



Homes &
Communities
Agency

CONSULTATION ON CHANGES TO THE REGULATORY FRAMEWORK

Annex 5. Other changes to registration criteria

May 2014

Annex 5. Other changes to registration criteria

- A5.1 In addition to the changes to the registration criteria as a result of proposed changes to the Standard covered in Chapter 5 of this consultation document, the Regulator has carried out a wholesale review of the registration criteria. The existing registration criteria have been in place since April 2010 and so it is timely that they are reviewed and that their continued relevance is considered.
- A5.2 The Regulator's conclusion is that, in the main, the criteria remain appropriate: they do not establish a barrier to entry to new providers of social housing and they recognise the need for new entrants to be financially viable and well-governed. Effective arrangements for governance and financial viability are essential to support registered providers' ability to deliver their objectives effectively and efficiently.
- A5.3 Since the criteria were established, the Regulator has registered over 100 existing and intending providers of social housing, including profit making and non-profit, stand-alone entities and those within a group structure. The review has led the Regulator to conclude that the criteria should continue to be linked to the Regulatory standards, as applicants will have an obligation to meet these standards once registered. The link to the standards also ensures that the registration criteria contribute to meeting the Regulator's fundamental objectives.

Changes to criteria for non-profit applicants

- A5.4 In addition to the registration criteria that focus on compliance with the standards, there are criteria that relate only to non-profit applicants. The current requirements in the registration criteria for non-profit applicants are that they have in their objects:
- the provision of social housing
 - non-profit status
 - non-distribution of assets to members
- A5.5 The Regulator proposes to amend the scope of these requirements and to narrow their application. Section 115 of the Act sets out how the Regulator must determine the designation of a provider on the register. If a provider is a registered or non-registrable charity (that is, a charitable industrial and provident society) then it is designated as non-profit on the register. If an applicant does not fall into either of these categories, then there are three conditions it must meet in order to be designated as non-profit. Designation on the register influences the scope of regulation as there are differing statutory provisions relating to non-profit and profit making providers.
- A5.6 The requirements in the existing registration criteria applying only to non-profit applicants were aligned to the conditions that had to be met for providers to be designated as non-profit on the register. The Regulator adopted this approach as the Act enables non-profit registered providers to amend their constitutions without the Regulator's consent, other than their objects where they need the Regulator's consent to any change. The Regulator was keen to ensure that the objects captured those elements that were key to the designation so that consent was required to any change. However, having reviewed the position, the Regulator recognises that some requirements are covered elsewhere in the Act or in other legislation, such as

the Charities Act 2011, or by other requirements that have the same effect. So, the Regulator is proposing changes to the criteria to address this.

- A5.7 The purpose of enshrining non-profit status in the objects was so that registered providers could not alter their constitutions to become profit making registered providers without the Regulator's consent. However, following review of the criteria, the Regulator has concluded that registered providers which are charitable are subject to other controls (Charity Commission and/or HMRC requirements) which mean that the Regulator's requirements in relation to their non-profit status are unnecessary. It is therefore proposed to remove this requirement for charitable organisations, but it will remain for applicant organisations that are non-profit but non-charitable.
- A5.8 The Regulator also sought to prevent any change to the constitutions of non-profit registered providers that would enable the distribution of assets to members, unless the Regulator's consent was given to such a change. However, under the Act, changes to constitutions that make provision about the distribution of assets cannot be changed without the Regulator's consent, whether or not the provision is contained within the objects. It is therefore proposed to remove the requirement for any non-profit applicant to have within their objects the non-distribution of assets to members. The position varies for CIOs which are covered below.
- A5.9 It is the Regulator's view that there is a need for there to be an explicit reference to provision of social housing in the objects of non-profit organisations (whether or not they are charitable) in order to provide clarity that there is a regulated element to the housing provision. However, it recognises that for the wording needs to reflect the nature of the charitable organisation and the type of social housing that it provides so alternative forms of wording are acceptable.
- A5.10 A new concern that has arisen since the registration criteria were first put into place is that the Regulator has seen constitutions that enable an organisation to become or cease to be a subsidiary of another organisation without any change to the constitution. This means that the controls the Regulator has under the Act become ineffective, as they apply only when rule changes are required. It is therefore proposed that there is a new criterion which requires constitutions to state that an organisation either is a subsidiary (and name the parent body) or has no power to become a subsidiary where it is not already. This will mean that the Regulator's consent is required to any changes to these provisions. This will apply to all non-profit applicants, whether they are charitable or not.
- A5.11 Any non-profit, non-charitable organisations that are registered must meet the requirements of section 115 of the Act in order to be designated as non-profit so any purposes they have must be connected with or incidental to the provision of housing. Note that if an applicant fails to meet this requirement, it does not mean it cannot be registered, but that it cannot be registered as non-profit.
- A5.12 In summary, the revised requirements the Regulator is considering for non-profit applicants are
- Registered and non-registrable charities
 - in their objects clause:

