the power**

- 3 A provider is responsible for ensuring that it achieves the standards set by the regulator. This requires the control and management of risk across all parts of the provider's operations and good service delivery to its tenants. Management services might be delivered by the provider directly, or by an agent or a contractor working under an agreement or a contract, including services delivered for a local authority by an Arms Length Management Organisation (ALMO) or a Tenant Management Organisation (TMO). The provider is responsible for managing itself, its employees, its agents and its contractors effectively.
- 4 Where the regulator suspects that the affairs of a provider may have been mismanaged, it may hold an inquiry in accordance with sections 206 to 209 of the Act. As part of an inquiry, the regulator may require the provider's accounts and balance sheet to be audited in accordance with section 210 of the Act. Further advice about the regulator's approach to the exercise of the powers on inquiry and extraordinary audit is set out in the relevant guidance note. The regulator will consider an interim or a final report of an inquiry into the affairs of a provider in accordance with the principles set out in the guidance on the use of the power to hold an inquiry. The power to require a provider to transfer management functions is one of the enforcement powers available to the regulator in certain circumstances as a result of an inquiry.

## **The power of management transfer**

- 5 The power of management transfer is set out in sections 249, 250 and 250A of the Act. The regulator may require a provider to transfer some or all of its management functions in relation to some or all of its social housing if, as a result of an inquiry under section 206 or an audit under section 210, the regulator is satisfied that:
- the affairs of the provider have been mismanaged in relation to social housing, or
  - a transfer of certain of a provider's management functions would be likely to improve the management of some or all of its social housing

## **Potential triggers to the power of management transfer**

- 6 If the regulator is satisfied that one or both of the circumstances specified in paragraph five apply, it will also consider whether it might be necessary to exercise any of the enforcement powers in the Act, including the power to require a provider to transfer management functions. The regulator is most likely to conclude that such a transfer is required in circumstances where it is satisfied that the findings of the inquiry demonstrate that one or more of the following circumstances apply:
- there has been persistent mismanagement in some or all of the provider's management functions
  - there has been mismanagement in the delivery of services where there are reasonable grounds to suspect there has been or there is a risk of a serious detriment to tenants
  - there has been mismanagement and there are reasonable grounds to suspect there has been or there is a risk of serious detriment to the security or interests of some or all of the provider's tenants
  - it is necessary to improve the management of some or all of the provider's social housing
  - the provider has failed to comply with any previous order or direction made by the regulator, including a requirement for a management tender, or to deal with previous regulatory interventions to the satisfaction of the regulator
  - the provider has failed to honour a relevant voluntary undertaking to the satisfaction of the regulator

These are illustrative examples, not an exhaustive list. The regulator may conclude that it is necessary to consider exercising the power where the findings of the inquiry demonstrate other circumstances to those set out above.

- 7 When exercising the power of management transfer, the regulator's main objectives will be to improve the management of social housing and to secure better services for tenants. The power gives the regulator an option to address poor performance without having to transfer ownership

of the provider's assets. The regulator can require the provider to transfer management functions to an alternative manager selected by the regulator. The regulator's approach will depend on the circumstances of the case, and on its assessment of the provider's willingness to contribute positively to a timely resolution of the presenting problems and capacity to achieve any necessary improvements or changes in the relevant management functions. The regulator is only likely to exercise the power of management transfer when there are no appropriate and reasonable alternatives, or when it considers that the provider is unable to take action to resolve management failures through voluntary means.

