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

Memorandum by the Government for Business, Innovation and Skills

Introduction

1. This Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Business, Innovation and Skills. It identifies the provisions of the Bill which confer powers to make delegated legislation and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

2. This Memorandum has been revised since it was first published to take account of amendments made to the Bill in the first House (the Commons) and updated to take account of other developments such as dates for consultations and the availability of draft secondary legislation.

3. Amendments made to the Bill which concern delegated powers are as follows: a new power to require designated banks to provide information about small and medium sized businesses to designated finance platforms (clause 5), a new power in relation to the definition of small and micro businesses (clauses 33 and 34), a power in the new measures concerning home businesses to describe cases of what will and will not count as a home business (clause 35), and amendments to the provisions about Pubs (clauses 40 to 70). There have also been amendments to powers contained in Schedule 3 (PSC register - companies) and clause 126 (sales to connected persons - insolvency) which have changed the applicable parliamentary procedure from negative to affirmative resolution.

4. One power was initially included at clause 114 of the Bill (as introduced) (about the position of creditors in insolvency) to allow secondary legislation to make consequential amendments as a result of the abolition of creditors meetings and giving creditors the ability to opt out of correspondence. However this power is no longer needed as all necessary consequential amendments have been made through the insertion of new Schedule 9 to the Bill during Commons committee stage.

5. The descriptions of the powers are arranged in the order that they appear in the Bill.

6. The Bill contains 75 individual provisions concerning delegated powers, 14 of which are Henry VIII powers.

Overview of the Bill

7. The Small Business, Enterprise and Employment Bill contains 12 Parts and 11 Schedules.

8. Provisions in Part 1 aim to help business, and small businesses in particular, by making the payment practices of businesses more transparent, incentivising improvements in payment culture, and helping small businesses agree fair payment terms. Further provisions aim to help business by improving access to finance through increasing the

availability of investment for small businesses, allowing HMRC to provide non-financial VAT registration data to approved parties increasing the reliability to credit reports and the introduction of 'Cheque Imaging', giving the added option of depositing cheques remotely via Smartphone or tablet, thus enabling a faster clearing cycle. There are also provisions which amend legislation to expand the powers available to UK Export Finance to support UK exports and exporters.

9. Part 2 deals with regulatory reform. Measures include requirements to make it easier for new companies to set up online, the establishment of a new office holder to scrutinise the processes for appeals and complaints against regulators to make them more effective for business, a requirement that regulations affecting business and voluntary and community bodies are reviewed frequently to remain effective, a requirement that the Government publishes a target for itself about the removal of regulatory burdens in each parliamentary term, including transparent reporting on progress. There is a power for the Competition and Markets Authority to make recommendations about proposals for legislation. There is also provision for new definitions of small and micro business which can be relied on in secondary legislation in order to allow businesses of this size to be exempted from that legislation, and a measure to allow tenants to run home businesses.

10. Part 3 contains powers to streamline public procurement to remove barriers and help small business gain fair access to the £230bn public procurement market and give additional powers to the Cabinet Office's Mystery Shopper scheme to monitor public procurement practice.

11. Part 4 contains provisions about the pubs industry. These aim to bring fairness to the sole traders and small businesses that run 20,000 or so tied pubs across England and Wales, with a new Statutory Code and independent Adjudicator to ensure that publicans who are tied to a pub owning company are treated fairly.

12. Part 5 contains measures relating to free of charge early years provision, amendments to requirements for various aspects of registration required for the provision of childcare, and measures to extend the existing exemption for schools from applying to Ofsted to provide care for children younger than school age to two year olds.

13. Part 6 contains measures for the sharing of information about students and former students to enable a fuller understanding of the impact of education choices.

14. Part 7 contains measures which amend UK company law. These aim to increase transparency around who owns and controls UK companies and to deter and sanction those who hide their interest in UK companies to facilitate illegal activities or who otherwise fall short of expected standards of behaviour. The measures include requiring every company to keep a register of people with significant control over the company, the abolition of bearer shares and corporate directors and the imposition of directors' duties to shadow directors.

15. Part 8 contains provisions that concern the filing requirements of companies. The measures amend requirements about the information which must be delivered to the registrar of companies in certain cases, providing a more flexible regime for companies in

their dealings with the registrar. It also makes changes to improve the ability of the registrar to deal with situations where disputes as to the contents of the register arise.

16. Part 9 amends the directors' disqualification regime to strengthen the rules that prevent an individual from acting as a director where that individual has committed misconduct. The measures introduce new grounds for disqualification, create a new way in which creditors may receive financial redress for loss suffered through director misconduct, and update the matters that courts must take into account when considering a director disqualification. It also makes changes to increase the efficacy of the disqualification regime.

17. Part 10 modernises and streamlines insolvency law to remove unnecessary costs and burdens to creditors and others. It also contains provisions that will ensure effective oversight of insolvency practitioners.

18. Part 11 of the Bill contains employment law provisions. These aim to deter employers from breaching National Minimum Wage legislation by amending the power to set the maximum penalty for under payment so it can be calculated on a per worker basis; to stop abuse of 'exclusivity clauses', in zero hours contracts, which stop individuals from working for another employer, even if the current employer is offering no work; and reform the employment tribunal system to encourage more efficient management of postponements to reduce delay and cost; and introduce a penalty to ensure that awards are paid so that the majority of employers that do comply with the process are not put at disadvantage by those that avoid their responsibilities and liabilities. There are also provisions to cap exit payments for workers leaving the public sector.

19. Part 12 of the Bill contains general and supplementary provisions.

Part 1: ACCESS TO FINANCE

Assignment of receivables

Clause 1: Power to make regulations nullifying contractual terms preventing the assignment of receivables.

Power conferred on: Secretary of State; Scottish Ministers in relation to contracts to which the law of Scotland applies

Power exercisable by: Regulations made by Statutory Instrument (also includes Henry VIII power)

Parliamentary procedure: Affirmative resolution

Context and purpose

20. Clause 1 confers on the Secretary of State a power to make regulations providing that, in any contract where at least one of the parties is a business, a term which prevents or restricts the assignment of a receivable (i.e. a right to be paid money arising from the contract) is ineffective (or has no effect in relation to prescribed persons or has effect in relation to such

persons only for prescribed purposes). In relation to contracts to which the law of Scotland applies the power is conferred on the Scottish Ministers.

21. The purpose of this measure is to make it easier for businesses to raise finance in respect of their trade receivables as these are often their main or only assets. The power would extend to any business contract for the supply of goods or services (other than excluded financial services contracts as defined in subsection (4)) but could only affect terms preventing or restricting the assignment of receivables (as defined in subsection (2)). The definition of "excluded financial services contracts" in subsection (4) includes a power to prescribe descriptions of contracts. By virtue of clause 154, the regulations may include exceptions and make different provision for different cases.

22. **The Government will be consulting on the use of this power in parallel to the passage of the Bill, and intends to publish draft secondary legislation alongside a consultation document in December 2014.**

23. The delegated power includes a power to make consequential amendments to primary legislation as certain Acts contain provisions affecting the assignment of receivables. For the Secretary of State, this consequential power is set out in clause 152. For the Scottish Ministers it is set out in subsections (7)-(9) of clause 1.

Justification for delegation

24. As the power would extend to all business contracts (apart from excluded financial services contracts), the implications need detailed consideration and it will be necessary to consult with stakeholders before making the regulations. This includes consideration of whether any further exceptions should be made and whether terms preventing the assignment of receivables should be ineffective only against an assignee or against others.

Justification for procedure selected

25. The delegated power exercisable by the Secretary of State will be subject to the affirmative resolution procedure and the power exercisable by the Scottish Ministers will be subject to the affirmative procedure in the Scottish Parliament. The Government considers this to be the appropriate level of parliamentary scrutiny given the nature of these proposals (including in particular their scope and the power to make consequential amendments to primary legislation).

Business payment practices

Clause 3: Power to impose a duty to publish report on payment policies and practices

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

26. Many payments in commercial transactions between businesses are made much later than agreed, hitting some businesses in the supply chain particularly hard, especially where their financial viability is dependent on a specific contract or business relationship. These same businesses are also often affected by very long payment terms. Over the years a number of measures have been taken to tackle late payment. Clause 3 aims at reinforcing existing late payment measures by introducing a standalone power enabling the Secretary of State to promote a culture of prompt payment by requiring companies that do not qualify as micro entities, small or medium companies under Part 15 of the Companies Act (so in essence large and quoted companies) to report on certain payment policies and practices. This reporting requirement will be separate from Companies Act 2006 reporting requirements.

27. The clause provides a power for the Secretary of State to make provision by regulations about the creation of a duty to publish a report on payment practices and policies.

The power allows regulations to provide:

(a) which large and quoted companies are required to prepare a report;
(b) which type of contract within scope is covered by the duty;
(c) the information which must be published;
(d) the frequency and form of reporting;
(e) the obligations of companies and others as regards—
(i) the approval or signing of the report,
(ii) the sending of reports to third parties,
(ii) the publication of the report.

It is intended that draft regulations will be available as part of a consultation in December 2014.

Justification for delegation

28. The Government considers that a delegated power for the Secretary of State to make regulations is most suitable for requiring companies to report on their payment practices and policies relating to certain business to business contracts. This is because the reporting requirement is being introduced as a tool to change behaviours and as such it is hoped that, in time, the requirement may be relaxed or dispensed with. It is necessary and desirable to leave the detail of the reporting requirement in secondary legislation. For instance, it could be that circumstances dictate that parallel sets of reporting regulations for different types of company e.g. companies in a particular sector, provide the most efficient way of tackling late payments. It could also be that evidence suggests that in time certain types of contracts should be excluded from the reporting obligation.

29. The clause also enables regulations made under this power to specify the persons responsible for complying with the regulations (or any specified part of them). It is appropriate that this should be left to secondary legislation so that responsibility can be allocated to the right person depending on the disclosure requirement or the company it affects.

30. The Government considers that the detailed form and content requirements for the report are also more appropriate for secondary legislation. This is because of the technical and detailed nature of these requirements, and the fact that from time to time they may need to be

changed in order to e.g. adapt to changes in payment practices across the board or in certain sectors.

31. The same flexibility is required for provisions regarding publication and sending of reports. The requirements may need to evolve over time to adapt to new technologies or business practices. Equally, prescribing whether companies are to report along certain set standards is better dealt with in secondary legislation because these standards are likely to change over time.

Justification for procedure selected

32. This new power is subject to the affirmative parliamentary procedure as it will place new burdens on some companies and it is important that Parliament should have the opportunity to debate regulations in these circumstances. The new power also requires the Secretary of State to consult on the secondary legislation so that full account can be taken of minimizing the burden on companies. A consultation is due to be launched in November and draft regulations will be produced for the purpose of this consultation.

Clause 3(7): power to specify the kind of breaches of the duty to report on payment practices which attract a criminal penalty and the persons on whom this penalty for a breach of duty should fall

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

33. The power sets maximum penalty for breach of the duty to report. The maximum criminal liability that the regulations may impose for an offence under this section is a fine upon summary conviction.

Justification for delegation

34. The regulations will specify the detail of the offence by specifying which actions/omissions may result in criminal liability and who is liable. The Government considers that is the most suitable way of dealing with offences in this context. The offence will be developed in conjunction with the disclosure requirement to ensure that enforcement is appropriate and proportionate. Any new criminal offence will be subject to a justice impact assessment and will also be agreed with the Ministry of Justice prior to introduction. Enforcement regulations will also be subject to affirmative resolution.

Justification for procedure selected

35. The Government considers that the exercise of the power to make or amend regulations concerning criminal penalties should be subject to the affirmative resolution procedure to ensure sufficient parliamentary scrutiny around the implementation and proportionality of a new criminal offence.

Financial information about businesses

Clause 4: Power to require designated banks to provide information about small and medium sized businesses to Credit Reference Agencies (CRAs), and for CRAs to provide such information to finance provider

Power conferred on: The Treasury

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution on first exercise, negative resolution thereafter

Context and purpose

36. Clause 4(1) confers on the Treasury a power to make regulations requiring designated banks to provide information about their customers which are small and medium-sized businesses to designated CRAs, and requiring such CRAs to provide such information to finance providers. The information must have been requested and the business to which the information relates must have agreed to its provision (subsections (2) and (3)). The regulations may impose other conditions before a CRA must provide information (subsection (4)), and the Government intends to require that this requirement applies only where the business has agreed to the finance provider obtaining information from the CRA, and the finance provider has agreed commercial terms with the CRA.

37. The regulations must specify the information to be provided (subsection (5)), and may make more detailed provision about requests for and provision of information (subsection (6)). The regulations must provide for the designation of banks and CRAs, including the requirements and process for designation, and revocation of designations (subsection (7)). Clause 7 defines the small and medium-sized businesses and finance providers to which the regulations may relate, and provides that the regulations may make further provision for the purpose of determining which businesses they apply to.

38. Clause 6 makes supplementary provision about regulations made under clause 4 (and regulations made under clause 5). Subsections (1) to (3) enable the regulations to make provision for the Financial Conduct Authority to monitor and enforce compliance with obligations by designated banks and CRAs; these provisions are similar to those at section 58 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, under which a similar regime of monitoring and enforcement by the Financial Conduct Authority has been established. Subsection (5) provides a power to require designated CRAs to provide the information that they receive from designated banks to the Bank of England, subject to provisions about confidentiality of the information.

39. Subsections (4) and (6) to (8) provide powers to put in place safeguards against banks or CRAs failing to handle information correctly. Subsection (4) enables the extension of the financial ombudsman's jurisdiction to cover the activities of designated CRAs so that a business about which information is held by a designated CRA may refer to the ombudsman a complaint about the CRA. Subsection (6) gives a power to provide a right of action for a

person who has suffered a loss as a result of a failure by a bank or CRA to provide information as required. Subsection (7) enables the regulations to apply provisions in the Data Protection Act 1998 and the Consumer Credit Act 1974 relating to access to, and correction of, information, to those designated CRAs to which the provisions do not already apply. Subsection (8) gives a power to provide a right for a business to seek a court order for incorrect information to be rectified, blocked, erased or destroyed.

40. The purpose of these provisions is to resolve a difficulty faced by challenger banks and alternative finance providers in obtaining relevant data about small and medium-sized businesses (which is generally held by the larger banks with which businesses have their current accounts), enabling smaller finance providers to make informed decisions about whether to provide credit to such businesses. It is intended that the regulations made under this provision will remove barriers to entry and increase competition in this sector.

41. **The Government will make available a draft of the regulations that it intends to make under these clauses at Lords Committee stage of the Bill**.

Justification for delegation

42. The regulations to be made under this power will contain a significant amount of procedural and technical detail of a kind that is not appropriate for inclusion on the face of primary legislation. Further, they must remain suitable for the sectors to which they relate over time. For this reason, it is important that the detail of the regulations can be amended to reflect changing commercial realities. The market positions of banks and CRAs may change over time, as may the information held by banks, the information used by finance providers in lending decisions, the way in which information is recorded and transferred, and the business models used by finance providers. The Government also wishes to be able to react to any concerns that may arise about the use of businesses' information by strengthening oversight and safeguards if necessary.

43. For these reasons, the Government considers that it is desirable for the provisions to be set out in regulations rather than in primary legislation.

Justification for procedure selected

44. The power is a significant one; its exercise will result in new obligations to disclose commercial information, and it is appropriate that the creation of such new obligations be subject to the affirmative resolution procedure. However, given that subsequent use of the power will involve minor tweaks to the regulations, we consider that the negative resolution procedure provides the appropriate level of scrutiny. The Government therefore considers that the negative procedure is appropriate for such amendments.

Clause 5: Power to require designated banks to provide information about small and medium sized businesses to designated platforms, and for designated finance platforms to provide such information to finance providers

Power conferred on: The Treasury

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution on first exercise, negative resolution thereafter

Context and purpose

45. Clause 5(1) confers on the Treasury a power to make regulations requiring a designated bank to provide information about a small and medium-sized business to designated finance platforms when the bank rejects an application for credit from the business. The business to which the information relates must have agreed to the provision of the information to the platforms (subsection (2)(a)). Clause 7 defines the small and medium-sized businesses and finance platforms to which the regulations may relate, and provides that the regulations may make further provision for the purpose of determining which businesses they apply to.

46. The regulations may also require platforms which receive information pursuant to subsection (1) to provide that information in anonymised form to all finance providers requesting it (subsection (4)(a) and (5)). Regulations may require a platform to provide full details of a business seeking finance to a finance provider if the finance provider requests it and the business agrees (subsection (4)(b)). All disclosure of information to finance providers may be subject to the finance provider agreeing to the platform's terms and conditions and complying with requirements to protect the information (subsection (6)).

47. The regulations may make more detailed provision about the holding and provision of information by platforms (subsection (7)), and may make provision about the ability of a platform to charge fees to businesses seeking finance (subsection (8)). The regulations must provide for the designation of banks and finance platforms, including the requirements and process for designation, and revocation of designations (subsection (9)).

48. Clause 6 makes supplementary provision about regulations made under clause 5 (as well as regulations made under clause 4). Subsections (1) to (3) enable the regulations to make provision for the Financial Conduct Authority to monitor and enforce compliance with obligations by designated banks and finance platforms; these provisions are similar to those at section 58 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, under which a similar regime of monitoring and enforcement by the Financial Conduct Authority has been established. Subsection (4) enables the extension of the financial ombudsman's jurisdiction to cover the activities of designated finance platforms so that businesses which are eligible to refer complaints to the ombudsman may refer complaints about such platforms. Subsection (9) provides a power to require designated platforms to provide to the Treasury statistical information.

49. The intention behind these provisions is to improve communications between small and medium sized businesses that are seeking finance on the one hand, and potential providers of finance to such businesses on the other. It is intended that the regulations made under this provision will remove barriers to entry to, and increase competition in, the market for providing finance to small and medium sized businesses, and will improve access to finance for such businesses.

The Government will make available a draft of the regulations that it intends to make under these clauses at Lords Committee stage of the Bill.

Justification for delegation

50. The regulations to be made under this power will contain a significant amount of procedural and technical detail of a kind that is not appropriate for inclusion on the face of primary legislation. Further, they must remain suitable for the sectors to which they relate over time. For this reason, it is important that the detail of the regulations can be amended to reflect changing commercial realities. The market positions of banks and the way in which finance platforms do business may change over time, as may the information held by banks, the information relevant for finance providers' consideration of business opportunities, the way in which information is recorded and transferred, and the business models used by finance providers. The Government also wishes to be able to react to any concerns that may arise about the use of businesses' information by strengthening oversight and safeguards if necessary.