- must refer to the provision of "social housing" explicitly, even where it refers to other housing-type objects, which can be worded as social housing in the form of almshouse accommodation or as charitable social housing
 - elsewhere in the constitution
 - must state if they are a subsidiary (naming the parent) and must have no power to become a subsidiary if they are not already
- Non-profit, non-charitable applicants
 - in their objects clause:
 - must refer to "social housing" explicitly
 - must refer to non-profit, whether using those exact words or other words which have the same effect
 - in their objects clause or elsewhere in the constitution:
 - must state if they are a subsidiary (naming the parent) and must have no power to become a subsidiary if they are not already

Charitable Incorporated Organisations

- A5.13 Charitable Incorporated Organisations (CIOs) are not mentioned in the Act. It has been possible to set up a new CIO since January 2013 but the Regulator has had no registration applications to date from CIOs. It will in the future be possible for some organisations on the register to convert to a CIO.
- A5.14 The Regulator is considering registration criteria that apply only to CIOs as there is concern that many of the Regulator's powers do not apply to CIOs. This is because the Regulator's powers are often specific to the type of entity, such as a limited company or an industrial and provident society, that is on its register. As CIOs are not mentioned in the Act, that means many of the Regulator's powers do not apply to them. Longer term, the Regulator's aim is for the Act to be amended. In the shorter term, the Regulator does not wish to be in a position where it registers a CIO knowing that some of the Regulator's powers do not apply. Given that organisations on the register cannot convert to become a CIO at present, the issue arises only with new CIOs which apply for registration. So, it is proposed to add to the registration criteria requirements that relate only to CIOs.
- A5.15 The Regulator's aim in making these proposals is not to make registration onerous for a CIO, but is to ensure that so far as is possible, the registration criteria put the Regulator in a similar position with CIOs as it is with other registered providers. The proposals therefore mirror provisions in the legislation for limited companies and industrial and provident societies. Examples of the provisions the Regulator is seeking to mirror are set out in the proposals below.
- A5.16 Consideration has been given to where there are powers that do not apply to CIOs. The Regulator has concluded that those which it is most concerned about addressing are:
- winding up/insolvency (s144 of the Act)
 - constitutional changes (s214 of the Act)

- gifts to members (s122 of the Act)

A5.17 Given that the Act does not mention CIOs, there would be no requirement for a person taking steps to wind up a CIO or appointing an administrator to notify the Regulator or seek its consent as there is for other legal entities. This means that the moratorium triggers generally do not apply to CIOs. This is obviously of concern to the Regulator as it means its ability to step in and take action to protect the social housing assets is limited.