### **Additional provisions for local authority providers**

- 8 Section 250A of the Act sets out some additional statutory provisions which apply where the regulator exercises the power of management transfer in relation to a local authority provider. These are that:
- the regulator can exercise the power of management transfer even if the local authority already has a management agreement covering the same management functions in place
  - the local authority may not give effect to a new or separate management agreement relating to those management functions of the authority that are the subject of the regulator's requirement in the period that the requirement is in force
  - any duty the local authority may have to consult on changes to the exercise of any relevant management functions does not apply in circumstances where the authority is acting in respect of a requirement imposed by the regulator
  - a requirement imposed by the regulator is not a management agreement within the definition set out in section 27 of the Housing Act 1985, but the local authority remains responsible for anything done or not done by or to the new manager as if the requirement was a management agreement except where the terms of any relevant management agreement provide otherwise or in relation to criminal proceedings against the new manager
- 9 In addition, the provisions of The Housing Management Agreements (Break Clause) (England) Regulations 2010 (the Regulations) imposed an obligation on all local authority providers to include a break clause in any management agreement entered into after 1 April 2010. This is intended to ensure that local authority providers have a suitable break clause that allows the management agreement to be terminated and the management functions transferred in circumstances where a requirement to transfer management functions is imposed by the regulator.
- 10 The position may not be clear in relation to any management agreements that were in place before 1 April 2010. Although many will include a clause providing for termination where there is serious under-performance, it is possible that some will not. It would not be tenable to defer a requirement to transfer management functions until an existing

management agreement had expired or had reached a previously agreed review point. In such circumstances, it would be for the provider to take any steps it considers necessary to comply with the requirement put in place by the regulator.

### **Additional expectations for private providers**

- 11 The additional statutory provisions outlined in paragraphs eight to ten do not apply to either a non-profit or a for-profit private provider. In general, the regulator expects such providers to ensure that any agreements or contracts with third parties for management services are specified to ensure compliance with relevant regulator standards. In addition, providers are expected to make provision for regular and periodic monitoring against agreed standards of performance and include provision for penalties or termination where agreed standards of performance are not achieved. In circumstances where the regulator imposes a requirement to transfer management functions, the regulator expects the provider to review its options in relation to its existing arrangements for the delivery of the relevant management functions, to take any steps it considers necessary to comply with the requirement and to ensure that the new manager can perform its duties regardless of any agreement or contract previously in place.

### **Best practice in procurement**

- 12 The Act does not make specific provision for the regulator to apply best procurement practice to a management transfer. As a public authority, the regulator is bound by relevant procurement law and will ensure that best procurement practice consistent with any applicable procurement law is embedded into the process. The regulator will inform the provider about its initial proposals for achieving these outcomes at an early stage in the process. It is in the best interests of both the provider and the regulator to identify the most efficient and effective process, and the regulator would expect the provider to co-operate with it in order to do so. In particular, the regulator will require the provider to give information and documents showing the basis on which relevant management functions are delivered by the provider or by its agent, together with any associated or related documents which might inform the regulator's decision on how best to proceed. The process to select the new manager will be carried out by the regulator, so the regulator will carry any risk associated with compliance with any relevant statutory procurement requirements.

### **Process**

#### **Notice**

- 13 If the regulator is minded to exercise this power, it must give the provider a notice and seek representations in accordance with the provisions set out in section 250 of the Act. The notice must:



- set out the grounds on which the regulator might take action
- warn the provider that the regulator is considering action
- explain the effect of section 250 of the Act
- specify a period of at least 28 days beginning on the day the provider receives the notice in which the provider may make representations to the regulator
- refer the provider to the provisions of section 125 of the Act, by which the provider may give a voluntary undertaking to the regulator. The regulator must indicate whether, and to what extent, it would accept a voluntary undertaking instead of, or in mitigation of, any action to require the provider to transfer management functions

14 The Act specifies that the regulator must send a copy of the notice to:

- the Greater London Authority (GLA) in a case where the requirement would be imposed on a provider owning land in Greater London
- the Secretary of State, in a case where the requirement would be imposed on a local authority provider
- any other persons or organisations the regulator thinks appropriate, including, in particular, any person or organisation that provided information that resulted in the notice being given. The regulator will consider which persons or organisations might be appropriate depending on the circumstances of the case

### **The possible use of other enforcement powers**

15 The Act specifies that the regulator may combine this notice with one or more notices relating to the possible use of certain other enforcement powers. In particular, the Act makes reference to:

- a pre-penalty warning (section 230 of the Act)
- a pre-compensation warning (section 242 of the Act)
- a management tender (section 248 of the Act), or
- an appointment of a manager (section 252 of the Act)

16 In circumstances where the regulator decides to issue more than one notice, it will do so in accordance with the terms of each relevant section of the Act and of each relevant guidance note on the use of the specific power. It follows that the regulator will only do so where the circumstances of the case make it appropriate and where the specific power is applicable to the particular type of provider. In addition, the regulator may also consider whether it would be appropriate to exercise any of its other enforcement powers either singly or in combination.