51. For these reasons, the Government considers that it is desirable for the provisions to be set out in regulations rather than in primary legislation.

Justification for procedure selected

52. The power is a significant one; its exercise will result in new obligations to disclose commercial information, and it is appropriate that the creation of such new obligations be subject to the affirmative resolution procedure. However, it would not be appropriate to require that level of Parliamentary time for subsequent amendments to the regulations which are likely to make less significant provision such as amending the precise nature of the information about rejected applications to be provided by banks. The Government therefore considers that the negative procedure is appropriate for such amendments.

Clause 7(3): Power to amend figure of £25 million in definition of small and medium-sized business

Power conferred on: The Treasury

Power exercisable by: Regulations (Henry VIII power)

Parliamentary procedure: Negative resolution

Context and purpose

53. The definition of small and medium business in clause 7(1) is partly by reference to turnover – a business with turnover of £25 million or more does not qualify. Subsection (3) provides a power for the Treasury to amend the figure.

Justification for delegation

54. Over time the value of turnover of £25 million is likely to reduce in line with inflation. In due course it may be desirable to amend the figure of £25 million either to take account of the effect of inflation, or for another reason such as aligning the figure with future definitions of small and medium-sized business which may use different levels of turnover. Subsection (4) requires the Treasury to consult appropriate persons before making an amendment to the figure.

Justification for procedure selected

55. Despite being a Henry VIII power, the power does not enable a significant change to the effect of clauses 4 to 7. It is available only to adjust one element of the definition of small and medium-sized business, and may only be used after consultation. On this basis, the Government considers that the negative procedure is appropriate.

Clause 8: Power for the Treasury to provide for additional purposes for which HMRC is authorised to disclose VAT registration information.

Power conferred on: The Treasury

Power exercisable by: Regulations (Henry VIII power)

Parliamentary Procedure: Affirmative resolution

Context and purpose:

56. Clause 8 provides that HMRC may disclose to a 'person' (P), information included in the VAT registration of another person (V) for the purposes of enabling or assisting P to assess V's (a) creditworthiness, (b) compliance with regulations relating to financial matters, or (c) risk of fraud.

57. Sub-section (10) of clause 8 provides that the Treasury may, by regulations, add additional purposes to those already listed.

58. Research has indicated that a controlled release of VAT registration data could release an additional £1.8 billion in trade credit with a likely take up of between £0.7 and £1.4 billion. In particular unincorporated and new businesses are likely to benefit from the measure. The research showed that access to non-financial VAT registration data enabled Credit Reference Agencies to establish a credit score for significant numbers of businesses where previously none was established. This was particularly true for new and unincorporated businesses because of the relative lack of information previously held. It also indicated that the increased information, even where a record was already established, enabled the Credit Reference Agencies to amend trade limits for a significant proportion as a result of the additional verifiability of data.

Justification for delegation:

59. It is likely that once the new disclosure regime is implemented, additional purposes will be identified for which a controlled release of VAT registration information will create a public benefit. This power will therefore give the Treasury the flexibility to add extra purposes via the affirmative procedure. The principle of a controlled release is established by virtue of the clause itself, and the protections provided for in the clause will also apply in respect of unauthorised use or disclosure of information for any new purposes provided for in regulations. Regulations will not be able to allow for an open release of data, nor will they be able to go any further than adding to the purposes for which data may be released.

60. In this context, amending the purposes by regulations is justified. The benefits to be accrued may be significantly delayed if primary legislation were to be required. With the

principle of a controlled release and the necessary protections in place, the flexibility on timing that a power enabling the addition of extra purposes will allow for will ensure that benefits to business and the taxpayer are maximised.

Justification for procedure selected:

61. Given that the regulations would be amending primary legislation, the Government considers that the affirmative procedure would be appropriate.

Clause 10: Power for the Commissioners of Revenue and Customs to make regulations concerning the disclosure of information regarding the export of goods

Power conferred on: The Commissioners of Revenue and Customs

Power exercisable by: Regulations

Parliamentary Procedure: Negative resolution

Context and purpose:

62. Clause 10 provides a power for the Commissioners of Revenue and Customs ("HMRC") to make regulations providing for the disclosure of specified information about the export of goods from the UK.

63. The intention is that HMRC will publish a limited set of data about exporters which should assist potential customers, especially from abroad, to contact exporters and thus increase the amount of exports from the UK.

Justification for delegation:

64. This delegation is necessary to allow HMRC to fully consult before making secondary legislation and ensure that the details of the disclosure can be worked out and provided for.

The Government intends to produce a draft of the regulations in time for scrutiny alongside the Bill in the House of Lords.

Justification for procedure selected:

65. The power is very tightly drafted and sets out the categories of information which could be disclosed under the regulations made using the power. There is no power to alter these categories. The statutory instrument will accordingly specify which of the categories of information will be disclosed and can also cover administrative arrangements. It is therefore considered that the negative procedure will be appropriate.

Clause 12: Power for Secretary of State to raise the limit on liabilities incurred in supporting UK exports and UK investments overseas

Power conferred on: Secretary of State

Power exercisable by: Order

Parliamentary procedure: Affirmative resolution in Commons

Context and purpose

66. Clauses 11 and 12 amend the Export and Investment Guarantees Act 1991 (the "EIGA").

67. Clause 11 broadens the support that the Secretary of State, acting through the Export Credits Guarantee Department ("ECGD") can provide to UK exports and exporters.

68. Clause 12 amends section 6 of the EIGA, which specifies limits on the liabilities which the Secretary of State may incur in exercising his powers under sections 1, 2 and 3 of the EIGA.

69. The amendment to section 6(1) consolidates the present sterling and foreign currency limits on the liabilities which the Secretary of State may incur in providing support for exports and insurance for overseas investments into a single limit. This new single limit is expressed in special drawing rights (SDR) and is equivalent to the aggregate value of the existing limits.

70. The amendment to section 6(3) consolidates the corresponding limits in section 6(3) for liabilities arising under portfolio management arrangements entered into by the Secretary of State in exercise of his powers under section 3.

71. The amendment to section 6(4) allows the Secretary of State, by order and subject to affirmative resolution by the House of Commons, to increase either of the new limits up to three times.

72. The order subject to the affirmative resolution procedure by the House of Commons only, as the order relates to a financial matter.

73. This power mirrors that in the current section 6(4) in relation to the present limits and the amendment creates an identical power in relation to the new consolidated limits.

Justification for delegation

74. The Government considers it sensible to renew the existing delegated power to increase the limits on the liabilities which the Secretary of State may incur in exercise of his powers under sections 1, 2 and 3 of the EIGA. This is to allow the Secretary of State to respond quickly to circumstances in which the liability limits are close to being reached. The consequences of a failure so to respond would be the inability to enter into commitments in support of UK exports and exporters within a timeframe required by the commercial needs of the exporters involved. Further, it would constrain the ability of the Secretary of State to enter into arrangements for the purposes of the proper financial management of ECGD's portfolio of risks.

75. The delegated power currently existing in the EIGA has been exercised on three occasions, in each case in relation to the limit on liabilities which the Secretary of State may incur in providing support for exports and insurance for overseas investments under section 1

and 2 of the EIGA where the guaranteed or insured transactions are denominated in foreign currency. The original limit for such liabilities of SDR 15,000 million was increased to SDR 20,000 million in 1995, to SDR 25,000 million in 1998 and to SDR 30,000 million in 2000.

Justification for procedure selected

76. The Government considers that the affirmative resolution procedure by the House of Commons remains appropriate, replicating the level of scrutiny currently existing in the EIGA.

Presentment of cheques

Clause 13: Power to provide for the collecting bank to be liable to compensate the paying bank and drawer for losses resulting from payment of a cheque presented by electronic image

Power conferred on: The Treasury

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution on first exercise, negative resolution thereafter

Context and purpose

77. Clause 13 inserts a new Part 4A into the Bills of Exchange Act 1882, enabling cheques and similar payment instruments to be presented by the provision of an electronic image of the instrument, rather than the instrument itself. This will enable cheques to be processed more quickly and efficiently, and enable banks to offer novel products to customers, such as the ability to pay in cheques through a smartphone app. The provisions also relate to other similar instruments, and the references to cheques below should be read as including reference to those other instruments.

78. New section 89D of the 1882 Act gives a power for the Treasury to make regulations providing that, where a person suffers a loss of a specified kind in connection with electronic presentment, or purported electronic presentment, of a cheque, the person may claim compensation for that loss from the bank (referred to in this paragraph and the next as the "responsible bank") which is responsible for collecting the funds on behalf of the customer or, if the instrument is held by a bank on its own account, that bank. The responsible bank will also be, in almost all circumstances, the bank which is responsible for the decision about how and by whom the electronic image is created. Subsection (5) allows the regulations to impose strict liability on the responsible bank, and for the amount of compensation payable to be reduced by virtue of the claimant's actions.

79. The Government intends to make regulations under this power which enable the drawer of a cheque, or the bank on which a cheque was drawn (and which therefore paid the cheque) to claim compensation from the responsible bank in certain circumstances, for example where a defect in the image provided leads to the payment being made to the incorrect account. The Government is minded to impose strict liability on the responsible bank for such losses, subject to the responsible bank showing that the problem was caused by a matter out

of its control, or contributory negligence on the part of the drawer or paying bank. The effect of this will be to ensure that the responsible bank takes appropriate action to avoid risks that may arise out of the new method of presenting cheques. Although the Government does not currently intend to make similar provision for losses incurred by persons other than the drawer or paying bank, it could become apparent in due course that such provision would be desirable if losses are in fact incurred by other persons in connection with electronic presentment and are not recovered.

80. **The Government will make available a draft of the regulations indicating the manner in which it intends to exercise this power at Lords Committee stage of the Bill.**

Justification for delegation

81. The content of these regulations is likely to include a significant amount of technical detail relating to the clearing arrangements for cheques which is not appropriate for inclusion on the face of primary legislation. Further, the content will necessarily depend on the way in which the clearing arrangements for cheques are set up by industry, which is likely to change as a result of this legislation. It may also need to develop over time in case those arrangements change, or to reflect risks to do with the new system which emerge only after it starts to be used, or expected risks which do not cause difficulties in practice. It may therefore be necessary for these regulations to be amended in certain respects over time.

Justification for procedure selected

82. The establishment of a new right for paying banks and drawers to make a claim, and for responsible banks to be liable for losses, is a significant one, and it is appropriate for the initial regulations establishing this right to be subject to the affirmative resolution procedure. However, amendments to the regulations thereafter are likely to be much less significant, addressing matters such as the technical issues that may give rise to losses. The Government therefore considers that the negative procedure is appropriate for subsequent amendments.

PART 2: REGULATORY REFORM

Review of business appeals procedures

Clause 18: Power to specify regulatory functions in respect of which a reviewer (the appeals champion) must be appointed

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and purpose

83. Clause 17 places a duty on the Secretary of State to appoint an officer holder (known as an appeals champion) to review and report on processes for making appeals and complaints against regulators. The appointment must be made in respect of regulatory functions which will be brought into scope of these provisions by regulations. The office holder (reviewer),

once appointed, has a duty to scrutinise and report on that regulator's appeals processes from the perspective of the businesses it regulates.

Justification for delegation

84. The Government considers that bringing regulatory functions into scope is appropriate for delegated legislation because the legislation, which will cover of up to fifty-eight regulators, will need regular updating, as the names and functions of regulators change due to machinery of Government and other organisational changes.

Justification for procedure selected

85. The Government considers the affirmative resolution procedure appropriate for this measure. Parliamentary scrutiny will provide a significant safeguard in relation to bringing regulators into scope of this policy, as full consideration and debate as to which regulators will be within scope of the appeals champion provisions will ensure that the provisions are applied to appropriate regulators.

86. There is precedent for bringing regulators into scope of an overarching policy to improve the processes of regulators. Provisions in the Legislative and Regulatory Reform Act 2006 place a duty on regulators to have regard to the better regulation principles and place a duty on non-economic regulators to have regard to a statutory Code of Practice. These duties are applied to regulators by way of affirmative secondary instrument bringing regulatory functions into scope, under section 24 of that Act.

Clause 19: Power of the Secretary of State to issue guidance to reviewers

Power conferred on: the Secretary of State

Power exercised by: Guidance

Parliamentary Procedure: None

Context and purpose

87. Clause 19 provides a power for the Secretary of State to issue guidance to Appeals Champions about the exercise of their statutory functions. The guidance will be used to enable the Government to set consistent policy and standards across over 50 non-economic regulators potentially in scope.

Justification for delegation

88. This guidance cannot be prescriptive, due to the diversity of regulators potentially in scope and so compliance with it is not mandatory – rather due regard must be given to it. However, the guidance will aim to secure some common outcomes to improve the procedures for appeals and complaints. It will also provide detailed explanation about the limits of the Champions role in accordance with their statutory underpinning, to ensure that this is well understood. The contents are therefore not considered appropriate for legislation, as they will be explanatory in nature.

89. The Government plans to hold a series of workshops in January and February next year with Regulators, business and other stakeholders to ensure that the guidance meets their needs, and will publish draft guidance for public consultation shortly after. After consultation, the guidance will be published before the Champion measure is implemented.

Justification for procedure

90. No parliamentary procedure is considered appropriate for guidance which is both administrative in nature and which does not require precise outcomes.

Report on investigations under financial regulatory' complaints scheme

Clause 20: obligation for Independent Complaints Commissioner to produce report

Power conferred on: The financial services regulators (the Bank of England, the PRA and the FCA).

Power exercisable by: Publication of document by the regulators

Parliamentary procedure: None

Context and purpose

91. The financial services regulators (the Bank of England, the Prudential Regulation Authority and the Financial Conduct Authority, together "the regulators") are required to make a scheme for the investigation of complaints by an independent complaints commissioner ("ICC"). The ICC is appointed by the regulators with the consent of the Treasury. This clause imposes a duty on the ICC to prepare an annual report on themes emerging from investigations conducted under the scheme.

92. The report must include an assessment of whether the regulators' complaints handling procedures are fair and open to complainants, including where appropriate an assessment in relation to different categories of complainant. This clause will improve scrutiny of the regulators complaints handling.

93. Before making the scheme the regulators must publish a draft of the scheme and take account of any representations made about the draft.

94. This is not considered to be a legislative power, because although the regulators have a duty to make a complaints scheme, the scheme itself is simply a published statement of how they will collaborate with the ICC in handling complaints, and does not comprise binding legal rules.

Justification for delegation

95. The complaints scheme is made by the regulators. It is therefore appropriate to introduce the new reporting duty by requiring the scheme to place such a duty on the ICC. This will ensure all the provisions of the scheme are in one place, and can be easily referred to by those making, or considering making, a complaint.

Justification for procedure selected

96. The arrangements for the scheme are made by the regulators, and accordingly are not subject to direct Parliamentary scrutiny.

Secondary Legislation: duty to review

Power to issue guidance

Clause 31(3): Power for Secretary of State to issue guidance about the factors to be taken into account in determining whether it is appropriate to make provision for review.

Power conferred on: the Secretary of State

Power exercised by: guidance

Parliamentary Procedure: none

Context and purpose

97. Clauses 28 to 32 create a duty on a Minister of the Crown making some types of secondary legislation to either include provision in that legislation for its automatic review, or make a statement that such review provision is not appropriate.

98. Clause 31 sets out the circumstances in which review provision may not be appropriate (where a review would be disproportionate given the economic impact of the legislation, or where a review would be undesirable for particular policy reasons) but these circumstances are not exhaustive.

99. In order to give Departments assistance in considering whether review is appropriate, the Secretary of State will issue guidance setting out an approach that requires balancing the benefits of conducting a review against any potential adverse effects of doing so, and the factors to be taken into account in weighing these up.

Justification for not legislating

100. This guidance is intended to be indicative rather than prescriptive. It sets out factors to be taken into account and explains how to approach the question of whether a review is proportionate. By its nature, these requirements are not suitable for legislation, as they are not binding. Rather, they will be instrumental in informing Departments' decision making in how to discharge the statutory duty to either include review provision or determine that it is not appropriate to do so.

Definitions of small and micro business

Clauses 33(4)-(7) and 34: powers to make regulations about definitions of small and micro business

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose

101. Clauses 33 and 34 are concerned with providing statutory definitions of the expressions "small business" and "micro business". The effect will be that when these expressions are used in secondary legislation made by UK Ministers and are defined in that secondary legislation by reference to these clauses, these expressions will have the particular meanings provided by these clauses.

102. The purpose is to make it more straightforward for future secondary legislation made by UK Ministers to exempt small and micro businesses from regulation or to mitigate any disproportionate impact of regulation on such businesses, while at the same time supporting and promoting consistency in the definitions of "small business" and "micro business" used in such cases.

103. It is intended that the definitions should be modelled closely on the definitions of "small enterprise" and "microenterprise" in the Annex to Commission Recommendation 2003/361/EC, while also explicitly including voluntary and community bodies. The EU definitions have a number of detailed, technical aspects and the Commission Recommendation is supplemented by a User Guide.

104. Clause 33(2) and (3) sets out the basic definitions of "small business" and "micro business". Clause 32(4) then gives the Secretary of State the power to make, by regulations, further provision about the meanings of these expressions. These regulations are referred to as "the small and micro business regulations". The basic definitions in clause 33 rely on the concepts of "headcount of staff", "turnover" and "balance sheet total". Clause 33(6) provides for these concepts to be defined in the small and micro business regulations, and for the regulations to set out the financial thresholds which will apply for establishing whether an undertaking is a "small business" or a "micro business" (respectively the "small business threshold" and the "micro business threshold").

105. Clause 34 sets out the other detailed provision which the small and micro business regulations can make. In summary, the regulations will also be able to –

a. determine how an undertaking's staff headcount, turnover and balance sheet total are to be calculated for the purposes of the definitions;
b. provide, when assessing whether a particular undertaking is a small business or a micro business, for the headcount, turnover and balance sheet total of connected undertakings to be taken into account (entirely or partly);
c. lay down (by reference to "assessment periods") rules about the how long an undertaking must meet the relevant size conditions before it is classified as "small" or "micro" and how long before it ceases to be classified as such;
d. provide for the way in which new undertakings are to be assessed;
e. make provision to deal with avoidance; and
f. provide for particular descriptions of undertaking to be incapable of being classified as small or micro businesses, irrespective of their size.