A5.18 It is proposed that registration criteria require that to be registrable, the constitutions of CIOs contain a provision requiring them to notify the Regulator where steps are taken preliminary to winding up or a voluntary arrangement. The Regulator recognises that this requirement cannot fully address the lack of Regulatory powers as the Regulator will still be unable to take the actions permitted for the Regulator during a moratorium, such as the appointment of an interim manager. The requirement to notify will at least ensure that the Regulator is aware that a CIO is in financial distress and will enable the Regulator to consider what action can be taken and also to work with the Charity Commission which has relevant powers under the Charities Act 2011.

A5.19 Constitutional changes are an area where the Regulator has powers in relation to non-profit organisations, but again these generally do not apply to CIOs. A CIO is not required to seek the Regulator's consent to changes of its objects, to make changes to its constitution to enable it to distribute its assets to members or to make changes to its constitution that enable it to become or cease to be a subsidiary of another body. It is proposed to require that the constitution of a CIO contains provisions requiring it to seek the Regulator's consent to any such changes. This puts into effect through the constitution the powers that the Regulator would have in relation to a limited company which was a registered charity under Section 214 of the Act.

A5.20 Finally, it is proposed to address the requirements in section 122 of the Act which relate to the wrongful payment of gifts to members. The statutory provisions enable a limited company or an industrial and provident society to recover gifts wrongfully paid to a member or for the Regulator to require them to do so. These requirements do not apply to a CIO. It is therefore proposed that the constitution of a CIO should contain a provision requiring it, in the case of wrongful payments to members, to take all reasonable steps to recover the sum(s) wrongfully paid out.

A5.21 In addition, it is proposed that the constitutions of CIOs contain a provision providing that no changes can be made to the provisions required by the Regulator without the Regulator's consent.

Conclusion: revised registration criteria

A5.22 The revised registration criteria resulting from the above issues are set out below.

An applicant must meet the Governance and Financial Viability Standard at the point of registration and demonstrate it can sustain its financial viability on an ongoing basis.

An applicant must have in place management arrangements that enable it to demonstrate the capacity to meet the other regulatory standards.

An applicant that is a registered or non-registrable charity must within its constitution:

- have as an object the provision of social housing (which can be worded as social housing in the form of almshouse accommodation or as charitable social housing)
- if it is a subsidiary, must state as much and name the parent body (in such a way that the parent cannot be changed without seeking the Regulator's consent)
- if it not a subsidiary, state that it has no power to become one without seeking the Regulator's consent

A non-profit applicant which is not a registered or non-registrable charity must within its constitution:

- have as an object the provision of social housing
- embed non-profit status
- if it is a subsidiary, state as much and name the parent body (in such a way that the parent cannot be changed without seeking the Regulator's consent)
- if it is not a subsidiary, state provisions that it has no power to become one without seeking the Regulator's consent

An applicant which is a Charitable Incorporated Organisation (CIO) must have (in addition to the requirements above for applicants that are registered charities) within its constitution requirements that:

- changes to its objects, to provisions for the non-distribution of assets to a member or members or to provisions enabling the CIO to become, or cease to be, a subsidiary of another body, shall only be effective if the consent of the Regulator is obtained
- in the case of wrongful payments made by the CIO to one or more of its members, the CIO shall take all reasonable steps to recover the sum(s) wrongfully paid out
- where steps are taken preliminary to winding up or a voluntary arrangement in relation to the CIO, it shall notify the Regulator of the fact
- changes to the provisions required by the Regulator may only be made if the Regulator has consented to the change

Consultation question

7. Do the proposed changes to the registration criteria:

- a) contribute to the Regulator better meeting its fundamental objectives?
- b) express the requirements of registered providers in a way that is clear and succinct?

homesandcommunities.co.uk
mail@homesandcommunities.co.uk
0300 1234 500



Homes & Communities Agency

Homes and Communities Agency

7th Floor

Maple House

149 Tottenham Court Road

London W1T 7BN

The Homes and Communities Agency is committed to providing accessible information where possible and we will consider providing information in alternative formats such as large print, audio and Braille upon request.