### **Seeking views on a requirement**

17 The Act specifies that in imposing a requirement to transfer management

functions, the regulator must have regard to views of:

- relevant tenants: the regulator recognises that in any situation where some or all of the provider's management functions might be subject to transfer, tenants may have concerns about the potential impact on the services they receive. The regulator will ensure, as far as it is reasonably practicable to do so, that tenants are informed about the proposed changes, and about the potential implications of the changes for both them and the provider. The nature of the information given to tenants will depend on the circumstances of the case and the timescales involved. It may not be practicable in all situations to make direct contact with each individual tenant and, in seeking tenants' views, the regulator may work through the provider or any recognised tenant representative groups or an appointed tenant adviser
- the registered provider: the regulator recognises that in any situation where some or all of the provider's management functions might be subject to transfer, those involved in the delivery of the functions, including employees, agents and contractors may have concerns about how the proposals might impact on the provider, on their organisations or on them as individuals. The regulator will seek the views of the provider. The regulator will expect the provider to keep its employees, agents and contractors fully informed about how the requirement to transfer management functions might impact on them throughout the process. Since the regulator is not required to have regard to the views of the provider's employees, agents or contractors, it will not seek their views and, if any such views are offered, it will not take them into account in reaching its decision
- the GLA where the requirement relates to a provider owning land in Greater London
- the Secretary of State in a case where the requirement is to be imposed on a local authority provider, and
- any relevant local authority in circumstances where the regulator thinks it appropriate to do so. The regulator will seek the views of the local authority in its strategic housing role in the area in which the registered provider that is subject to the transfer operates. The regulator will not usually seek the views of a local authority in its strategic role if it is considering the use of this power against the same local authority in its landlord role. In such circumstances, the regulator will usually only seek the views of the local authority in its role as the registered provider

18 In addition, and depending on the circumstances of the case, the regulator may also provide information to, and, possibly, seek views from others, including:

- other regulators such as the Financial Services Authority, the Charity Commission or the Registrar of Companies
- secured creditors particularly when a requirement is likely to have a

material impact on some aspect of the provider's business

- 19 The regulator will seek views on the proposed requirement from relevant people and organisations at the most appropriate point in the process. This could be at the same time as the regulator sends notice to the provider or at a later date. The regulator's over-riding objective will be to provide all the information relevant to the particular circumstances of the case, so that respondents are as fully informed as possible when giving views on the requirement.

### **Considering views, representations and voluntary undertakings**

- 20 Before making its decision on whether or not to impose a requirement, the regulator will consider all the material and views submitted to it in the light of the findings set out in the inquiry report. While the regulator must have regard to the views of those individuals and organisations listed in paragraph 17, it will not necessarily be bound by them. In particular, it may not be possible to reconcile all the various views in circumstances where some of them suggest a fundamentally different approach to others. The regulator's approach will depend on the nature of the various views submitted to it, on the specific circumstances of each case and on whether the regulator is satisfied that any necessary improvements or changes to relevant management functions will be achieved in a timely manner.
- 21 The regulator will also consider any representations and any proposals for voluntary undertakings submitted by the provider in response to the notice in the light of the findings set out in the inquiry report and in accordance with its general approach to such undertakings set out in the regulatory framework for social housing in England from April 2012. The acceptability, or otherwise, of any such undertaking will depend on the circumstances of the case. The regulator will consider the provider's capacity to honour the undertaking and whether the terms of the undertaking are sufficient to bring about the necessary improvements to relevant management functions in a timely manner.
- 22 The regulator will expect the provider to demonstrate clearly that it has the capacity and the capability to achieve a timely resolution of all relevant problems identified in the findings of the inquiry report, including the commitment of any funds or other resources that are necessary. The provider must demonstrate to the satisfaction of the regulator that the proposals set out in any views, representations or voluntary undertakings will fully resolve any mismanagement and bring about any necessary improvements in the management of the social housing. The proposals must achieve outcomes for tenants or for the business which can be sustained in the long term and are at least as good and as timely as those anticipated by the terms of the proposed requirement for a management transfer.
- 23 Where the regulator is satisfied with the proposed terms of the voluntary