Justification for delegation

106. Subsections (2) and (3) of clause 33 set out the key elements of the definitions of small and micro business, but rely on regulations to complete the picture. The intention is to follow closely the substance of the corresponding definitions in Commission Recommendation 2003/361/EC. Many aspects of the definitions will need to be elaborated (and appropriately tailored to voluntary and community bodies) and the detail required for full legislative definitions along these lines is extensive and in many respects technical. In the Government's view, this level of detail is more suited to secondary legislation.

107. Further, some flexibility is needed to adjust the definitions in future, for a number of reasons. The EU definitions may be subject to change and this may require corresponding amendments to the UK definitions. Further, the financial thresholds in the EU definitions are expressed in euros and it may be necessary to adjust the sterling equivalents in the UK definitions in the light of exchange rate changes. Future amendments to wider UK legislation may also mean that the detail of the UK definitions needs to be changed (it is very likely that there will need to be cross-references to, and reliance on concepts in, wider UK legislation – for example in defining the "turnover" of various kinds of business organisation).

108. Finally, the aim is to produce clear definitions which are as straightforward as possible to apply in practice, despite the technical detail, and difficulties of interpretation of the more detailed aspects of the EU definition mean that it may be necessary to adjust elements of the UK definitions more often than Parliament could be expected to legislate on the matter. In the light of all these considerations, the Government considers that much of the detail of the proposed definitions is much more suited to secondary legislation than to primary. The Government considers that it has struck the right balance.

109. In doing so, the Government has been careful to ensure that there are, on the face of the powers, clear indications of what the regulations are likely to provide. Thus, subsections (2), (4), (6) and (7) of clause 34 set out the provision which the powers can in particular be used to make. In doing so, the Government has sought to produce an appropriate division of detail between primary and secondary legislation while ensuring that the powers provide a sufficiently clear indication of the policy.

The Government intends to produce a draft of the small and micro business regulations in time for scrutiny alongside the Bill in the House of Lords.

Justification for procedure selected

110. Clause 33(7) provides that the negative resolution procedure is to apply to the small and micro business regulations made under clauses 33 and 34.

111. It will not be possible for the regulations to amend primary legislation. As explained above, the regulations will make extensive detailed, and in many respects, technical provision. The intention is to follow closely the definitions of "small enterprise" and "microenterprise" in Commission Recommendation 2003/361/EC, and the powers make clear what provision can be made. In the Government's view, the regulations are not likely to be politically controversial. In the light of these considerations, the Government considers the negative resolution procedure to be appropriate and justified.

Home businesses

Clause 35: Exclusion of home businesses from Part 2 of the Landlord and Tenant Act 1954

Power conferred on: *The Secretary of State, the Welsh Ministers*

Power exercisable by: *Regulations*

Parliamentary procedure: *Negative resolution*

Context and purpose

112. This clause provides the Secretary of State in relation to England, and the Welsh Ministers in relation to Wales, with a new power to make regulations under the Landlord and Tenant Act 1954 to prescribe cases of what are or will not be home businesses. This is for the purposes of a new home business exception to the security of tenure provisions in that Act for premises occupied in whole or in part for the purposes of a business. Part 2 of the Landlord and Tenant Act 1954 ("the 1954 Act") contains provisions for security of tenure for tenants of premises that are occupied for business purposes, or for those and other purposes. The 1954 Act provisions may offer tenants' rights to remain in premises that exceed those available under legislation applicable to dwellings, but can be simply avoided by the inclusion of a covenant against business use. Accordingly, the law as it stands establishes a strong incentive for landlords to include such a covenant in the tenancies of dwellings. At the same time, tenants in the large and growing number of tenants who do conduct business activities in their homes are likely to be in breach of the terms of their tenancies.

113. The clause establishes a new concept of the "home business", which may be carried on in the home without the home therefore coming within the ambit of the 1954 Act. A home business is defined by subsection (4) of the new section introduced into the Act by the clause as "a business of a kind which might reasonably be carried on at home". There is a specific exclusion in subsection (5) for the sale of intoxicating liquor on the premises, and a power in subsection (6) to prescribe cases of what are, or are not, to be home businesses. To come within the home business exception the tenancy a must relate to a home let as a separate dwelling, to an individual tenant or tenants, for occupation as a home and must permit, or permit the landlord to consent to, the home business being carried on. Alternatively, where a tenancy prohibits any business use, if the landlord later consents to, or acquiesces in, the carrying on of a home business, the tenancy will also come within the exception. It is the power in subsection (6) to prescribe cases of home businesses that is the subject of this memorandum.

114. The clause is intended to remove the incentive to include an absolute covenant against business use in all tenancies of dwellings, and thus facilitate the operation of home businesses. The delegation is designed to help attain that objective and to ensure that the new exception works as it should for the benefit of all interested parties.

Justification for the delegation

115. The definition of a home business, taken together with the conditions that must apply to a tenancy if the home business exception is to apply firmly establish the main parameters of the new provision made by the clause. The borderline between home businesses and businesses that come within the ambit of the 1954 Act will still fall to be considered from time to time however, and it may be that in the light of experience further stipulation is needed for cases that may or may not qualify as home businesses. It may also be that the new provision may result in types of business being carried on in dwellings that have not been foreseen and concerning which questions may arise whether they are consistent with their domestic character or their setting in a residential area. Here again, the power will allow those cases to be stated explicitly to be outside the terms of the exception if necessary, so that they will not be encouraged. There is no immediate intention to make regulations under the power. It might be necessary to use it however if, for example, there were doubt whether shop premises let together with living accommodation came within the exception, in which case regulations could stipulate that they should not.

Justification for the procedure selected

116. The Department considers that the negative procedure is appropriate for the exercise of this power. The major parameters for the operation of the home business exemption, and for the definition of a home business itself, are established in primary legislation by the clause. The power allows for the refinement of the operation of the exception to ensure that it operates consistently with the intention expressed in those parameters. The power cannot be used to widen the scope of the exception. Any use of it would be likely to be explicitly to exclude particular cases that fall outside the generic definition of a home business from the operation of the exception.

Liability of bodies concerned with accounting standards

Clause 37: New section 18A, Companies (Audit, Investigations and Community Enterprise) Act 2004

Power conferred on: the Secretary of State

Power exercised by: Order or regulations

Parliamentary Procedure: Negative resolution

Context and purpose

117. Section 16 of the Companies (Audit, Investigations and Community Enterprise) Act 2004 ("the 2004 Act") provides that the Secretary of State can make a grant to a body carrying on activities concerned with the matters set out in section 16(2). These activities include issuing accounting standards for auditors and actuarial work, investigating departures from such standards, exercising the functions of the Secretary of State under Part 42 of the Companies Act 2006 (the Secretary of State's audit regulatory functions), acting as the "Independent Supervisor" in respect of audits of companies owned by the Government and supervising the regulatory functions of the professional accountancy bodies.

118. Section 18 of the 2004 Act provides that where a grant has been paid to a body under section 16, the body has no liability in damages arising for certain acts or omissions occurring

during the period of 12 months beginning with the date on which the grant is paid to it. The Financial Reporting Council ("FRC") currently carries out the regulatory functions under section 16(2) and is exempt from liability under section 18 by virtue of a grant it receives.

119. The Government *continues* to believe that it is desirable to exempt certain persons or bodies from liability in damages for acts or omissions in connection with the activities set out at section 16(2) of the 2004 Act. The existing exemption (section 18) limits those benefitting from the exemption to bodies in receipt of a grant and limits the application of the exemption to acts or omissions occurring within 12 months of the payment of a grant.

120. The Government wants to be able to exempt from liability a body carrying out some or all of the activities set out in section 16(2) without the corresponding need to give them a grant in order for the exemption from liability to apply. Simply removing the "grant-recipient" condition from section 18 would be too far-reaching in its consequences. It would be difficult to determine whether a body was or was not entitled to the exemption and could lead to unintended consequences by allowing bodies which are not currently grant-recipients to rely on the exemption. Accordingly, the Government needs another means of identifying and controlling the applicability of the exemption.

121. Clause 37 repeals section 18 of the 2004 Act and replaces it with a new 18A. Section 18A gives the Secretary of State the power by order or regulations to exempt specified bodies or persons. Clause 37 further provides that the Secretary of State can apply the exemption subject to specified conditions or for a specified period making the exemption potentially narrower in scope than the exemption it replaces.

122. Clause 37, like the section it replaces, provides that the exemption for liability in damages:

- extends to the body's members, officers and employees in respect of anything done or omitted to be done in carrying on the section 16(2) activities or the purported carrying on of such activities; and
- will not apply where the act or omission is shown to have been in bad faith or where such act or omission was unlawful under section 6(1) of the Human Rights Act 1998.

Justification for delegation

123. The Government has no immediate plans to halt the grant it gives to the FRC or to grant an exemption to any other body to carry out section 16(2) activities. However, should circumstances change, the Government requires flexibility as to who precisely should benefit from the exemption at any particular time and as to whether it would be appropriate to apply any related conditions or time-periods during which an exemption is to apply.

124. It is possible that different regulatory bodies may carry out various of the functions under section 16(2) in the future and by taking a power, the exemption can be adapted as necessary. It will also enable an exemption to be put in place quickly should a new or alternative body be asked to take the section 16(2) activities.

Justification for procedure selected

125. The Government considers that the negative resolution procedure is appropriate for this power. The power is subject to the negative resolution procedure save where it is used

tandem with powers which are subject to the affirmative procedure, where it will be subject to the affirmative procedure.

126. The effect of clause 37 is to replace an existing exemption from liability contained in primary legislation where a grant has been given by Government to a power for the Secretary of State to exempt.

127. The current position is that the 2004 Act exempts bodies from liability automatically if they perform requisite activities and receive a grant from the Secretary of State. Thus Parliament has no say in who receives the exemption. These provisions will remove this automatic exemption where a body receives a grant and will require bodies receiving the exemption to be set by regulations. The negative resolution procedure represents an increase in scrutiny when compared to retaining the status quo.

128. The Government considers that this is a technical, regulatory matter. It does not therefore expect the use of the new power to attract widespread interest. In the circumstances, it does not consider that the additional procedures and parliamentary engagement associated with using an affirmative resolution statutory instrument can be justified whenever the power is exercised.

PART 3: PUBLIC SECTOR PROCUREMENT

Clause 38: Power to make regulations about procurement

Power conferred on: Minister of the Cabinet Office or Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose

129. The overarching intent behind the procurement provisions is to create a simple and consistent approach to procurement across public sector authorities so that small businesses can gain better and more direct access to this market.

130. Public procurement for certain goods, services and supplies above specified financial thresholds is regulated by EU law. However, by its nature small business is more likely to be attracted to public procurement opportunities available below these financial thresholds. The aim of these provisions is both to remove barriers to small business participating in procurements and to streamline procurement practices across the public sector.

131. This power will enable a Minister to impose duties on contracting authorities in respect of the exercise of their functions in relation to procurement. For these purposes, "the exercise of functions relating to procurement" includes the exercise of functions in preparation for entering into contracts and the management of contracts. "Contracting authority" is defined by reference to the Public Contracts Regulations 2006, albeit that bodies whose functions are wholly or mainly devolved are excluded.

132. In particular, the Regulations may impose:

- duties to exercise functions relating to procurement in an efficient and timely manner;
- duties relating to the process by which contracts are entered into (including timescales and the extent and manner of engagement with potential parties to a contract);
- duties to make available without charge, information or documents, or any process required to be completed in order to bid for a contract;
- duties relating to the acceptance of invoices by electronic means (including a prohibition on the charging of fees for processing such invoices, the publication of reports relating to the number of such invoices received or the electronic systems that must be used by a contracting authority);
- a duty to publish reports about compliance with the regulations.

133. Before making regulations under this section, the clause requires the Minister to consult those who he or she considers appropriate. The clause also gives the Minister the power to issue guidance relating to the regulations, to which contracting authorities must have regard. Any guidance or revised guidance must be published.

134. **A Government consultation on the use of this power closed on the 13th November 2014 and the responses are being considered. The Government aims to make illustrative draft regulations available to assist with the scrutiny of the Bill in the House of Lords.**

Justification for delegation

135. There are a number of precedents for public procurement legislation being contained in secondary legislation, for example the Public Contracts Regulations 2006 (SI 2006/5), the Utilities Contracts Regulations 2006 (SI 2006/6) and the Defence and Security Public Contracts Regulations 2011 (SI 2011/1848). The purpose of this power is to permit the Minister to make further secondary legislation for public procurement matters where vires under section 2(2) of the European Communities Act 1972 (under which the majority of existing legislation has been made) is absent or questionable. The flexibility of secondary legislation is required as it is likely to be necessary to adapt or add to the duties imposed to ensure they remain effective, continue to achieve the overall aim and take account of changing economic circumstances.

136. The purpose of the guidance would be to guide contracting authorities in how they fulfil the duties set out in the regulations. The Government envisages that the guidance would provide examples of good practice and principles to which contracting authorities should have regard. The Crown Commercial Service already provides a considerable amount of guidance on public procurement including Procurement Policy Notes and on the Lean Sourcing principles, and it is possible that the guidance published under clause 38 would draw from this material.

Justification for procedure selected

137. The Government considers that the negative resolution procedure, alongside the consultation requirement imposed by the clause, provides the necessary level of

Parliamentary scrutiny of the regulations. The procurement regulations referred to above, which already place significant obligations on contracting authorities in respect of procurement, were all made under the negative resolution procedure. The regulations are likely to need to be amended, possibly to make changes to technical details and/or to respond to new economic circumstances when speed may be of the essence. Technical changes could include changes to the names of websites on which information relating to procurements must or might be published (for example, the Cabinet Office maintains the Contracts Finder and Procurement Pipelines sites), changes in how to satisfy reporting requirements (for example, whether reports must be placed on internet and if so where and in what form), or minor changes to the number of days within which a process must be completed.

138. Since the guidance will merely supplement the regulations, and is not in itself legislation, the Government considers it unnecessary for the guidance to be subject to parliamentary procedure. The clause requires that the guidance, and any revised guidance, is to be published.

PART 4: THE PUBS CODE ADJUDICATOR AND THE PUBS CODE

Clause 41: Power to make a Pubs Code

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and purpose

139. Clause 41 imposes a duty on the Secretary of State to make regulations ("the Pubs Code") about practices to be followed by pub owning businesses in their dealings with their tied pub tenants. The Code will set out obligations on pub-owning businesses in their dealings with their tied tenants. The Code will implement two important principles set out in clause 40; the first is that there should be fair and lawful dealing between pub companies and their tenants, the second is that tied pub tenants should not be worse off as a result of any product or service tie. It is intended that the Code will provide all tied tenants with increased transparency and fair treatment. An updated draft Code was published ahead of Commons Report Stage on 14th November 2014.

140. Clause 42 makes further provision about what must be included in the Pubs Code. In particular it provides that the Code must include a requirement that large pub-owning businesses offer their tied tenants a "market rent only option". Subsection (11) provides that the Secretary of State must implement the measures required by the clause by regulating the Pubs Code and that those regulations are to be subject to negative resolution procedure. In this respect, the drafting of the clause (which was a non-Government amendment made at Report) does not work, because the Pubs Code itself is subject to the affirmative resolution procedure and, as such, any amending regulations should be subject to that procedure. The Government will need to address this at Lord's Committee.

141. Clause 43 imposes a duty on the Secretary of State to review the Code, an initial review by 31 March following the second anniversary of the Code coming into force and

further reviews every three years thereafter. The purpose of the review is to establish the extent to which the Code is delivering the principles set out above and whether the Code can be revised to more fully achieve its objectives. The Secretary of State must publish a report of the review's findings and lay a copy of the report before Parliament.

Justification for the delegation

142. The power at clause 41 is delegated because the detail of the Code and the duties imposed on pub owning businesses are more appropriate for secondary rather than primary legislation. The Secretary of State has a duty to consider how the Code could be revised to more fully achieve the principles set out above. The Code will need to be reviewed in the context of its consistency with the principles cited in clause 41 and the changing face of the pubs industry.

Justification for procedure selected

143. The Government considers that the affirmative resolution procedure provides the safeguard required in relation to issuing a Pubs Code, as it will provide Parliament with the opportunity to consider and approve the detail of the Code, and its impact and burdens on ties tenants and pub-owning companies.

Clause 44(1): Power to make further provision about the effect of inconsistency with the Pubs Code etc.

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

144. Regulations made under clause 44 sub-paragraph (1) may make void or unenforceable any term of a tenancy or other agreement between a pub-owning business and their tied tenant to the extent that it is inconsistent with a provision of the Pubs Code. In particular terms purporting to penalise tied pub tenants for initiating rent or fee assessments in accordance with the Code, or those purporting to provide that an assessment for the rent or fee due may only be initiated by the pub-owning business, or that it will only determine an upward increase may be rendered void. Also, terms purporting to penalise a tied pub tenant for requiring a pub-owning business to act /not act in accordance with any provision of the Code which the pub- owning business is bound to comply may also be rendered void.

145. The power also allows the Secretary of State to make further provision about the effect of non-compliance with the Pubs Code and/or the effect of a term of a tenancy or other agreement being void as a result of this clause or the regulations made under it.

146. Such regulations can apply to tenancies or agreements entered into prior to the Code coming into force.

147. The effect of Clause 44(4) is to make a term of any agreement between a tied pub tenant and a pub-owning business void if it purports to prevent the tenant from referring a dispute to the Adjudicator for arbitration in accordance with clause 44 or purports to penalise a tenant for making such a referral. Clause 44(5) makes unenforceable any term of an arbitration agreement between a tied pub tenant and a pub-owning business which is inconsistent with the clauses 47, 48 or any regulations made under 48(7). This applies to terms of arbitration agreements entered into before these Bill provisions come into force.

148. Regulations made under clause 44 (7) may make provision about the effect of a term of an agreement being void or unenforceable as a result of subsections (4) and (5) described above.

Justification for the delegation

149. Clause 44 goes to the relationship between existing contractual arrangements between tenants and pub-owning businesses and statutory provisions. Existing contracts are likely to include tenancies and franchises, and might also include an arbitration agreement which is an agreement to submit to a specific arbitration agreement in the future.

150. This is a complex area and whilst particular terms of tenancies and other agreements, such as terms purporting to impose penalties on tied pub tenants for initiating rent assessments, those purporting to provide that an assessment of the rent due may only be initiated by the pub-owning company or that it will only determine an upward increase in rent are very likely to be inconsistent; until the provisions of the Code are settled it is not possible to describe the terms of the relevant agreements which would be inconsistent with the Code and therefore which should be rendered void. The power at clause 44 (1) will allow further clarification to be made.

151. The power will also allow for provision to be made as to the validity of other terms contained in tenancies, arbitration agreement and other agreements in circumstances where terms in these tenancies or other agreements are void as a result of being inconsistent with statutory provision.

Justification for the procedure selected

The Government considers that given the potential impact any changes to contractual arrangements between tenants and pub-owning companies could have on both parties the affirmative resolution procedure is appropriate.

Clause 48(2): power to specify a fee for arbitration

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

152. This power allows the Secretary of State to make regulations setting a fee to be paid by tied pub tenants in relation to any dispute which the Adjudicator is arbitrating. The regulations can specify when the fee is to be paid, in what circumstances the fee is waived, and the circumstances in which the fee is to be refunded to the tied pub tenant.

Justification for the delegation

153. It is likely that details regarding amount of fee, timing of payment and particular circumstances in which a fee may be waived or refunded to the tied pub tenant are likely to be amended in future. This power allows for the flexibility to do this.

Justification for procedure selected

154. It is considered that the potential impact that these regulations could have for tied pub tenants requires the scrutiny afforded by the affirmative resolution procedure.

Clause 48(7): Power to cap the costs of arbitration paid by the tied pub tenant

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

155. The effect of these regulations is to provide for a cap on how much the tenant should pay towards the costs of arbitration. Costs of arbitration include the pub-owning business's costs as well as the tenant's own costs.The purpose of the power is to ensure that tenants are not deterred from referring breaches of the Code to arbitration due to the potential for them to face significant costs.The regulations may provide that the costs faced by the tenant can be limited and the specific circumstances in which the tenant may be required to pay costs above that limit.

Justification for the delegation

156. The power allows for the regulations either to state a figure or to set out how any amount is to be determined. Any figure is likely to need amendment in the future and this power will allow for the flexibility required.

Justification for procedure selected

157. These regulations will potentially have a financial impact on pub-owning businesses and it is felt that the affirmative procedure will provide the appropriate safeguards for a measure having these effects.

Clause 55(6): power to specify permitted maximum penalty or how this is to be determined

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and purpose

158. Following an investigation as to whether a pub-owning business has breached the Pubs Code, the Adjudicator must consider whether to use any of his enforcement powers. The Adjudicator may choose to impose a financial penalty on a pub-owning business. This financial penalty must not exceed a permitted maximum.

159. Clause 55(6) requires the Secretary of State to make regulations either specifying a permitted maximum or alternatively specifying how the permitted maximum is to be determined.

Justification for delegation

160. The Government considers that any maximum financial penalty, or how it is to be determined, should be clearly set out so as to provide transparency for all involved in the pubs industry. Equally though, to simply insert a maximum into the Bill, without consultation with stakeholders, would not be appropriate. The Adjudicator is obliged to consult before publishing any guidance on the criteria that should be adopted in deciding the amount of any financial penalty. The Government has committed to consulting on the maximum financial penalty in advance of this.

Justification for the procedure selected

161. The Government recognises that the level of a maximum penalty or the method for determining such could have a sizeable financial impact on pub owning companies and that the scrutiny afforded by the affirmative procedure is therefore required.

Clause 63(1): Power to abolish the Adjudicator

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution, negative resolution for clause 63(1) (c)

Context and purpose

162. Clause 62 requires the Secretary of State to review the Adjudicator's performance after approximately two years, and then after each successive period of three years. The review must consider how effectively the Pubs Code has been enforced. A report of the review's findings must be published and laid before Parliament.

163. The outcome of a review may be that there is no change to the status quo; or it may be that the Secretary of State simply exercises the power in clause 62(8) to give guidance to the Adjudicator.

164. However, another possible result of a review is that the Secretary of State exercises by regulations a power to abolish the Adjudicator.

165. Clause 63(1)(a) enables such abolition if the Secretary of State is satisfied that the Adjudicator has not been sufficiently effective.

166. Clause 63(1)(b) enables abolition if the Secretary of State is satisfied that it is no longer necessary for there to be an Adjudicator to enforce the Pubs Code. For example, this might be because the evidence of a period of operation is that there are very low levels of disputes, complaints, investigations and non-compliance. Another possibility is that because the Adjudicator has been particularly successful in improving compliance, the Secretary of State is confident that this compliance will continue in the absence of the Adjudicator.

167. Where there are regulations to abolish the Adjudicator, subsection (3) permits the regulations to amend or repeal these provisions (as enacted) or any other enactment for that purpose. Amendment might, for example, be needed in order to allow the Adjudicator to exercise only certain functions pending abolition.

168. The office of the Adjudicator will impose costs on businesses, and in particular on pub-owning businesses, including through levy funding. The Government considers that, as a matter of better regulation, the continuation of this office and its functions should be a matter of regular review to ensure that their continuation is justified.

169. If the outcome of a review is that the Adjudicator should be abolished, then this should be capable of taking place quickly, rather than the office continuing, while parliamentary time is found to achieve this in primary legislation. In the case of abolition it might be that a different approach to enforcement would be needed which might itself require new primary legislation. In the meantime, it might not be appropriate for the Adjudicator to continue.

170. As regards clause 63(1)(c), if the Pubs Code were revoked then there would no longer be a Pubs Code to enforce and, again, there would be no reason to retain the office of the Adjudicator.

Justification for procedure selected

171. Abolition would be an important decision involving an exercise of judgment by the Secretary of State, following a detailed consultation and review. It would mean the end of an office created by primary legislation. Therefore it is considered that the affirmative procedure is needed.

172. By contrast regulations made under clause 63(1)(c) would follow regulations revoking the Code, which would themselves have been subject to the affirmative procedure.

Clause 66(2): power to determine in relation to a particular case who is to be treated as a pub owning company

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and purpose

173. Clause 66(1) defines a pub-owning business as a landlord of 500 or more tied pubs. But clause 66(2) gives the Secretary of State power to make regulations to provide that in specified circumstances a group company of the landlord can also be treated as a pub-owning business (and so will be bound by the provisions of the Code and Part 4 of the Bill). The power also allows the regulations to confer discretion on the Adjudicator to decide in specified circumstances whether a group company of the landlord is to be treated as a pub-owning business. Group companies can be brought within the scope of the Code in the context of, for example, arbitration, investigations, imposition of financial penalties and consideration of the amount of a penalty by reference to turnover.

Justification for the delegation

174. This power is necessary to ensure that the definition of a pub-owning business can encompass any group companies in certain circumstances.

Justification for procedure selected

175. How a pub owning business is defined can have a very large impact on those falling within the definition. For example, if a financial penalty is imposed under clause 55 the difference between group turnover and turnover of an individual pub-owning business is likely to be very significant. It is considered appropriate therefore that the affirmative procedure is necessary in this case.

Clause 66(6): power to amend clause 66(3) and 66(4)

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and purpose

176. Clause 66 as it was on introduction in the House of Commons included a definition of a "pub-owning business" (the landlord of one or more tied pubs) and stipulated that if a pub-owning business was the landlord of 500 or more tied pubs for the requisite period, then that business is a pub-owning business. (The definition of large pub-owning business was needed principally for the provision that then Code may require "large pub-owning businesses" to provide parallel rent assessments.)

177. As a result of non-Government amendments made at Commons Committee, the definition of a "pub-owning business" is now, essentially what was a large pub-owning business. Clause 66(6) purports to provide a power to amend the number of tied pubs (and period in which they were owned) for what was the definition of a "large pub-owning business". That power would not, as it is currently drafted, be effective for the purposes of

amending the definition of "pub-owning business". The Government intends to revisit this power at Lords Committee and will provide the Committee with a supplementary memorandum in due course.

Clause 68: Power to grant exemptions from the Pubs Code

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and purpose

178. Clause 68 allows the Secretary of State to exempt from the Pubs Code dealings with a particular type of tenant, or in relation to particular types of premises. This can be achieved in two ways: by disapplying the Code or parts of it to dealings between pub-owning businesses and specified tied tenants or pubs or specified tied pubs, or to dealings between specified pub-owning businesses or those of a specified description and tied pub tenants of a certain description.

179. Subsection (3) also provides that regulations may set out circumstances where a particular description of tied pub is not counted for the purposes of calculating whether a company is a large pub owning business. Again, this power needs revisiting in light of the changes referred to above under the power in clause 66(6).

Justification for the delegation

180. This power will allow the Secretary of State to ensure that the Pubs Code or parts of it do not apply to certain types of pub-owning business because of the nature of the tenancy, licence or agreement entered into between that pub - owning business and a tied pub tenant. This will ensure that franchises (other than pub franchises) can be clearly exempted from the Code.

Justification for the procedure selected

181. The government appreciate that this is a wide power that can allow particular premises or tenants to be excluded from the statutory framework or from parts of it. Many implications for pub-owning companies will flow from inclusion within the Code and therefore the scrutiny afforded by the affirmative procedure is necessary. Clause 70(3) provides that regulations made under this power will not be subject to the hybrid instrument procedure. This is necessary because if regulations made under 68 affected franchises more than other types of tied pubs the instrument would be likely to be hybrid as it would be treating franchises differently than others in the same class. The Government is satisfied that the private interests of franchises (other than pub franchises) will be sufficiently protected because they will not inadvertently fall within the provisions of the Pubs Code.

Clause 69(1): Power to define meaning of a parallel rent assessment

Power conferred on: the Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative resolution

Context and purpose

182. Regulations made under clause 41 can require large pub-owning companies to provide parallel rent assessments in relation to their tied pub tenants and can confer on the Adjudicator functions in relation to parallel rent assessments. This clause gives the Secretary of State power to prescribe what is meant by a parallel rent assessment in regulations.

Justification for the delegation

183. Following Royal Assent the government intends to consult on the version of the draft Pubs Code published at Commons Report stage. This power will give the Secretary of State the necessary flexibility to be able to respond to the evidence from this consultation and ensure that any meaning of a parallel rent assessment takes account of the tied pub agreements used by different business models within the industry, so that such assessments can capture meaningful and relevant information.

Justification for the procedure selected

184. The Government recognises that the provision of parallel rent or fee assessments will have potentially large cost implications for pub-owning companies. So that the burdens on pub-owning companies remain proportionate but the parallel rent assessment still delivers the principle of no worse off it is believed that the scrutiny afforded by the affirmative procedure is justified.

PART 5: CHILDCARE AND SCHOOLS

Clause 74 and Schedule 2 (paragraph 16(a): Power to make regulations to provide that registration may be suspended generally or in respect of particular premises

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations*

Parliamentary procedure: *Negative resolution*

Context and purpose

185. Part 5 contains clauses 71 to 74 (and Schedule 2) which amend the provisions on the regulation of childcare in Part 3 of the Childcare Act 2006 ("the CA"). Clause 74 and Schedule 2 remove the registration requirement for certain providers to register in respect of premises, enabling providers who operate out of more than one set of premises to be covered by a single registration.

186. Paragraph 16(a) of the Schedule inserts a new section 69(1A) into the CA. This provision relates to an existing power under section 69(1) of the CA. Currently, regulations

made under section 69(1) can provide for the registration of a childcare provider to be suspended for a prescribed period in prescribed circumstances. Section 69(1A) specifies that regulations under subsection 1 may provide for registration to be suspended generally or only in relation to particular premises.

Justification for delegation

187. The power in paragraph 16(a) relates to an existing delegated power which allows for registration to be suspended in prescribed circumstances. When childcare providers were required to register each premises separately, this power was sufficient. Childcare providers will now have multiple premises under one registration. It would not always be proportionate to suspend the entire registration where prescribed standards are not met in respect of only some of the premises held under a single registration. The Secretary of State therefore requires a more targeted power to suspend registration in respect of particular premises

Justification of procedure selected

188. The delegated power is subject to the negative procedure under Section 105(1) of the CA, The Government considers this to be the appropriate level of parliamentary scrutiny given the existence of similar regulation making powers under section 169 of the CA.

Clause 74 and schedule 2 (paragraph 17): Power to make regulations to make failing to comply with a prescribed requirement relating to premises an offence

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations*

Parliamentary procedure: *Negative resolution*

Context and purpose

189. Clause 73 introduces some flexibility for childminders to operate on non-domestic premises. Clause 74 and Schedule 2 remove the registration requirement for certain providers to register in respect of premises, enabling providers who operate out of more than one set of premises to be covered by a single registration. Existing regulation making powers (see sections 35(5)(b), 36(5)(b), 54(5)(b) and 55(5)(b) of the CA) will prescribe registration requirements relating to premises such as a requirement for providers to obtain approval from the relevant regulator (either Her Majesty's Chief Inspector of Education, Children's Services and Skills or a childminder agency) before operating out of any additional premises.

190. Paragraph 17 of the Schedule inserts a new section 85A to the CA which enables the Secretary of State to make regulations to create a criminal offence of failing to comply with a prescribed requirement relating to premises. Paragraph 17 specifies that a person guilty of the offence is liable on summary conviction to a fine.

Justification for delegation

191. Given that the offence relates to registration requirements which are not set out on the face of the CA the Government considers it appropriate to delegate the power so that the

offence can also be in secondary legislation where it can be tailored to the failure to comply with the relevant prescribed requirement relating to obtaining approval to operate out of a particular premises. The offence is consequential on the removal of the requirement to register premises as part of a separate registration, and allowing childminders flexibility to operate on non-domestic premises which means the existing offences in sections 33, 34, 52 and 53 of the CA (offence to operate without being registered) are not capable of capturing the scenario where a provider has obtained approval to operate out of some, but not all premises.

192. There is an existing precedent for both the delegation and the choice of parliamentary procedure in section 43(3) of the CA. That subsection allows for regulations to provide that failure to comply with a welfare requirement is an offence.

Justification of procedure selected

193. The delegated power will be subject to the negative procedure under section 105(1) of the CA, The Government considers this to be the appropriate level of parliamentary scrutiny given the existence of similar regulation making powers in the CA and the plan to regulate for the offence alongside the prescribed registration requirements in regulations which are already subject to the negative procedure.

PART 6: EDUCATION EVALUATION

Clause 76: Power to prescribe persons or categories of person which whom a person in England can share student information, the types of information that can be shared and the circumstances in which it can be shared

Power conferred on: the Secretary of State and the Welsh Ministers

Power exercised by: Regulations

Parliamentary Procedure: Negative resolution

Context and purpose

194. Clause 76 allows any person in England or Wales to share, in prescribed circumstances, student information of a prescribed description with a range of persons, including the Secretary of State or Welsh Ministers (as the case may be) and an information collator. “Student information” is defined by reference to an individual who is seeking or has sought to obtain, or has obtained, a regulated qualification (in the case of England) or a relevant qualification (in the case of Wales). Clause 76 builds on the existing information sharing power, in section 537A of the Education Act 1996, that the Secretary of State has in relation to schools. In particular it reflects subsections (4) to (6) of section 537A which provide: (i) the Secretary of State with a power to share “individual pupil information” with a range of persons, including an information collator; and (ii) for the circumstances in which individual pupil information may be passed on by an information collator or by any other person.

195. The regulation making powers will be used to prescribe persons or categories of person with whom a person in England or Wales can share student information with and will, furthermore, prescribe both the circumstances in which such a person can share student information, as well as prescribing the types of student information which may be shared. The Government, in prescribing persons and categories of person under this clause, will be at least as restrictive as it has been in its prescription of such persons in relation to schools (under the section 537A power). Furthermore, the types of student information to be prescribed in regulations will be restricted to qualification-related information only. The circumstances to be prescribed will further narrow the information sharing under this provision by permitting it only at the end of key stage 4 or each year during a 16 to 19 Study Programme. In addition, student information may only be shared with the Secretary of State or an information collator in circumstances where the Secretary of State or an information collator requests it.

196. These provisions are neeeded in order to enable any assessment centre (other than schools, which can rely on the existing gateway in section 537A) to provide student information to the Secretary of State, an information collator, an awarding body and other prescribed persons; as well as enabling the further sharing of such information (for example, by the Secretary of State with an awarding body, for verification purposes). The Government's aim in collecting this information is to gather a complete picture of regulated qualifications undertaken irrespective of where the learning took place.

Justification for delegation

197. The Government considers that this type of detail is better suited to being included in regulations rather than primary legislation. This is because altering the range of prescribed persons, circumstances and information over time, by amending regulations, represents a more flexible option to the alternative, of seeking a new primary legislative vehicle, in order to effect the changes. This will assist the Government to strike the right balance between those in favour of more information sharing (under this clause) as against those seeking to restrict such sharing. Section 537A of the Education Act 1996, which clause 73 builds on, also contains regulation making powers in relation to "individual pupil information" and persons or categories of person. In addition, by prescribing persons, circumstances and information, the regulations will set the scope of information sharing which is possible under this provision, and will look, in particular, to set limits for information sharing which does not involve either the Secretary of State or an information collator.

Justification for procedure selection

198. The Government considers that the negative procedure provides a suitable level of scrutiny, given that the powers will be used to restrict the scope of the information sharing. The regulation making powers in section 537A of the Education Act 1996 are also subject to the negative procedure.

Clause 77: Power to share information about former students

Power conferred on: the Secretary of State and the Welsh Ministers

Power exercised by: Regulations

Parliamentary Procedure: Negative resolution

Context and purpose

199. Clause 77 enables the Secretary of State in England and Welsh Ministers in Wales to share with a further education institution, "destination information" relating to their former students, including information on the activities of such students, once they have left the institution. The clause reflects the existing information sharing power, in section 537A of the Education Act 1996, that the Secretary of State has in relation to schools. In particular it reflects subsection (4) of section 537A which provides the Secretary of State with a power to share individual pupil information with a range of persons, including an information collator.