undertaking, it may decide not to impose the requirement with immediate effect, but to allow the provider a period of time to implement its proposals. In such circumstances, the regulator will monitor and review the provider's progress on a regular basis and at key milestones in order to assess whether or not the provider has honoured the undertaking. The regulator will give reasons for any decisions it makes in relation to such monitoring or review. In circumstances where the regulator subsequently concludes that a provider has failed to honour the undertaking or has failed to deliver any obligations at key milestones, it may decide to impose the requirement to transfer management functions without delay.

- 24 Alternatively, where the regulator is not satisfied with the proposed terms of the voluntary undertaking, it may decide to impose the requirement without delay. The regulator is likely to take such action where it considers that the terms of the undertaking are unsatisfactory or insufficient to resolve the problems or where urgent or immediate action is necessary.

### **The transfer**

- 25 The purpose of this power is to improve the management of some or all of the provider's social housing. The requirement to transfer management may relate to the provider's management functions generally or to specific management functions in relation to its social housing. It may relate to the provider's social housing stock generally or to specific social housing stock in a defined area. The circumstances of each case will determine whether the regulator requires a full or partial transfer of functions. For example, a partial transfer may be required where the underlying mismanagement is known to be confined to a specific function of the provider's management operations in relation to its social housing, or to a specific geographical area.
- 26 The regulator will select the new manager that will take the transfer of management functions. The Act makes provision for the transferee manager to be any person or organisation specified by the regulator. This could be another registered provider or an agent or a contractor with the capability and capacity to deliver efficient and effective management and sustain it throughout the period stipulated by the regulator in the requirement. In selecting the transferee manager, the regulator will have particular regard to the quality and management of that organisation's service delivery in relation to the specific functions to be transferred. In addition, the regulator will expect the transferee manager to demonstrate good governance, financial viability and the management and financial capacity to deliver these functions.

### **The terms of the transfer**

- 27 The Act makes provision for the transfer to be on terms and conditions specified in, or determined in accordance with, any requirement imposed by the regulator. The actual terms and conditions will depend on the circumstances of the case. The regulator will specify the terms and

conditions of the transfer and will set them out in any requirement imposed on the provider. Those terms and conditions must include provision for the remuneration of the transferee manager and specify the powers of the transferee manager. The Act also makes provision for the transferee manager to have any other power in relation to the provider's affairs required by the manager for the purposes specified in the requirement, including for example, the power to enter into agreements and to take other action on behalf of the provider.

### **The consent of the Secretary of State**

- 28 The regulator can only exercise the power to require a provider to transfer management functions with the consent of the Secretary of State to the transfer and to terms of the transfer. The regulator will keep the Department for Communities and Local Government informed of progress on any cases where a requirement to transfer management functions might be imposed. The regulator will submit its formal application for the necessary consents following any decision by the regulator to impose the requirement. The application will include full information about the case and the process followed by the regulator in reaching its decision to impose the requirement.

### **The requirement and complying with it**

- 29 The requirement will set out the extent of the services that the provider must transfer and the specific terms and conditions attached to the transfer. The regulator will notify the provider about the requirement by letter addressed to the Chief Executive or other suitable person. The letter will set out the regulator's proposals for its subsequent liaison with the provider to ensure compliance with the requirement. The regulator will expect the provider to effectively manage the transition from its existing manager to the transferee manager. The regulator will wish to satisfy itself that the provider is taking the appropriate action to comply with the requirement. Where the provider does not do so, the regulator will review its options and may consider exercising any of its regulatory, enforcement or general powers or taking other action against the provider.