200. "Destination information", in connection with an institution, means information relating to a former student of the institution and includes information concerning such a person's "prescribed activities" following departure from the institution. The regulation making powers will prescribe what those activities are. The Government, in prescribing such activities, will narrow down the scope of information sharing which is possible under the clause by defining in regulations only a limited range of activities and by restricting the length of such activities, following departure from the institution, to one year only.

201. The provisions are needed for the following reasons. Firstly, it will enable further education institutions to check destinations information relating to their former students, in advance of the Government publishing "Destination measures" (a key performance measure for schools and further education institutions, published by the Department for Education). This will serve to enhance the robustness of information contained in those measures. Secondly, the information will support self-evaluation and self-improvement, in the same way as for schools, by enabling further education institutions to analyse the destinations of their former students. Thirdly, the information will also allow FE providers to make informed decisions about its choice of curriculum and qualifications and to assess the effectiveness of its support for students, for example, in relation to careers guidance.

Justification for delegation

202. It is considered that this type of detail is better suited to being included in regulations. This is because altering the range of activities over time, by amending regulations, represents a more flexible option to the alternative, of seeking a new primary legislative vehicle, in order to effect the changes. This will assist the Government over time to strike the right balance between those in favour of more information sharing (under this clause) as against those seeking to restrict such sharing. Section 537A of the Education Act 1996, which clause 76 builds on, also contains regulation making powers in relation to "individual pupil information". In addition, the regulations will define and thus limit, by range and length, the type of activities which count for the purposes of "destination information", and thus what information about a former student can be shared back with an FE institution.

Justification for procedure selected

203. The Government considers that the negative resolution procedure provides a suitable level of scrutiny, given that the powers will be used to restrict the scope of the information sharing. The regulation making powers in section 537A of the Education Act 1996 are also subject to the negative procedure.

PART 7: COMPANIES: TRANSPARENCY

Register of people with significant control

Clause 78 and Schedule 3: Register of people with significant control

General introduction to register of people with significant control

204. Clause 78 and Schedule 3 insert a new Part 21A into the Companies Act 2006 ("CA 2006"). The new Part requires every company to which the Part applies to identify those people with significant control over the company.

205. The company must keep a register of its people with significant control (a "PSC register") together with prescribed particulars of those people. There are a variety of enforcement mechanisms to ensure that companies do so.

206. The Clause and new Part contain a number of provisions that contain delegated powers, discussed below. References to sections in paragraphs 207 to 305 and headings are to sections of the Companies Act 2006. References to Schedule 1A and 1B are to Schedules of the Companies Act 2006.

Section 790B(1)(b): Power to exempt companies from the application of Part 21A

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

207. Section 790B details the companies to which new Part 21A applies and those which are not required to maintain a PSC register.

208. "DTR5 issuers", being those companies that are subject to Chapter 5 of the Disclosure Rules and Transparency Rules made by the Financial Conduct Authority, are outside of scope as such companies are already subject to an obligation to publicly disclose information on interests in their shares. DTR5 issuers therefore are not required to keep a PSC register.

209. Subsection (1)(b) allows the Secretary of State to exempt other companies by regulations from the duty to maintain a PSC register. The Secretary of State, in deciding what type of company should be released from the duty to maintain a PSC register, is required to consider whether they already comply with disclosure requirements broadly similar to those applying to DTR5 issuers (subsection (2)).

Justification for delegation

210. This power is to future proof the policy. The Government considers the delegation necessary to ensure that duplication of reporting requirements can be avoided, and the regime

can be kept relevant and workable by keeping the type of companies that are excluded from the Part (because they make public their ownership through other means) up to date.

211. For the provisions concerning the PSC register to be effective, fit for purpose and enduring, it is necessary to ensure that there is flexibility within the Part's architecture to be able to work alongside current EU and UK law as well as adapt to any future changes in the wider corporate transparency landscape. One example of where the Government might consider exercising the power is in respect of UK companies listed on overseas stock exchanges subject to ownership disclosure requirements broadly similar to those that apply in respect of DTR5 issuers.

Justification for procedure selected

212. Regulations made under this section are subject to the affirmative resolution procedure. This is appropriate as the power is will allow the Secretary of State to exempt entities from the application of the Part, albeit with regard to certain factors. The requirement in subsection (2) that the Secretary of State must have regard to any disclosure requirements in deciding whether to exercise the power means that any such decision should not impact the efficacy of the policy with respect to corporate transparency. However it is appropriate that Parliament has the opportunity to scrutinise any decision to exempt certain types of company.

Section 790C(7)(d): Power to specify legal entities subject to their own disclosure requirements for the purpose of Part 21A

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

213. This power allows the Secretary of State to make regulations deeming certain types of legal entity to be "subject to its own disclosure requirements" for the purposes of Part 21A.

214. Section 790C explains some key terms used in Part 21A, including what is meant by a person with significant control ("PSC"). Such a person is an individual meeting one or more of the conditions specified in Part 1 of Schedule 1A (subsections (2) and (3)).

215. In certain circumstances, a legal person may be entered in the register in place of an individual. These are 'relevant legal entities' ("RLEs") (subsection (6)). RLEs are legal entities that would have come within the definition of a PSC had they been individuals and that are "subject to their own disclosure requirements".

216. A company is "subject to its own disclosure requirements" if it meets any of the conditions set out in subsection (7). They are that: the entity is subject to Part 21A; is a DTR5 issuer; is subject to regulations made under section 790B (see above); or is of a description specified in regulations made under subsection (7).

217. In making regulations under subsection (7)(d), the Secretary of State must have regard to the extent to which those legal entities are subject to disclosure and transparency rules broadly similar to those which apply to other entities considered to be subject to their own disclosure requirements (subsection (11)).

Justification for delegation

218. The delegation is needed in order to future proof the provisions against changes in the regulatory landscape of companies, in the UK or overseas. If a type of legal entity becomes subject to disclosure requirements in the future, in order for the policy to remain effective, the legal entity ought to be able to be deemed an RLE.

219. This power may be used, for example, to provide that overseas companies complying with disclosure and transparency rules broadly similar to UK companies may be RLEs. This may in particular be necessary if in the future other types of legal person (whether in the UK or otherwise) are required to obtain and hold information on people with significant control and make this information publicly available, or in the light of changing disclosure and transparency rules across the wider regulatory landscape.

220. The power will only be exercised if these types of legal persons are subject to equally robust ownership disclosure requirements and which, in the interests of consistency and minimising regulatory burdens on business, should be entered in the PSC register. The reductions in burden on business come from using this entry instead of requiring companies to 'look through' such legal persons to find their PSCs. It is appropriate to take the power in secondary legislation as it would be disproportionate to require an Act of Parliament to add such legal persons to the list.

Justification for the procedure selected

221. Regulations made under this section are subject to the affirmative resolution procedure. It is appropriate to allow Parliament to scrutinise the decision to designate a type of entity as being subject to its own disclosure requirements.

Section 790C(12): Power to modify the application of Part 21A in respect of corporations sole, Governments and others

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose

222. This power allows the Secretary of State to make regulations that modify the application of Part 21A in relation to corporations sole and certain governmental bodies.

223. Section 790C(2) provides that a person with significant control is an individual who meets one or more of the specified conditions (see section 790C(3) and Part 1 of Schedule 1A). As described above, in certain circumstances where there is an appropriate level of

transparency of ownership and control, a legal entity may be entered in the PSC register instead of an individual, known as RLEs.

224. There are however some types of entity that are not subject to disclosure requirements but which cannot practically or usefully be 'looked through' to identify an individual or individuals who meets the specified conditions. These are corporations sole, Governments, certain international organisations and local Government bodies (section 790C(12)). It is likely that in the majority of such cases there would not be an individual or individuals meeting one or more of the specified conditions, i.e. no person who could be said to have significant control over the company.

225. The result of this is that where one of these corporations sole or governmental bodies was a PSC, there would be no entry on the company's PSC register where such an entity would meet one or more of the specified conditions were it an individual. It is felt that this would be unhelpful, and potentially misleading, for the searcher of the register. It is considered that it is therefore appropriate to treat such entities, for the purpose of Part 21A, as if they were individuals (section 790C(12)), i.e. to name them on the PSC register.

Justification for delegation

226. It may however be necessary to modify the application of Part 21A to ensure that the provisions can practically be applied to such entities. Such provisions are more appropriate to be contained in secondary legislation in view of their technical nature. For instance, it may be necessary to set out lists of particulars that would need to be included on the register for each of these types of entity. There is also the need to be able to keep the details of the application under review (including in light of any other changes made to this Part by regulation). Section 790C(12) therefore provides that regulations may be made to modify Part 21A in its application to the entities listed in that subsection.

Justification for the procedure selected

227. Regulations would be made under the negative resolution procedure. This is considered appropriate because the regulations will not be creating new obligations but merely altering the application of existing provisions for certain entities; the regulations will be of a technical nature, dealing with particulars to suit the entity concerned rather than changing the policy on the face of the Bill in any substantive way. Further, the regulations cannot amend the entities to which the provision applies. Part 21A itself will have been subject to full Parliamentary scrutiny.

Section 790D(9) and 790E(7): Powers to prescribe information contained within notices issued under this section

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose

228. Section 790D requires a company to take reasonable steps to find and identify anyone who is a registrable person or a registrable RLE in relation to the company. 'Registrable person' and RLE are defined in section 790C.

229. Unless the company has already been informed of the status of a registrable person or RLE and has all of the relevant information required to be entered in the PSC register, the company must issue a notice to the registrable person or registrable RLE. The purposes of the notice are to confirm whether the person is a registrable person or registrable RLE and to obtain the relevant information ('the required particulars').

230. Notice may also be issued to a person who knows the identity of a registrable person or registrable RLE; or to someone else likely to have that knowledge (subsection (5)). Such notice may require the addressee to state whether they know the identity of any registrable persons or registrable RLEs in relation to the company, or any person likely to have that knowledge; to supply any particulars of such persons that they have; and to confirm whether information is being provided with that person's knowledge (subsection (6)).

231. Section 790E similarly requires a company to give notice where it knows or has reasonable cause to believe that a 'relevant change' has occurred. 'Relevant change' is defined in subsection (3) and (4).

232. The power in section 790D(9) provides that the Secretary of State may make further provision by regulations about the giving of notices under section 790D, including form and content. The power in section 790E(7) provides that subsections (8) to (10) of section 790D also apply to notices under section 790E, ensuring the power to make regulations concerning the giving of notices extends to notices given under section 790E.

Justification for delegation

233. It may be appropriate to require the notices to contain additional information, for example, to specify which of the required particulars will be made publicly available via the company's own register and by the registrar or how a person may apply for their details to be exempt from the public register, and this level of detail is more appropriately contained in secondary legislation than in primary. This is in line with other similar provisions in the CA 2006. This is mainly in order to retain a degree of flexibility in what is to be prescribed in the notices if experience show that, for instance, the notices are not providing sufficient information or in a manner that is effective for the operation of the provisions.

234. The power is sufficiently narrow to ensure that the regulations cannot change the circumstances where notice is required, nor the sanction for non-compliance with the notice. Any regulations made under this power would be to ensure the efficiency of the system of giving notices.

Justification for the procedure selected

235. These Regulations would be subject to the negative resolution procedure. This procedure is appropriate as they will be technical regulations that ensure that the notice and the manner of its giving are effective.

Section 790K(5): Power to make further provision about the particulars relating to the nature of a person's control over the company

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose

236. Section 790K sets out the information companies must obtain and hold in their PSC register on registrable persons, entities to which this Part applies as if they were individuals (e.g. corporations sole) and registrable RLEs. These are the 'required particulars'. This includes the nature of their control over the company.

237. The Government wants to ensure clarity for companies, registrable persons and RLEs in terms of what the register should state to indicate the nature of the person's control over the company. The Government also wants information shown by the register to be clear and concise. This will be particularly important where, for example, control is held other than through a direct interest in shares or voting rights. This might be through trust or other legal arrangements; or where the person exercises significant influence or control over the company by other means.

238. Section 790K(5) provides that the Secretary of State may by regulations make further provision about the particulars required in relation to the nature of a person's control.

Justification for delegation

239. It is appropriate that the level of detail setting out these provisions is found in regulations, as the granular nature of the information to be required is too detailed to be included sensibly in primary legislation. The power is not so broad as to be able to amend the particulars required to be gathered.

Justification for the procedure selected

240. These regulations would be made under the negative resolution procedure. This procedure is appropriate as the detail of what constitutes significant control is contained within the Bill in Schedule 1A and will therefore have been subject to full Parliamentary scrutiny; these regulations may only set out in what way the nature of control must be described.

Section 790L: Power to add to or remove from the required particulars

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

241. This power allows the Secretary of State to alter the required particulars to be entered on a PSC register.

242. As set out above, section 790K contains the required particulars companies must obtain and hold in their PSC register on registrable persons. In respect of registrable persons, with the exception of former name and business occupation, the personal information replicates that currently held on company directors (see section 163 of the CA 2006, 'Particulars of directors to be registered: individuals'). Information on the date a person became a person with significant control and the nature of that control must also be obtained and entered in the register.

243. In respect of registrable RLEs, the required particulars replicate those currently held on corporate directors (see section 164 of the CA 2006, 'Particulars of directors to be registered: corporate directors and firms'). Information on the date the entity became an RLE and the nature of their control over the company must also be obtained and entered in the register. In respect of entities to be treated as if they are individuals (e.g. corporations sole) the required particulars are close to those required for registrable RLEs.

244. The intention is that the required particulars will allow those looking at the register to uniquely identify the individual recorded as the person with significant control in the vast majority of cases; to identify uniquely any registrable RLEs or other entities; and to build a meaningful picture of the company's overarching ownership and control structure – both as at the date the register is inspected and previously.

245. This is particularly important from the perspective of identifying people with significant control over companies alleged or confirmed to have engaged in criminal activity; and people who have themselves carried out criminal activity (and may, for example, be using UK companies to hide their proceeds of crime). It is also important in terms of allowing those who engage with UK companies to have confidence in terms of knowing who ultimately owns and controls the company in question.

Justification for delegation

246. It is vital that the required particulars can be reviewed, and amended as necessary, in the light of changing circumstances. Enforcement agencies may, for example, identify additional or alternate pieces of information which would better enable them to consider information held by the registrar against other sources of information (such as the Passport Office or Driver and Vehicle Licensing Agency). New data sets may in future be routinely collected across Government which could be replicated within this legislation to maximise efficiency for companies and individuals.

247. The statutory review of legislation implementing the PSC register may provide an appropriate point at which to evaluate the efficacy of the existing required particulars.

248. Section 790L therefore enables the Secretary of State to make regulations adding or removing from the list of required particulars.

Justification for the procedure selected

249. These regulations would be made under the affirmative resolution procedure. This will allow Parliament to debate changes which may add or remove burdens on business; or otherwise impact registrable persons and registrable RLEs. The power, and approach, is consistent with that in place in respect of company directors (and see section 166 CA 2006, 'Particulars of directors to be registered: power to make regulations').

Section 790M(7): Power to prescribe additional matters to be noted on the PSC register

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

250. Section 790M requires companies to keep a PSC register. The register will contain information on registrable persons, i.e. PSCs and RLEs. Section 790M(2) provides that the required particulars in respect of PSCs and RLEs (set out in section 790K) must be entered in the PSC register once confirmed.

251. To ensure clarity for people looking at the register, a company's PSC register may also need to contain information detailing a number of other factors that inform the searcher about the nature of the control over the company, besides information on PSCs and RLEs. For example, where a notice has been issued under section 790D or 790E and the time for reply has elapsed but no response has been received; where information on a person with significant control is protected from public disclosure by virtue of regulations made under section 790ZF; where the company knows or suspects that there is a person with significant control but cannot identify that person; or where the company does not have any PSCs or RLEs.

252. The register may also need to be annotated to provide clarity in the context of registrable RLEs or other entities, in terms of explaining why a legal entity rather than an individual has been entered in the register.

Justification for delegation

253. This delegation will allow detail on what information needs to be noted in the PSC register to be set out in full with a granularity that would be inappropriate to primary legislation, and will allow experience to inform whether extra or different detail would be necessary or helpful. Given the multiple scenarios of company ownership that can arise, and the need to ensure that adequate clarity is provided around these structures, the delegation is necessary.

254. For example, it might become clear that numerous notices are not being responded to, and so it might be expedient to ask companies to record on the PSC register the fact that notices have been issued, but no response received. This would save investigators from approaching the company to find out if it was a failure on the part of the company or the notice recipient.

Justification for the procedure selected

255. These regulations would be made under the affirmative resolution procedure. This will allow Parliament to debate changes which may add or remove burdens on business.

Section 790O: Power to prescribe fees for access to the PSC register

Power conferred on: Secretary of State

Power exercisable by: Regulations or order

Parliamentary procedure: Affirmative or negative resolution

Context and purpose

256. Section 790O requires a company to make its PSC register open to the inspection of any person without charge, and to provide a copy of the register or a part of it on payment of a prescribed fee.

257. It is necessary to allow companies to charge a fee since a burden is being imposed on companies to provide copies of the register which will naturally incur costs. However it would be inappropriate to allow companies to set fees themselves in case they set a fee so high that it was prohibitive to a person seeking access. It is therefore appropriate for the Secretary of State to set the level of the fees.

Justification for delegation

258. It would be inappropriate to set the fee for access in primary legislation, since this would cause difficulties if the fee requires revision in line with inflation or other external factors that would affect the cost to a company of providing copies of the register.

259. This is a technical provision that replicates section 116(2) of the CA 2006 ('Rights to inspect and require copies') which allows fees to be set in respect of a company's register of members.

Justification for the procedure selected

260. There is no parliamentary procedure given for the power to "prescribe" in section 1167 CA 2006. However section 1292(3) CA 2006 allows that any provision that may be made by order or regulations for which no parliamentary procedure is prescribed may be made subject to negative or affirmative procedure.

Section 790ZD: Power to extend option to keep information on central register to public companies

Power conferred on: Secretary of State

Power exercised by: Regulations (Henry VIII power)

Parliamentary procedure: Affirmative resolution

Context and purpose

261. The CA 2006 requires companies to keep and maintain their own registers containing the details of directors, directors' residential addresses, members and secretaries. As discussed above, the Bill contains a new requirement to keep and maintain a PSC register.