### **Notification of a requirement**

- 30 The regulator will publicise the action that it takes in accordance with its policy on public statements. The regulator will inform those individuals and organisations that provided views on the proposed requirement about the regulator's final decisions on the matter. The Act specifies that in circumstances where the regulator imposes a requirement to transfer management functions, it must send a copy of it to:
- the GLA in a case where the requirement is to be imposed on a provider owning land in Greater London
  - the Secretary of State, in a case where the requirement is to be imposed on a local authority provider

## **Appeal**

- 31 The provider may appeal to the High Court against a requirement to transfer management functions.

## **Guidance note 22**

### **Guidance on section 252A**

#### **Appointment of an adviser to a local authority provider**

##### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power to appoint an adviser to a local authority provider. This is an enforcement power and is set out in chapter seven and section 252A of the Housing and Regeneration Act 2008 (the Act). This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

##### **Scope**

- 2 The power may be exercised only in relation to a local authority provider. It does not apply to a private registered provider.

##### **Background and context to the use of the power**

- 3 The authority is responsible for ensuring that it achieves the standards set by the regulator. This requires the control and management of risk across all parts of the authority's social housing operations and good service delivery to its tenants, both where management services are provided by the authority directly, or where such services are provided by an Arms Length Management Organisation (ALMO), a Tenant Management Organisation (TMO) or another manager under contract.
- 4 In circumstances where there has been a failure against a standard, or where the authority's affairs in relation to social housing have been mismanaged, the regulator will assess the most appropriate course of action. We will consider the authority's willingness to contribute positively to a timely resolution of the presenting problems and its capacity to achieve the necessary improvements. Where the regulator has been engaging with the local authority to achieve those improvements, but the underperformance has continued, it may have to exercise the power to appoint an adviser or require the authority to appoint an adviser.
- 5 In exercising this power, the regulator's intention is to work with the authority to help improve its services. An adviser or advisers will give the authority specialist support and a range of relevant additional skills and expertise to assist in addressing the regulator's concerns. This is a supportive action designed to act as a catalyst for the changes necessary to address those concerns.

## **Potential triggers to the exercise of the power**

- 6 The Act specifies the circumstances in which the regulator may exercise its discretion to use this power. They are set out in paragraph seven of this guidance. The regulator is most likely to exercise the power where it considers that one or more of the following circumstances apply:

- the authority's affairs in relation to its social housing have been mismanaged
- there has been a failure against one or more consumer standards where there are reasonable grounds to suspect there has been or there is a risk of a serious detriment to tenants
- the authority has failed to deal with previous regulatory interventions to the satisfaction of the regulator
- the authority has failed to honour a relevant voluntary undertaking to the satisfaction of the regulator
- the case raises matters of wider regulatory significance or concern

This is not an exhaustive list and the regulator may conclude that it is necessary to exercise the power in other circumstances to those set out above.

## **The power**

### **The circumstances in which the power can be exercised**

- 7 Section 252A of the Act specifies that the regulator may exercise the power to appoint an adviser when it concludes that:

- it is necessary for the proper management of the authority's affairs in relation to its social housing, or
- it is desirable in the interests of securing better services for the authority's tenants

- 8 In such circumstances the regulator may:

- appoint one or more advisers to assist the authority in relation to its social housing affairs, or a particular aspect of those affairs. (An appointment)
- require the authority to appoint one or more advisers to assist in relation to its social housing affairs, and specify a process which the authority is required to implement for selecting advisers. (A requirement)

- 9 The regulator will consider whether to direct an appointment or a requirement based on the particular circumstances of each case. In principle, the regulator would prefer to work with the authority through the requirement route and, if it is appropriate to do so, to draw on



mechanisms for self-improvement that are available to the local authority sector. The regulator may require the authority to put an adviser in place at an early stage in its regulatory engagement in order to reinforce the authority's own proposals for self-improvement. In circumstances where the regulator directs a requirement, the regulator may propose certain individuals as advisers, but will also consider individuals proposed by the authority as potential advisers. The regulator will specify the process that the authority will be required to follow for selecting the adviser. The regulator may participate in the selection process. The final decision will be made by both the regulator and the authority together.

- 10 However, in circumstances where the regulator concludes that the authority is either unable or unwilling to work in partnership to identify and select a suitable adviser, or where an authority has not fulfilled its obligations under a requirement in a timely manner, the regulator may identify and appoint advisers itself. In such circumstances the final decision will be made by the regulator.
- 11 The Order specifies that the authority must co-operate with any advisers. The regulator will monitor this through the adviser, and if the authority fails to co-operate, the regulator may consider taking further action including, but not limited to, the possible use of other regulatory, enforcement or general powers.

#### **The period and terms of an appointment or a requirement**

- 12 The appointment or requirement will specify the adviser's terms and conditions, including any provision for remuneration. The appointment or requirement will usually be for an initial period of six months, although this may vary depending on the circumstances of the case. It will be reviewed on a regular basis and the regulator may extend the period or may withdraw the adviser at any time depending on the progress made at agreed milestones. An adviser can resign at any time. Where an adviser does so, the regulator will decide whether it is necessary to replace the adviser who has resigned, and whether any new adviser should be put in place through an appointment or a requirement.
- 13 The regulator will agree the most appropriate mechanisms by which the adviser will interact with the authority's management structure in consultation with the authority and the adviser. This will depend on factors such as the particular management arrangements within the authority and those aspects of the authority's social housing affairs that are the subject of the appointment or requirement. The regulator expects an adviser to work within the authority's relevant codes of conduct, standing orders, policies, procedures and budgets, and to give advice and exercise their judgement in the best interests of both the authority and its tenants. The adviser will focus on the matters specified in the appointment or requirement and assist the authority to

achieve the proper management of its social housing affairs or to secure better services for tenants.

### **Who can be an adviser?**

- 14 The Act places no restrictions on who can be an adviser. Individuals could be drawn from any source. The regulator will always try to match the most suitable people to the authority and to the particular circumstances of the case. Advisers will have relevant knowledge, skills and expertise. They will have the interpersonal and relationship management skills to operate effectively.
- 15 The regulator will establish good working relations with organisations that encourage self-improvement in the local authority sector. Such organisations can draw on local authority elected members, senior officers and expert advisers to assist in resolving problems. The regulator may consider using such individuals as an adviser to an authority.
- 16 The regulator has established a panel of expert individuals who are available to act when the regulator exercises its power under section 269 of the Act to appoint a new officer to a non-profit provider. The individuals on the panel represent a broad cross-section of interests and experience. Their skills and expertise in social housing may be relevant to a local authority provider. In identifying individuals who might act as an adviser to a local authority provider, the regulator will consider whether individuals from the panel might be suitable to the particular circumstances of the case.
- 17 However, the regulator accepts that restricting its options to individuals on the panel might not be appropriate in some circumstances. For example, this might be because the number of people on the panel with the required skills who are prepared to serve in the area in which the authority operates is limited. Consequently, the regulator may also consider suitable individuals who are not on the panel. Our over-riding objective will be to identify the most appropriate people for the case.

### **Notification and initial contact**

- 18 The regulator will notify the authority about a requirement or an appointment by a letter addressed to the Chief Executive or other suitable person. In respect of a requirement, the regulator will serve an order which specifies the process that it requires the authority to implement for selecting the adviser and will then work with the authority to ensure that the specified process is followed. In respect of an appointment, the regulator will serve an order on the authority for each adviser and the orders will be copied to the adviser. The regulator will issue a news release to announce a requirement or an appointment. The authority will be given an opportunity to comment on

the factual accuracy of any such news release.