262. Schedule 5 and (by inserting Chapter 4 of new Part 21A) Schedule 3 amend the CA 2006 to give private companies the option of keeping the information on any or all of these registers on the public register maintained by the registrar (Companies House) instead. The aim of this is to avoid duplication of information and reduce the administrative tasks required of companies. For example, when a director is appointed a company would no longer have to separately update its register of directors and notify the registrar to put the information on the public register. There would also be benefits for third parties who would be able to obtain information by searching the public register online rather than having to contact companies directly.

263. Section 790ZD provides a power for the Secretary of State to extend this option to public companies as regards the PSC register by amending the CA 2006 and making consequential amendments to that Act. This is consistent with the power sought in Schedule 5 in relation to a company's other registers (and see paragraphs 3, 7 and 10 of that Schedule).

Justification for the delegation

264. It is considered appropriate to retain a degree of flexibility over which companies may opt to keep information on the public register instead of on their private registers to future proof this provision as regards application to public companies. In the future the Government may decide that it is appropriate that public companies should be allowed to take advantage of this option. It is considered that this kind of amendment is best made by secondary legislation.

265. Whilst there is no exact precedent for this power, section 354 of the CA 2006 ('Power to limit or extend the types of company to which provisions of this Chapter apply') gives the Secretary of State the power by regulation to extend or limit the types of companies to which the provisions of Chapter 5 of Part 13 ('Additional requirements for quoted companies and traded companies') apply. Regulations made under section 354 to extend the application are subject to the affirmative procedure.

Justification for procedure selected

266. The affirmative procedure is considered appropriate. Whilst the regulations would be deregulatory, the Government considers that it is appropriate that Parliament should have the opportunity to debate regulations which increase the amount of information on the public register and which make consequential amendments to primary legislation.

Section 790ZE Protection of information as to usual residential address

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose

267. Section 790ZE provides that information about a person's residential address and information that a person's service address is their residential address ('protected information') must not be used or made available publicly by the company or the registrar, other than in specified circumstances or to specified authorities. This is achieved by applying sections 240 to 244 of the CA 2006 ('Directors' residential addresses: protection from disclosure') which provide for this outcome in respect of company directors.

268. Section 243 CA 2006 ('Permitted use or disclosure by the registrar') gives the Secretary of State the power to make regulations under the negative resolution procedure in relation to a director's protected information. This includes provision specifying conditions for the disclosure of protected information and the charging of fees; and the public authorities to whom protected information may be disclosed, in accordance with conditions set out in regulations. The Secretary of State may also make provision requiring the registrar, on application, to refrain from disclosing protected information to a credit reference agency in certain circumstances. Regulations may also provide for the charging of fees.

269. It is important that equivalent provision can be made in respect of people with significant control as has been currently made in respect of company directors. This power is accordingly applied to Part 21A by extension through section 790ZE.

Justification for the delegation

270. This level of detail is more appropriate to be contained within secondary legislation. This will also allow flexibility in the event of changing circumstances and on-going review – for example, should the list of specified authorities need to be updated. The Government is consulting on the use of this power currently (the discussion paper closes on 9th December 2014) to ensure that the regime is effective and covers all it is necessary to do so.

271. The power under section 243 has been exercised in The Companies (Disclosure of Address) Regulations 2009. The intention is to make broadly similar provision in respect of people with significant control to ensure consistency of approach as appropriate.

Justification for procedure selected

272. Regulations made under this section would be subject to the negative resolution procedure, since the new section merely applies the existing power in section 243. Section 243(8) CA 2006 provides that regulations are made using the negative resolution procedure. Additional Parliamentary scrutiny is not considered necessary since the core framework is set out in primary legislation.

Section 790ZF: Power to make regulations protecting material

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

273. Section 790ZE provides that certain of registrable persons' information must not be made available for public inspection. However, there may be circumstances in which some or all of a person's personal information should be suppressed from the public register. For example, where a person is at serious risk of violence or intimidation as a result of being on a PSC register.

274. Section 790ZF accordingly allows the Secretary of State to make regulations that govern the use and disclosure of data regarding people with significant control on application to the registrar. This will be used to create a regime where individuals may apply to have their details withheld from public disclosure. This power is modelled on that at sections 243 to 244 CA 2006, which allows regulations to be made preventing some of a director's information from being disclosed to credit reference agencies in specified circumstances.

275. The regulations may make provision as to who may make an application; the grounds on which an application may be made; the information to be included in the application; the method of determining an application; and the duration of restrictions granted and procedures for their revocation. The latter is considered important as it may be appropriate to review that decision in the light of changing circumstances. Regulations may confer discretion on the registrar or provide for him or her to refer a question to another person in relation to the determination of an application and its duration. Regulations may also make provision for the payment of fees for access to protected information in prescribed circumstances.

Justification for delegation

276. This level of detail is more appropriate to be contained within secondary legislation. This will also allow flexibility in the event of changing circumstances and on-going review. The Government is consulting on the use of this power currently (the discussion paper closes on 9th December 2014) to ensure that the regime is effective and covers all it is necessary to do so.

277. A further reason for requiring further flexibility about disclosure or otherwise of information that the requirements about prescribed particulars might be changed by other regulations under Part 21A.

Justification for procedure selected

278. Regulations made under section 790ZF will be subject to the affirmative resolution procedure. The protection regime is a significant protective measure for individuals but needs to be balanced against the demands of transparency, and so it is important that Parliament has the opportunity to scrutinise the measures fully, particularly in regards to the grounds for making an application, the process by which applications are determined and access to that information. The affirmative resolution procedure is therefore the appropriate level of scrutiny.

Paragraph 24 of Schedule 1A: Requirement for Secretary of State to publish guidance about the meaning of 'significant influence or control'

Power conferred on: Secretary of State

Power exercisable by: Statutory guidance

Parliamentary procedure: None, but guidance to be laid before Parliament

Context and purpose

279. Paragraph 2 of Schedule 3 inserts Schedule 1A to the CA 2006. Schedule 1A sets out the conditions which constitute 'significant control' over a company. An individual is a person with significant control if they meet one or more of the conditions set out in paragraphs 2 to 6 ("the specified conditions").

280. One of the ways in which a person may have significant control is by having an interest in more than 25% of a company's shares or voting rights; or by having the right to exercise – or actually exercising – 'significant influence or control' over a company.

281. 'Significant influence or control' is used to capture those people who would not be caught by any of the other specified conditions. It is intended to ensure that all persons who have the ability to influence significantly or control a company or its management – whether through the directors, shareholders or otherwise – to an extent broadly equivalent to that which a person would have were they to hold 25% of the company's shares or voting rights are entered in a company's PSC register.

282. Where a positive obligation to identify persons with such influence and control is placed on companies (with a criminal offence for failure to do so), it is important that there is adequate clarity as to those factors that might constitute significant influence or control. It is also important that there is adequate flexibility to rapidly amend or add to these factors in light of monitoring and review.

Justification for delegation

283. For this reason, paragraph 24 of Schedule 1A places a duty on the Secretary of State to publish guidance about the meaning of significant influence or control for the purpose of Schedule 1A (and therefore Part 21A by extension). This will not seek to be an exhaustive list or guide; rather it will provide companies with key factors to which they should have regard in identifying people with significant control under section 790D; and help individuals and entities ascertain whether or not they should provide information under section 790G. The Government would look to consult in developing this guidance to ensure a wide range of input and expertise is obtained.

284. Companies, RLEs and individuals will be required, under paragraph 24(3) of Schedule 1A, to have regard to this guidance in interpreting references to 'significant influence or control' in the context of their duty to obtain or provide information about people with significant control.

Justification for the procedure selected

285. Guidance issued under this paragraph of the Bill will be laid before Parliament. This level of scrutiny is considered appropriate on the grounds that it will be worked up in consultation with stakeholders and will not conflict with the statutory provisions as set out in new Part 21A and Schedule 1A.

Paragraph 26 of Schedule 1A: Power to amend Schedule 1A for a permitted purpose

Power conferred on: Secretary of State

Power exercisable by: Regulations (Henry VIII power)

Parliamentary procedure: Affirmative resolution

Context and purpose

286. Paragraph 2 of Schedule 3 inserts Schedule 1A to the CA 2006. Schedule 1A sets out the conditions which constitute 'significant control' over a company. An individual is a person with significant control if they meet one or more of the conditions set out in paragraphs 2 to 6 ("the specified conditions").

287. These specified conditions include having control over the company through holding shares or controlling voting rights (paragraphs 2 and 3). In those cases, the criteria for being a person with significant control is that an individual (X) holds directly or indirectly more than 25% of the shares; or is entitled directly or indirectly to exercise – or control the exercise – of more than 25% of the voting rights.

288. This threshold is consistent with the definition in regulation 6 of the Money Laundering Regulations 2007, which is drawn from the Third Money Laundering Directive. More than 25% is also the point at which a person could block special resolutions of a company; and therefore be said to exercise significant control over the company.

289. The power in paragraph 26 of Schedule 1A provides that the Secretary of State may by regulations amend the qualifying threshold set out in the CA 2006 for people with significant control through shares or voting rights, or change or supplement the specified conditions to cover scenarios which give individuals broadly similar levels of control over a company to those covered by the existing specified conditions.

Justification for delegation

290. In light of on-going monitoring and review or changing circumstances, it is felt necessary to enable the specified conditions to be amended should the need arise. The threshold of 25% might need to be changed, for example, if domestic or international anti-money laundering regulations were to adopt a different threshold in the context of their equivalent definition of 'person with significant control'.

291. It is also possible that there may be a need to amend or add to the specified conditions to cover, for example, more complex company ownership and control structures. Such structures or arrangements may result in an individual having broadly similar levels of control over a company as envisaged in the specified conditions. Such circumstances could

arise as new corporate structures develop, or potentially as those who intend to criminally misuse companies seek new ways to evade the requirements of Part 21A. In such cases it would be important to be able to rapidly amend the legislation to maintain the efficacy of the legislation.

292. It is important to note that the power only allows the specified conditions to be changed so as to give individuals a level of control broadly similar to those already in place. This prevents the power being used capriciously to make one specified condition particularly onerous.

Justification for procedure selected

293. Regulations made under paragraph 26 would be subject to the affirmative resolution procedure. This will allow Parliament to debate proposals which could have a material impact on the efficacy of the policy, as it may bring a wider range of people into the category of "PSC", as well as increasing burdens on companies and individuals.

Paragraph 12 of Schedule 1B: Power to prescribe information contained within notices issued under this Schedule and related matters

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose

294. Schedule 1B provides that in taking reasonable steps to identify registrable persons or registrable RLEs under section 790D, or keep information up to date under section 790E, a company may subject a 'relevant interest' to restrictions if it does not receive a response to notices issued under those sections and if it has not received a valid reason as to why a response has not been provided. 'Relevant interest' is defined in paragraph 2.

295. The effect of the restrictions would include that any transfer of the interest would be void; that no rights would be exercisable in respect of the interest; and that no payment of sums due from the company would be made in respect of the interest (other than in a liquidation). Schedule 1B also makes provision in relation to the relaxation of such restrictions, the sale of interests subject to restrictions by the court and the process by which aggrieved persons may apply to the court.

296. In deciding whether it is a reasonable step to impose restrictions, a company must have regard to the rights of third parties in respect of the interest. The company must also give notice to the person with the relevant interest who has failed to comply with notice given under section 790D or 790E, the company intends to subject the shares to restrictions in not less than one months' time, unless by then the person has complied with the notice under section 790D or 790E or provided a valid reason for not responding.

297. This power allows the Secretary of State to make regulations about the procedure to be followed by companies in issuing and withdrawing restrictions notices.

Justification for delegation

298. It will be important that such notices contain information about the effect of the restrictions and how such restrictions may be lifted. It is also important that there is sufficient clarity for companies as to what may constitute a valid reason for failure to respond to a notice issued under section 790D or 790E; and as to the effect of withdrawal of a notices imposing restrictions on matters that are pending (e.g. a company's proposed payment of dividends) at that point.

299. This level of detail is more appropriately contained in secondary legislation than in primary, in line with other similar provisions in the CA 2006. Further, the Government considers it appropriate to retain a degree of flexibility in what is to be prescribed in the notices to ensure that the regime can take into account experience of implementation.

300. The power is not so wide as to be able to change the circumstances where notice is required to be given to implement restrictions, or the effect of the restrictions. Any regulations made would clarify the process of subjecting an interest to restrictions for both the company and the recipient of the notice.

Justification for procedure selected

301. Regulations would be subject to the negative resolution procedure. This procedure is appropriate as the notice (and therefore the regulations) will reflect the content of the primary legislation, which will have been subject to full Parliamentary scrutiny.

Paragraph 8 of Schedule 3: Power to make regulations about where certain company records to be kept available for inspection

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose

302. Section 1136 CA 2006 ('Regulations about where certain company records to be kept available for inspection') provides that regulations may be made specifying places other than a company's registered office where documents required to be made available for public inspection may be kept. This includes the register of members and directors. Regulations are made under the negative resolution procedure (section 1136(7) CA 2006). This power has been exercised under the Companies (Company Records) Regulations 2008.

303. Paragraph 6 of Schedule 3 extends the application of this existing power to include the PSC register.

Justification for delegation

304. In the interests of consistency and minimising burdens on business, paragraph 8 of Schedule 3 extends the application of this power to include the PSC register and any historic PSC register kept where a company has made an election to keep its PSC register on the public register held by the registrar (see Chapter 4 of new Part 21A CA 2006). Since the rules governing the keeping of all other company registers at alternative locations are made through regulations under this power, it would be inappropriate to make separate provision for the PSC register, in primary legislation or otherwise.

Justification for procedure selected

305. Regulations would be subject to the negative resolution procedure, as is currently the case under the existing power in section 1136 CA 2006. The extension of the power does not warrant any change to the existing procedure.

Corporate directors

Clause 84: Requirement for all directors to be natural persons

Power conferred on: Secretary of State

Power exercisable by: Regulations (Henry VIII)

Parliamentary procedure: Negative resolution

Context and purpose

306. The Companies Act 2006 introduced a requirement on companies to appoint at least one director who is a natural person. Companies can however appoint any number of other directors who can be either natural or legal persons.

307. Clause 84 inserts new sections 156A-C in the Companies Act 2006. The purpose of these amendments is to prohibit the appointment of company directors that are not natural persons – i.e. corporate directors. Corporate directors can obscure identification and liability of those who control companies, with the potential for criminal activity and poor corporate governance. This is achieved by imposing a requirement for all company directors to be natural persons at section 156A.

308. At the same time, it is recognised that there may be situations where the risk of criminal activity through reliance on corporate directorships is lower and standards of corporate governance are higher. Therefore, section 156B delegates to the Secretary of State the power to provide for exceptions to the general rule that each director must be a natural person set out at section 156A. The regulations will specify the circumstances in which the appointment of a corporate director can be made, and any conditions attached to the appointment. The regulations may include provision that an appointment of a corporate director can be made only with the approval of a specified regulatory body.

Justification for delegation

309. It is appropriate for the Secretary of State to have the power to ensure that the exceptions available remain suitable over time and therefore these exceptions should be made

by secondary legislation rather than by amendment to primary legislation. This will provide assurance to the business community and to public authorities that the prohibition on corporate directors can be used as a flexible tool to react to changes in business practices and landscape. The flexibility provided by secondary legislation will enable the timely adoption of both regulatory and deregulatory measures to ensure that a robust but fair legal framework to counter corporate criminal activity and opaque corporate governance is in place at all times.

310. The power also provides that different provisions may be adopted for different parts of the United Kingdom. This flexibility is required to ensure that the regulations apply effectively in all parts of the United Kingdom, taking account of differences in legislation across the different jurisdictions.

Justification for procedure selected

311. The exercise of the power to make or amend regulations should be subject to the negative resolution procedure. This power will be exercised to define the exceptions to the general rule enshrined in primary legislation, following discussion with stakeholders and the public. **To this end, a discussion paper is being published shortly. The results of this discussion paper will be made available to Parliament during the passage of the Bill.** Subsequent changes to the exceptions regime will be to ensure that the exceptions remain current and effective in delivering the aims of corporate transparency. The negative resolution procedure ensures that the regime can remain responsive to the changing corporate environment. The power includes a power to amend section 164 of the Companies Act 2006, so as to require information relating to exceptions to be included in the company's register of directors where it appoints corporate directors in reliance on the exceptions contained in the regulations. Whilst this is a Henry VIII power, it is merely ancillary to the core power to provide for exceptions to the general rule requiring directors to be natural persons, and is simply intended to ensure that there is an appropriate level of transparency in the company's register of directors in cases where the company has appointed a corporate director in reliance on an exception. Accordingly, it is considered that the negative resolution procedure is appropriate for the exercise of this power.

Shadow directors

Clause 86: Application of directors' general duties to shadow directors

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

312. The Companies Act 2006 sets out general duties that apply to the directors of companies. These are based on existing common law and equitable principles. With respect to shadow directors, defined in section 251 of the Companies Act 2006, the duties were applied where and to the extent that the common law and equitable principles applied, under section 170(5).

313. Clause 86 replaces section 170(5) of the Companies Act 2006 to apply the general duties of directors to shadow directors, where and to the extent that they are capable of applying. The intention is that the statutory duties will become the frame of reference for conduct of shadow directors, as they are for directors. The courts will continue to develop their interpretation of the application of the duties to shadow directors.

314. Clause 86 provides the Secretary of State with a power to apply, with adaptations if required, one or several of the general duties of directors to shadow directors by regulation. The Secretary of State is also given the power not to apply the general duties to shadow directors.

Justification for delegation

315. The delegation is necessary in order to ensure the framework of the general statutory duties of shadow directors can be kept current and consistent to ensure clarity for business. It will not be so wide as to change the duties as they apply to directors, nor to change the definition of a shadow director – that is to say, to whom the duties apply.

316. The primary legislation sets out the principle that general duties should apply to shadow directors. This delegation allows for developments in common law and equitable principles in relation to shadow directors and related areas to be incorporated into the statutory position, should that become necessary. It will also allow for adaptations to be made to the duties to ensure they are relevant and workable for shadow directors as they are, in parallel, for directors.

Justification for procedure selected

317. Regulations made under this section are subject to the affirmative resolution procedure. This is considered appropriate as it is felt that Parliament should be allowed to debate changes which may alter the responsibilities of those who become involved in controlling a company, and which could make amendments to primary legislation.

PART 8: COMPANY FILING REQUIREMENTS

Annual return reform

Clause 89: Duty to deliver confirmation statement instead of annual return

Introduction

318. Companies are required to collect and maintain information about their ownership and management. Some of this information is retained by the company, some made available for public inspection via the registrar of companies.

319. Some of the information sent to the registrar, such as details of directors of a company, is required to be updated as the information changes and within certain delivery periods for the relevant documents, known as “event driven filing”. However other information is only required to be provided to the registrar once a year, such as changes to the legal shareholders.

320. Currently all companies are required to complete an annual return on a specified date each year. The Companies Act 2006 sets out what information should be contained in an annual return.

321. Clauses 89 and 90 replace the current requirement for an annual return. Companies will now be required instead to confirm at least once in a 12 month period that all their requisite information has been delivered to the registrar using a "confirmation statement". The statement must confirm that all information required to be delivered by the company to the registrar in relation to the confirmation period has been delivered or is being delivered with the confirmation statement. This effectively confirms that certain key information held by the registrar is up to date.

Clause 89 and 90 (new section 853C(3) and amended section 9(5A) and (5B) Companies Act 2006): Ability to prescribe system of classifying business activities

Power conferred on: Secretary of State

Power exercised by: Order or Regulations

Parliamentary procedure: Negative or affirmative resolution

Context and Purpose

322. This power restates an existing power to prescribe type of company and principal business activities in the annual return, which is being replaced by these new sections, and extends its application to incorporation documents.

323. Among the incorporation documents required to be delivered to the registrar for a company to be formed is a statement of its intended type and principal business activities (new section 9(5A) and (5B) CA 2006, inserted by clause 90).

324. If there are any changes in the company's principal business activities, the company must notify the registrar of such changes when it delivers a confirmation statement. These requirements are contained in new section 853C(3) CA 2006 (inserted by clause 89). This replicates the current drafting in section 855(2) CA 2006.

325. The new sections allow the type of company and the principal business activities to be given by reference to the prescribed classification system or using one or more categories of any prescribed system of classifying business activities respectively. Section 1167 CA 2006 states that "prescribed" means prescribed by order or by regulations by the Secretary of State.

326. Regulations currently exist under section 855(3) CA 2006, the Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008 (S.I.2008/3000), which prescribe the type of company and the system for classifying business activities. However since section 855(3) CA 2006 will be replaced by new section 853C(3), and because the systems will need prescribing for the purposes of section 9(5A) and (5B), the Regulations will be allowed to lapse and be remade.

327. The classification of type of company is contained in a Schedule to those Regulations, and the business activities classification system is prescribed as that of the Office of National Statistics (ONS). The ONS collates information about economic activity in the UK and compares a number or sectors by using a classification system and is widely used across government. The current system used for classification is the UK Standard Industrial Classification of Economic Activities, 2003 edition. The intention is that these systems will continue to be prescribed for the purposes of these new sections.

Justification for delegation

328. It is considered necessary to allow the Secretary of State to prescribe the systems of classification for type and business activities as the systems are subject to regular changes. In particular, when the ONS changes or updates the classification system the regulations will need to take account of any changes to the current system or any decision to move to a different classification system. It is also important to ensure that the registrar is collecting classification information on the same basis as other Government departments and organisations, and so the flexibility of having the detail in secondary legislation allows the regulations to be amended in line with cross-Government policy.

329. The information contained in regulations made under this power would be technical and granular, which is inappropriate for primary legislation.

Justification for procedure selected

330. There is no parliamentary procedure given for the power to "prescribe" in section 1167 CA 2006. However section 1292(3) CA 2006 allows that any provision that may be made by order or regulations for which no parliamentary procedure is prescribed may be made subject to negative or affirmative procedure.

331. It is anticipated that the negative procedure would be used in this case, in line with the previous regulations made under the current power that is being replaced (S.I. 2008/3000, mentioned above). The power does not give the Secretary of State the ability to change the information required to be delivered to the register it is a power to prescribe the use of a particular system. As such, the negative resolution procedure is considered sufficient parliamentary scrutiny, although if particular circumstances warranted greater scrutiny (for instance if there were any controversial decisions in the system proposed by the ONS), the affirmative procedure could be considered.

Clause 89 (new section 853F(6)): Power for the registrar to impose requirements as to form

Power conferred on: Registrar of companies (extension of existing power)

Power exercisable by: Registrar's rules

Parliamentary procedure: None

Context and purpose

332. Amongst other information to be included in a confirmation statement, every company must confirm the name of every member of the company as it appears in the register of members (new section 853F(5)(a) CA 2006).

333. The power in subsection (6) allows for the registrar to impose requirements concerning the form in which this information is delivered to the registrar for the purpose of enabling the entries relating to any given person to be easily found.

334. If this new power were exercised, the rules would likely determine factors such as whether the information should be presented in alphabetical order, or perhaps in order of date of becoming a member.

335. The registrar has made extensive rules governing form, manner and authentication of delivery for information that is required to be delivered to the registrar under the power in section 1117 CA 2006.

Justification for the delegation

336. It is considered necessary to take this power to enable the registrar to set rules on this particular matter to ensure the register is useful and accessible and that information delivered to the registrar is usable and relevant. It is appropriate that the registrar may exercise this power since it is the registrar that will have the specialist knowledge and experience of what is required in terms of the form of delivery. The requirements relate to practical and administrative matters, rather than the substantive requirements as to nature and content. The registrar is better placed than the Secretary of State to establish requirements which reflect the needs and capabilities of both the registrar's own systems and of the companies who use them.

Justification for the level of parliamentary scrutiny

337. There is no parliamentary scrutiny for any registrar's rules as the power sits with the registrar rather than Parliament. The registrar must, however, publish the rules in a manner designed to bring them to the attention of those affected by them and to make copies of the rules available in both hard copy and electronic form.

Clause 89 (new section 853J): Power to impose additional delivery duties for certain information

Power conferred on: Secretary of State

Power exercisable by: Regulations (Henry VIII power)

Parliamentary procedure: Affirmative resolution

Context and purpose

338. New section 853J gives the Secretary of State the power to make further provision about the requirements to deliver information about a company's trading status of shares (section 853E(4)), shareholders (section 853F(5) and 853G(6)), any exemption from Part 21A (section 853H(2)) and the PSC register (section 853I(2)).

339. It is envisaged that this power may be exercised in particular in order to change the frequency with which the information about these particular matters is delivered to the registrar, as indicated by section 853J(2).

340. The legislation implementing the PSC register (see above, at clause 78) will be reviewed within three years of legislation requiring companies to deliver to the registrar details of people with significant control coming into force (see clause 79). At that point it may be necessary to change the frequency with which information in the PSC register is filed with the registrar. For example, it may be necessary to require companies to check and confirm information in the PSC register more frequently to improve the accuracy of the register. This might become a quarterly requirement or a requirement to update information on the register within a fixed number of days of any change (as is required in relation to directors, for example, see section 167 CA 2006, 'Duty to notify registrar of changes').

341. If the frequency with which the PSC register information was delivered to the registrar changed, it would be appropriate to consider also changing the frequency with which information about shareholders was delivered. This is in order to create as full a picture as possible about the ownership and control of the company at any given point. It would also be necessary to change the frequency with which information on the trading status was delivered, since this information is needed to ascertain whether a company is required to keep a PSC register or not.

342. Some companies are exempt from the provisions of Part 21A because they are already subject to stringent ownership disclosure requirements (section 790B as inserted by Schedule 3 to the Bill). It is therefore important that information as to whether a company is exempt from Part 21A is available on the public record so that it is clear why a company has not filed information on its PSCs.

343. Should the frequency with which a company is required to file information on its members or PSCs change, it would therefore be important to have the power to also update the frequency with which companies are required to file information on the trading status of their shares or their exemption from Part 21A. This would ensure that users of the register can clearly see why a company has or has not provided certain information.

Justification for delegation

344. Since it is important to be able to make changes that will improve the accuracy of the register as described above, section 853J provides the Secretary of State with a power to make further provision by regulations in relation to the obligations by a company to deliver information to the registrar.

345. The Government envisages that, if exercised, this power will be used to amend the frequency with which information on the register of members, PSC register, trading status of shares and exemptions from Part 21A is filed at Companies House. It is noted that the power is not restricted to this type of change, and could make provision about any aspect of the delivery of information, although the power cannot be used to change what information may be delivered.

346. The power also allows regulations made under it to make provision as to offences for failing to comply with the obligation to deliver such information; this is necessary for the effective enforcement of any new obligations and is in line with the offences for failing to deliver other information in the Companies Act 2006. Failure to deliver a confirmation statement is made an offence under new section 853L and that the regulations will just replicate this position if the delivery frequency changes. The power is limited however as the maximum sentence allowed to be imposed by regulations is on the face of the Bill.

Justification for procedure selected

347. Regulations would be subject to the affirmative resolution procedure. This will allow Parliament to debate proposals which could have a material impact on the efficacy of the policy as well as potentially adding burdens to business.

Clause 89 (new section 853K): Power to make further provisions as to the information to which a confirmation statement should relate

Power conferred on: Secretary of State

Power exercisable by: Regulations (Henry VIII power)

Parliamentary procedure: Affirmative resolution if regulations relate to a duty not for the time being mentioned in section 853A(2); otherwise negative resolution applies

Context and purpose

348. This new section gives the Secretary of State the power to make further provision as to what information has to be included as part of the confirmation statement by a company. The power allows the Secretary of State through regulations to amend or repeal the provisions of sections 853A to 853I, which set out the obligations that must be part of the confirmation statement, and to provide for exceptions to the requirements from time to time.

349. The obligations that are set out on the face of the primary legislation include details as to shareholding, PSC register, share capital, whether an election has been made to hold company registers on the public register, principal business activities, trading status, exemption from Part 21A ('register of people with significant control') and registered office.

Justification for the delegation

350. It is considered necessary to take this power to retain a degree of flexibility over the requisite information that companies confirm has been delivered to the register. In the future it is possible that changes to the business environment, particularly with regard to regulating companies, may result in changes to the information that is required to be delivered to the registrar of companies, and to have to make further provision in primary legislation would be burdensome and prevent a quick response to the demands of the business environment.

351. The new power derives from section 857 CA 2006 and is little changed. The Government considers that the new power to make provision as to the content of the confirmation is broadly analogous to the section 857 power.

352. Section 857 CA 2006 currently provides the Secretary of State with the power to make provisions by regulations as to the information to be contained in the company's annual return. This includes amending or repealing those sections of that Act relating to the content of the annual return and providing exceptions from the requirements of those sections. Regulations under this existing section are subject to the negative resolution procedure.

Justification for the level of parliamentary scrutiny

353. Where regulations are made in relation to a duty to deliver information not for the time being mentioned in section 853A(2), they will be subject to the affirmative resolution procedure. This will give Parliament the opportunity to debate provisions which may increase burdens on business.

354. In all other cases, it is considered appropriate that any such regulations are to be subject to the negative procedure as such regulations may only amend, repeal or provide for exceptions to the information that is already required to be included in the confirmation. Based on the clear precedent in current section 857 CA 2006 (from which this power derives) and since the power cannot be used for any burdening of companies, the negative resolution procedure is considered sufficient parliamentary scrutiny.

Additional information on the register

Clause 91 and Schedule 5: Option to keep information on central register

Powers to extend the option to public companies - Schedule 5, paragraph 3 (new section 128K), paragraph 7 (new section 167F) and paragraph 10 (new section 279F)

Power conferred on: Secretary of State

Power exercised by: Regulations (Henry VIII powers)

Parliamentary procedure: Affirmative resolution

Context and purpose

355. The Companies Act 2006 requires companies to keep and maintain their own registers containing the details of directors, directors' residential addresses, members and secretaries. The Bill also contains a new requirement to keep and maintain a register of people with significant control (clause 78 and Schedule 3) (see also new power at new section 790ZD described above, which is analogous to these).

356. Schedule 5 amends the Companies Act 2006 to give private companies the option of keeping the information on any or all of these registers on the public register instead. The aim of this is to avoid duplication of information and reduce the administrative tasks required of companies. For example, when a director is appointed a company would no longer have to separately update its register of directors and notify the registrar to put the information on the public register. There would also be benefits for third parties who would be able to obtain information by searching the public register online rather than having to contact companies directly.

357. The Companies Act 2006 as amended by Schedule 5 would provide a power for the Secretary of State to extend this option to public companies by amending the Act, and making consequential amendments.

Justification for the delegation

358. It is considered appropriate to retain a degree of flexibility over which companies may opt to keep information on the public register instead of on their private registers. In the future the Government may decide that it is appropriate that public companies should be allowed to take advantage of this option. It is considered that this kind of amendment is best made by secondary legislation.

359. There is no exact precedent for this power, although section 354 CA 2006 gives the Secretary of State the power by regulation to extend or limit the types of companies to which the provisions of Chapter 5 of Part 13 (additional requirements for quoted companies and traded companies) apply. Regulations made under section 354 to extend the application are subject to the affirmative procedure.

Procedure justification

360. The Government considers it appropriate that Parliament has an opportunity to debate regulations that seek to amend primary legislation.

Schedule 5, paragraph 30: Power to allow the registrar of companies to require delivery by electronic means

Power conferred on: The registrar of companies

Power exercised by: Registrar's rules

Parliamentary procedure: None

Context and purpose

361. Where a company elects to keep the information in its register of members on the public register instead, it must provide the registrar of companies with all the information that is required to be on that register. If that information changes subsequently, the company must notify the registrar of the changes.

362. Section 1068(6) CA 2006 prevents the registrar from requiring that documents are delivered to the registrar only by electronic means. Section 1069 CA 2006 provides a power to make regulations requiring documents to be delivered electronically but this power has never been exercised. Schedule 5 inserts a new section 1068(6A) which provides an exception to the general restriction in section 1068(6) to allow the registrar to be able to require electronic delivery of certain documents and information. This exception is limited to information supplied to the registrar when a company makes an election in respect of its register of members and, after an election has been made, when changes to the information about members is supplied to the registrar.

363. A person becomes a member of a company only after their name is entered into the register of members (section 112(2) CA 2006). Where a company has elected to keep this information on the public register instead, a person will become a member when their name is registered by the registrar. In order to ensure that information about the legal owners of a company is provided and updated in a timely manner, the registrar may require this information to be provided electronically.

Justification for delegation

364. Providing that the registrar may require electronic delivery of certain documents and information will provide the registrar with some operational flexibility to ensure that the manner of delivery is appropriate for the circumstances.

365. Section 1068 CA 2006 provides that the registrar may impose requirements about the form, authentication and manner of delivery of documents. Section 1117 CA 2006 makes general provision for the exercise of this power to impose requirements. There is no Parliamentary procedure for the registrar's rules made under section 1068. The registrar must, however, publish the rules in a manner designed to bring them to the attention of those affected by them and to make copies of the rules available in both hard copy and electronic form.

Justification for procedure selected

366. The requirements relate to practical and administrative matters, the manner in which documents must be delivered, rather than the substantive requirements as to nature and content. The registrar is better placed than the Secretary of State to establish requirements which reflect the needs and capabilities of both the registrar's own systems and of the companies who use them. The requirement would only apply where a private company chose to keep information on the public register rather than in their register of members.

Clause 92: Recording of optional information on the register

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution

Context and Purpose

367. Clause 92 inserts a new section 1084A into the Companies Act 2006, giving a power to the Secretary of State to make regulations authorising a company to deliver certain optional information to the registrar of companies. Regulations made under this power may in addition impose requirements on the company regarding keeping this information up to date, and make provision about how the information can be removed from the register on either the authority of the company or by the registrar and how the information can be replaced.

368. The registrar of companies makes available to the public information about the ownership and management of companies along with accounting information under the obligation in section 1080 CA 2006. The registrar does not put on the register information

related to the company that he is not legally required to under the CA 2006 or other legislation.

369. Regulations made under this power will enable the registrar to put on the public register additional information delivered by companies on a voluntary basis, providing a wider range of information for those undertaking data analysis of company and economic activity, whether in the commercial, private or Government sector.

Justification for delegation

370. It is appropriate to have the additional information provisions in secondary legislation as (i) that granularity of detail is not appropriate for primary legislation, (ii) using secondary legislation offers a degree of flexibility to enable the policy to be future-proofed; over time and as the register may develop its commercial activities it may be advantageous to enable companies to supply more additional information if they think there would be benefits to doing so, and (iii) the provisions are purely enabling for companies and do not place any additional obligations on them. Information that is likely to be included as "optional information" includes number of employees or trading addresses.

Justification for procedure selected

371. It is considered appropriate that any such regulations are to be subject to the affirmative parliamentary procedure. Parliament should have the opportunity to debate regulations which allow information to be voluntarily provided to the registrar and then held on the public register as this is a departure from the normal role of the registrar of companies which is to make compulsorily delivered information available on the public register.

Directors' dates of birth

Clause 93 (new section 1087B (2) and (3)): Power to specify public authorities to whom the registrar of companies may disclose the full date of birth information in respect of company directors and people with significant control.

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative resolution

Context and Purpose

372. Clause 93 inserts a new section 1087A into the CA 2006 which requires the registrar of companies to omit the day of a relevant person's date of birth from material on the public register that is available for public inspection. "Relevant persons" include a director of a company or a person registered on the PSC register (included in schedule 3 to this Bill). The aim of this provision is to reduce the risk of identity theft.

373. Clause 93 also inserts a new section 1087B into the CA 2006 which enables the registrar of companies to disclose the full date of birth information to specified public authorities and credit reference agencies. The Secretary of State may by regulations specify

which public authorities the registrar may disclose the full date of birth to. The intention is to specify the same public authorities as those already specified in regulations under section 243 of the CA 2006 (see below).

Justification for the delegation

374. It is appropriate to give the Secretary of State the flexibility to decide which bodies the registrar may supply the information to. Secondary legislation allows the Secretary of State to include other bodies that may need to be included in the future.

375. Section 243 of the CA 2006 allows the Secretary of State to make regulations specifying which public authorities the registrar may disclose directors' residential addresses, which would otherwise be protected information and as such, not disclosable. The proposed power in new section 1087B (2) mirror the powers under section 243 for dates of birth. Under new section 1087B (3), provisions relating to the power in section 243 are imported into the new power in subsection (2).

Justification for procedure selected

376. The regulations are equivalent to regulations under section 243 and similarly use the negative parliamentary procedure.