- 19 The regulator will hold a meeting with the advisers to brief them and to provide them with all the background material they will need to carry out their duties. As a minimum, such background material is likely to include:

- information about the authority and its operations
- background to the regulator's concerns
- specific detailed information about any particular aspect of the authority's social housing affairs that is the subject of the appointment or requirement
- any relevant assessment or performance information
- the most recent financial statements in relation to social housing
- the terms of any public statement that the regulator requires the authority to make
- a draft news release to announce the advisers

- 20 The regulator will hold a meeting with the authority in order to:

- introduce the advisers and explain their role
- explain the advisers' relationship with the regulator
- explain the advisers' relationship with the authority and with the ALMO, TMO or contractor where relevant
- explain the regulator's expectations of the authority and of the ALMO, TMO or contractor where relevant
- explain the implications of the authority's regulatory status and the actions that the regulator expects the authority to take to overcome the failure or problem with the support of the adviser
- agree lines of communication between the regulator and the advisers and between the regulator and the authority

## **Expectations**

### **What an adviser can expect from the regulator**

- 21 Throughout the period that an adviser is in place, the regulator will:
- agree appropriate liaison and reporting arrangements with advisers at the outset, including nominating a member of the regulator's staff as the main point of contact
  - meet advisers from time to time in order to check progress and ensure that the underlying concerns are resolved to the satisfaction of the regulator
  - provide an indemnity to advisers that are subject to an appointment to the effect that any individual adviser who has acted honestly and in good faith will not have to meet out of their own personal resources any personal civil liability which is incurred in execution or purported execution of their adviser functions save where the person has acted recklessly

### **What the regulator expects from an adviser**

- 22 The regulator expects an adviser to:
- work in the best interests of the authority and its tenants
  - work within the authority's relevant codes of conduct, standing orders, policies, procedures and budgets
  - be circumspect about making any public comments about the authority or about their role as an adviser and to generally act within the authority's rules on confidentiality
  - refer any news enquiries to the appropriate person in the authority and to generally act within the authority's communications strategy
  - maintain contact with the regulator, to keep it informed of key developments and to provide it with feedback on progress

### **What the regulator expects from the authority**

- 23 The regulator expects members and staff of the authority to:
- co-operate with the regulator in relation to an appointment or a requirement
  - co-operate with advisers in accordance with the requirements of the Act and, where relevant, to ensure that the board members and staff of any ALMO, TMO or other agent also co-operate with advisers
  - facilitate the full involvement of an adviser in the social housing affairs of the authority or in the relevant aspect of those affairs
  - provide the adviser with copies of all documents, operating procedures and standing orders relevant to their role as an adviser

- make copies of all notices, agendas and papers for meetings available to an adviser
- provide liability insurance cover to advisers that are subject to a requirement which is equal to such insurance cover it arranges for elected members or senior officers of the authority
- reimburse an appointed adviser for all reasonable expenses they incur in accordance with the established policy and practice for the authority
- pay remuneration to the adviser in accordance with the provisions of the appointment or requirement
- co-ordinate its communications strategy on all matters relating to the advisers with the regulator, and to give the regulator the opportunity to comment on the content and timing of any news releases or other public statements

## **Guidance note 23**

### **Guidance on sections 269A & 269B**

#### **Censure of a local authority employee or agent during or following an inquiry**

##### **Purpose**

- 1 This document gives general advice and guidance on how the regulator may exercise the power to censure a local authority employee or agent during or following an inquiry. This is an enforcement power and is set out in chapter seven and section 269A of the Housing and Regeneration Act 2008 (the Act). This document should be read in conjunction with the regulatory framework for social housing in England from April 2012, which sets out the objectives and principles that underpin the regulator's approach.

##### **Scope**

- 2 The power may be exercised only in relation to an employee or agent of a local authority provider. It may not be exercised in relation to an elected member of a local authority. This power does not apply to private registered providers.

##### **Background and context to the use of the power**

- 3 The authority is responsible for ensuring that it achieves the standards set by the regulator. This requires the control and management of risk across all parts of the authority's social housing operations and good service delivery to its tenants, both where management services are provided by the authority directly, or where such services are provided by an Arms Length Management Organisation (ALMO), a Tenant Management Organisation (TMO) or another manager under contract. The authority is responsible for managing itself, its employees and its agents effectively.
- 4 Where the regulator suspects that an authority's affairs in relation to its social housing may have been mismanaged, the regulator may hold an inquiry in accordance with sections 206 to 209 of the Act. As part of an inquiry, the regulator may require the authority's accounts and balance sheet relating to its social housing to be audited in accordance with section 210 of the Act. Further advice about the regulator's approach to the exercise of the powers on inquiry and extraordinary audit is set out in the relevant guidance note. In circumstances where an inquiry is in progress, the regulator will expect the authority to ensure that its employees and its agents co-operate fully with the inquiry and respond positively and in a timely manner to all reasonable requests from the inquirers. The power to censure a local authority employee or agent is one of the enforcement

powers available to the regulator in certain circumstances when an inquiry is in progress.

### **Potential triggers to the exercise of the power**

- 5 Section 269A of the Act sets out the circumstances in which the regulator may exercise the power to censure a local authority employee or agent. The regulator may give a censure notice to an authority where an inquiry under section 206 of the Act is in progress in respect of the authority and:
1. The regulator has reasonable grounds for believing that the affairs of the authority have been mismanaged and that the interests of the tenants of the authority, or its assets, require protection, or
  2. The regulator is satisfied as a result of an inquirer's interim report that the affairs of the authority have been mismanaged

### **The power**

#### **Consideration of an inquiry report**

- 6 The regulator will consider an interim or a final report of an inquiry into the affairs of a local authority provider in accordance with the principles set out in the guidance on the use of the power to hold an inquiry. In doing so, the regulator will consider all the relevant material and decide whether it demonstrates:
- that the affairs of the authority have been mismanaged
  - that there are grounds for believing that the interests of the tenants of the authority require protection
  - that there are grounds for believing that the authority's assets require protection
- 7 In circumstances where the regulator concludes that one or more of the criteria in paragraph six apply, it will also consider whether any employee or agent of the authority has contributed to the mismanagement or the risk to tenants or assets. If the regulator is satisfied that an employee or agent of the authority has so contributed, it will also consider whether a censure notice is appropriate, balancing all the relevant factors associated with the case.

### **Censure notice**

- 8 A censure notice is a mechanism by which the regulator might notify an authority where the regulator has concluded that an individual employee or a group of employees or, where relevant, an individual employee or group of employees of an ALMO or TMO or an agent of the authority has contributed to the failure or mismanagement. The notice would set out the regulator's reasons for reaching the

conclusion. The notice would be addressed to the Chief Executive of the authority or other suitable person and also to the employee or agent concerned. While no more than one employee or agent can be named in a censure notice, the regulator may give several notices in respect of the same failure or mismanagement.

### **Response to the censure notice**

- 9 The Order makes provision for section 269B of the Act which requires the authority to which the censure notice is given to respond to the regulator in writing within 28 days of receiving the notice. The response must:

- explain what action (if any) the authority has taken or proposes to take in relation to the employee or agent, or
- explain why the authority does not think that the employee or agent has contributed to the failure or mismanagement or the risk to its tenants or assets, or
- explain why the authority does not think that its affairs have been mismanaged

### **Possible further action by the regulator**

- 10 The regulator will consider whether the authority's response to the censure notice is satisfactory taking into account all the circumstances of the case. Where the regulator concludes that the response is not satisfactory, it may consider taking further action including, but not limited to, the possible use of other regulatory, enforcement or general powers. In circumstances where the regulator does decide to take further action, it would inform the relevant local authority and the Department for Communities and Local Government, its sponsoring government department, of its intention to do so. The regulator may also inform other relevant organisations where it is appropriate to do so.
- 11 The regulator is most likely to take further action where it has concluded that the interests of tenants of the authority, or its assets, require protection but the authority has neither taken the action necessary to achieve that protection, nor provided a satisfactory explanation for not doing so.

### **Further action by the authority**

- 12 It is the local authority's responsibility to take action against its employees or agents following a censure notice, where it considers it to be appropriate to do so. The regulator has no locus in any such action, but it would expect the authority to keep it informed about progress and the final outcome of the action. The regulator will wish to satisfy itself that the action had been concluded appropriately in all the circumstances of the case. Should the authority fail to complete the



actions it had proposed to take, the regulator may consider its options and may require the authority to take some further action.

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