Registered office disputes

Clause 96 (new section 1097A): Address of company registered office

Power conferred on: Secretary of State

Power exercised by: Regulations (Henry VIII power)

Parliamentary procedure: Affirmative resolution

Context and purpose

377. A company must at all times have a registered office to which all communications and notices may be addressed. A registered office also serves as a place where company records may be inspected. Subject to the requirement that a registered office must be a physical location in the jurisdiction that the company is registered in, the registered office may be any address of a company's choosing.

378. There is nothing at present in the CA 2006 allowing any person other than the company itself to initiate a change to its registered office address and current provisions are insufficient to enable third parties to object to a company's registered office.

379. Clause 96 inserts a new section 1097A into the CA 2006, providing power to the Secretary of State to make regulations enabling third parties to apply to the registrar of companies to change a company's registered office where the registrar is not satisfied that the company is authorised to use the address.

380. The aim of the provision is to deal with situations where a company uses an address of another business or private individual with whom they have no connection, or an address which has not been authorised for use as the company's registered office. This may result in individuals or companies receiving unsolicited correspondence intended for that company, becoming associated with a negative credit rating, and, worse, subject to visits from bailiffs. In some cases, this can be the result of an innocent mistake by the company, but it may also be deliberately mischievous.

Justification for delegation

381. It is considered appropriate to retain a degree of flexibility over the procedure for an application to change a company's registered office and how the registrar of companies determines such applications, including: who may make an application; the information and documents required in such an application; evidence the registrar is entitled to rely on without further enquiry; what the registered office is changed to; and the general effect of any change in registered office.

382. Section 1095 of the CA 2006 provides the Secretary of State with power to make provisions by regulations requiring the registrar, on application, to remove from the register material of a description specified in the regulations that (a) derives from anything invalid or ineffective or that was done without the authority of the company, or (b) is factually inaccurate, or is derived from anything factually inaccurate or forged. Regulations under this section are subject to the affirmative procedure.

383. Similar to new section 1097A, section 1095 sets out the outline of the power of the registrar to rectify material on the register, upon application, but leaves the creation and detailed scope of the procedure to regulations made by the Secretary of State. It also provides flexibility for changes to be made in the light of experience of the procedure, for example to the evidence the registrar is entitled to rely on without further enquiry, if this was appropriate.

Justification for procedure selected

384. It is considered appropriate that any such regulations are to be subject to the affirmative parliamentary procedure. Parliament should have the opportunity to debate regulations which specify a detailed procedure for the application to change a company's registered office under which the registrar of companies will be required to make an administrative decision (of arguably a quasi-judicial nature) that will impact upon companies and third parties alike. It is also more appropriate since the power may amend primary legislation. It is also recognised that analogous provisions, such as section 1095 of the CA 2006, are similarly subject to the affirmative procedure.

385. The regulations may also make provision enabling the registrar to nominate a "default" registered office address to which the registrar may change the registered office, in the event that the registrar is satisfied that the company is not authorised to use the present registered office address. The default address will, therefore, be capable of being nominated by the registrar under the registrar's rules. This is considered appropriate because it provides the registrar flexibility to nominate default registered office addresses as the registrar considers appropriate from time to time.

Director disputes

Clause 98 (new section 1097B): duty to notify directors

Power conferred on: Secretary of State

Power exercised by: Administrative direction

Parliamentary procedure: not applicable

Context and purpose

386. Clause 98 creates an obligation for the Registrar of Companies to send a notice to every new director appointed to a company. The Registrar will be obliged to do this as soon as is reasonably practicable after registering the director's appointment. The preceding clause 97 removes the requirement for companies to send the Registrar a consent by each new director to act in that capacity. Companies will instead be obliged to state that the person has consented to act as director. The notice informing the director of their appointment will therefore perform an important function: if the director did not in fact provide their consent, they will be able to apply for the registration to be removed from the company's public register under the process being introduced by clause 99.

387. The notice will also provide a means of informing new directors of their legal duties. The Government considers that directors should be made more aware of these duties and the implications of failure to comply with them. Policy in respect of directors' duties is the responsibility of the Secretary of State and not the Registrar. It is for this reason that clause 98 has been formulated so that the direction on what information to include in the notice will come from the Secretary of State.

Justification for delegation

388. There is a need to be flexible in prescribing the information about directors' duties being provided to new directors and the manner by which it is presented. The information is being provided purely for educative purposes, and will need to be reviewed regularly to ensure it is being provided in as helpful and user-friendly a manner as possible.

Justification for procedure selected

389. The Government does not consider it appropriate for the content to be prescribed by way of secondary legislation. The duties of a director are already set out in law, including by way of the general duties set out in sections 172 to 177 of the Companies Act 2006. It is not therefore considered necessary for Parliament to have scrutiny over the content of the information provided, or the manner by which it is set out. It is possible that the information will be provided by way of a link to a page on the 'gov.uk' website. Public information provided on this website is not routinely subject to Parliamentary scrutiny.

390. There is also a danger that any such legislative prescription of the information provided could be viewed as prioritising certain directors' duties over others, or creating ambiguity over which is the definitive statement of such duties.

PART 9: DIRECTORS' DISQUALIFICATION, ETC.

Determining unfitness

Clause 103: Determining unfitness and disqualification orders: matters to be taken into account

Power conferred on: Secretary of State

Power exercised by: Order (Henry VIII power)

Parliamentary procedure: Negative resolution

Context and purpose

391. Clause 103 amends the Company Directors Disqualification Act 1986 ("CDDA") to broaden those particular matters or behaviours which a court must have regard to when determining whether a person is unfit to act in the management of a company, whether an individual should be disqualified as a director and what any period of disqualification should be. Those matters are listed within the new Schedule inserted into that Act by the clause. They are not exhaustive and a court may take into account any other matter that it sees fit, however the Schedule highlights those that are considered important.

392. Subsection (7) of new section 12C (inserted by clause 103) includes a power to enable the Secretary of State to amend the Schedule. This power would enable the Secretary of State to modify the Schedule if it were felt necessary to amend those matters that the court must take into account in determining whether a person is unfit to act in the management of a company. Amendment might be necessary if a significant characteristic among unfit directors emerges in future disqualification proceedings.

393. An equivalent power is contained in the new Article 17A to the Company Directors (Northern Ireland) Disqualification Order 2002 (as inserted by Schedule 8).

Justification for the delegation

394. An equivalent power already exists in section 9(4) CDDA to amend the current Schedule of matters determining unfitness that clause 103 replaces.

395. The new Schedule is drafted in broad terms. If circumstances were to change in light of the practical experience of using the new Schedule or if disqualification practice or case law were to evolve, it would be helpful to have a power that could be used to modify behaviours that must be brought to the particular attention of the court listed in the Schedule. For example, being able to modify it to provide clarity in relation to a specific category of conduct that emerges in many disqualifications would prove useful.

Justification for procedure selected

396. The negative resolution procedure is considered appropriate, despite being a Henry VIII power, because the power would only be used to highlight certain factors and behaviours

that the court would, in any event, have discretion to take into account in deciding whether to disqualify. As such, a lower level of scrutiny is sufficient.

397. The current power that exists for modifying the existing Schedule of matters determining unfitness is subject to the negative resolution procedure.

398. The equivalent Northern Ireland provision mentioned is subject to the affirmative resolution procedure, in line with precedent in that Order.

Clause 108 and Schedule 7 - consequential amendments to s21(2) CDDA (Interaction with Insolvency Act)

Power conferred on:

For making rules under section 411 of the Insolvency Act 1986 (the "IA"), in relation to England and Wales, the Lord Chancellor with the concurrence of the Secretary of State and, in the case of rules that affect court procedure, with the concurrence of the Lord Chief Justice; in relation to Scotland, the Secretary of State.

For making a fees order under section 414 of the IA: the Lord Chancellor (or in Scotland the Secretary of State) with the sanction of the Treasury.

For making an order under section 420 of the IA: the Lord Chancellor with the concurrence of the Secretary of State and the Lord Chief Justice.

For the making of an order under section 422 of the IA: the Secretary of State with the concurrence of the Treasury and after consultation with the Financial Conduct Authority and the Prudential Regulation Authority.

Power exercised by:

For section 411 of the IA, rules made by statutory instrument.

For sections 414, 420 and 422 of the IA, order made by statutory instrument

Parliamentary procedure: Negative resolution for all

Context and purpose

399. The changes made to the CDDA by Clauses 101 to 107 include creating new grounds for disqualification (sections 5A, 8ZA to 8ZE), providing a new list of factors to be taken into account by the court in disqualification proceedings (Schedule 1 and section 12C) and allowing for compensation orders to be made against disqualified directors (sections 15A to 15C).

400. Paragraph 16 of Schedule 7 (Sections 101 to 107: consequential and related amendments) amends section 21(2) CDDA to deem new sections 5A, 8ZA to 8ZE, 12C and 15A to 15C included in Parts 1 to 7 of the IA for the purpose of making use of existing powers within the IA. These will enable rules to be made and fees to be fixed for functions

exercised by the official receiver or the Secretary of State in respect of disqualification applications under the new clauses. It will also allow orders to be made to apply the provision to insolvent partnerships and formerly authorised banks.

401. An equivalent power is contained in paragraph 9(15) of Schedule 8.

Justification for the delegation

Section 411 power

402. It is standard practice under the IA and CDDA for procedural detail relating to the operation of insolvency proceedings, including director disqualification proceedings, to be provided in rules. This is because procedural rules can be quite lengthy and may require amendment from time to time following experience of their application in practice.

Section 414 power

403. This power to make fees gives the Lord Chancellor flexibility to determine the appropriate level of fee for tasks to be carried out by the official receiver or the Secretary of State. Most disqualification proceedings under the CDDA are brought by or on behalf of the Secretary of State. Since the cost in carrying out such tasks is subject to change over time, it is appropriate that the level is set in secondary legislation rather than primary legislation.

Sections 420 and 422 powers

404. These powers will enable the Secretary of State to apply the new provisions in the CDDA to insolvent partnerships and certain financial institutions, instead of only in relation to companies. It would be inappropriate to include the drafting for these less common entities on the face of the Bill as it is common practice to use existing powers to apply insolvency and disqualification legislation to such entities.

Justification for procedure selected

Section 411 power

405. The negative resolution procedure is considered appropriate for the power to make procedural rules as such rules are used for detailed matters of process for which a lower level of scrutiny is sufficient. There are additional safeguards in that before making rules under section 412 IA, the Lord Chancellor must (i) consult the Insolvency Rules Committee established under section 10 of the Insolvency Act 1976, and (ii) obtain the agreement of the Secretary of State, and in the case of rules that affect court procedure, the agreement of the Lord Chief Justice.

Section 414 power

406. The negative resolution procedure is considered appropriate as the power is used for fixing fees for tasks to be carried out by the official receiver or the Secretary of State and therefore a lower level of scrutiny is sufficient. There is an additional safeguard in that before making an order under section 414 IA, the Lord Chancellor will need to obtain the consent of the Treasury.

Sections 420 and 422

407. The negative resolution procedure is considered appropriate as the power is merely used to extend to other entities, with necessary modifications, provisions that apply to all companies. The content is already fixed in primary legislation.

408. It is proposed to rely on the resolution procedure that applies for the other types of disqualification application to which each of these powers already apply.

PART 10: INSOLVENCY

Position of Creditors

Clauses 119 and 120 and Schedule 9: abolition of requirements to hold meetings

Power conferred on: Lord Chancellor with the concurrence of the Secretary of State (England and Wales); Secretary of State (Scotland)

Power exercised by: Rules made by statutory instrument

Parliamentary procedure: Negative resolution

Context and purpose

409. These clauses, together with Schedule 9 to the Bill, amend the Insolvency Act 1986 so that a face-to-face meeting of creditors or contributories will not be the default mechanism for seeking the approval of either creditors or contributories to proposals in insolvency proceedings. In most cases the office-holder will be able to use a process of deemed consent, where the office-holder writes to creditors, or as the case may be, contributories, with a proposal, and provided that objections are received from less than a prescribed proportion of creditors or contributories, the proposal will be deemed to be approved. In the event that objections are received by more than the prescribed proportion, the office-holder will be required to use an alternative decision making procedure.

410. Deemed consent will not be available for a limited number of decisions: matters relating a proposal for a voluntary arrangement, the removal of an insolvency office-holder or the remuneration of an office-holder, or where the Court orders or the Insolvency Rules or any other legislation states otherwise. An office-holder will only call a face-to-face meeting of creditors or contributories if this has been requested by more than a prescribed proportion of creditors or contributories.

411. Final meetings in insolvency proceedings are also being abolished by Schedule 9.

412. These clauses and the provisions in Schedule 9 enable insolvency rules made under sections 411 and 412 of the Insolvency Act 1986 to provide:

- the minimum proportions of creditors and contributories needed to require a face-to-face meeting to be held and the procedure for doing so;

- the minimum proportions of creditors and contributories needed to invoke an alternative decision making procedure by objecting to a proposal where the deemed consent procedure has been used;
- the framework under which decision making procedures should be used, including prescribing examples of procedures, rules on the use of alternative decision making procedures, who may participate in such procedures and to whom notices should be given and;
- the period within which objections to the release of an office-holder should be given (currently such objections are made in final meetings);
- that certain decisions must be made using particular decision-making procedures, including by way of face-to-face meetings.

Justification for delegation

413. The reasons for the delegation are twofold. First, the intention is to avoid adding further detail on the face of the Insolvency Act 1986, already a very complex piece of legislation. Sections 411 and 412 and Schedules 8 and 9 to that Act already provide extensive powers to make rules to complement the Act and the Government considers that in principle the detail of insolvency procedures should be contained in the Rules. Procedures for meetings are currently largely set out in the Rules, and it is considered this is the appropriate place for alternative decision making procedures.

414. Secondly to provide flexibility for the future as to the way in which the procedures will operate in case experience of how the new provision operate show that changes are required to be made. It is anticipated that the minimum proportion of creditors and contributories needed to require a face-to-face meeting to be held, and to invoke an alternative decision making procedure by objecting to a proposal under the deemed consent procedure will initially be set at 10% in value, although flexibility will be needed to ensure these levels continue to be appropriate. The use of the particular procedures, such as deemed consent, will also need to be monitored for their appropriateness for different decisions, as will timescales, for example, the period for objecting to a release. This period is intended initially to be set at 28 days after completion of the insolvency process. The same degree of flexibility will be needed in setting out examples of decision making procedures in the Rules. While it is intended to set out procedures for remote meetings and decisions by correspondence at the outset, it may be appropriate to add further examples as technology develops.

Justification for procedure selected

415. Rules under sections 411 and 412 of the Insolvency Act 1986 are made in England and Wales by the Lord Chancellor with the concurrence of the Secretary of State (and in respect of court rules the concurrence of the Lord Chief Justice) and in relation to Scotland by the Secretary of State. Before making such rules the Lord Chancellor is required by section 413 to consult the Insolvency Rules Committee. Rules are subject to annulment by either House. It is appropriate that the new provisions sit within the existing framework of Insolvency Rules, as they also govern the way insolvency legislation operates in practice.

Clauses 121 and 122 and Schedule 9: ability for creditors to opt not to receive certain notices

Power conferred on: Lord Chancellor with the concurrence of the Secretary of State (England and Wales); Secretary of State (Scotland)

Power exercised by: Rules made by statutory instrument

Parliamentary procedure: Negative resolution

416. Clauses 121 and 122 and Schedule 9 to the Bill amend the Insolvency Act 1986 and make provision in respect of the insolvency rules to give creditors the option to opt out from receiving notices from the office-holder in a particular insolvency case. Creditors who have opted out will still receive notices of any intended dividends, although they will no longer receive any notices stating that there will be no dividend. Creditors will be able to opt back in to receiving correspondence at any time.

417. These clauses amend the rule-making powers in the Insolvency Act 1986 to enable insolvency rules made under sections 411 and 412 to provide the procedure for opting out (and opting back in) to receiving notices from office-holders. The changes to the rule-making powers in Schedule 8 to that Act apply to rules about company insolvency proceedings and the changes to Schedule 9 to that Act apply to rules about individual insolvency proceedings.

Justification for delegation

418. The reasons for this delegation are twofold. First, the intention is to avoid adding further detail on the face of the Insolvency Act 1986, already a very complex piece of legislation. Sections 411 and 412 and Schedules 8 and 9 already provide extensive powers to make rules to complement the Act and the Government considers that in principle the detail of insolvency procedures should be contained in the Rules. Secondly, leaving the procedure to be set out in the Rules will provide flexibility for the future as to the way in which the procedure for opting out will operate in light of experience of how the provisions are operating.

Justification for procedure selected

419. Rules under sections 411 and 412 of the Insolvency Act 1986 are made in England by the Lord Chancellor with the concurrence of the Secretary of State (and in respect of court rules the concurrence of the Lord Chief Justice) and in relation to Scotland by the Secretary of State. Before making such rules the Lord Chancellor is required by section 413 to consult the Insolvency Rules Committee. Rules are subject to annulment by either House. It is appropriate that the new provisions sit within the existing framework of Insolvency Rules, as they also govern the way insolvency legislation operates in practice.

Administration

Clause 126: Administration: sales to connected persons

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

420. Teresa Graham's independent review The Graham Review into Pre-Pack Administration ("Graham Review") made a number of recommendations to reform what are known as 'pre-pack administrations', designed to improve their workings both for creditors and to benefit the economy as a whole.

421. Administration is an insolvency procedure focussed on company rescue (or realising more for creditors than would be the case if the company went into the terminal insolvency procedure of liquidation). It can only be entered if a company is insolvent, or likely to become so. A pre-pack administration is where an administrator sells the business or a substantial part of the business at or soon after his or her appointment – where the preparatory work for the sale is carried out in advance of entry into formal administration.

422. The Graham Review recommended that these reforms be carried out by the insolvency industry on a voluntary basis without the need for legislation. However, recognising the risk that the voluntary reforms may not be adopted, the Graham Review also recommended that Government consider taking a "reserve legislative power", at the earliest opportunity, in order to act should the behaviours outlined in the Review continue as well as to encourage take up of the voluntary reforms.

423. One of the key voluntary recommendations in the Graham Review was for proposed sales to a person connected to both the insolvent and purchasing business, to be subject to independent third party scrutiny. This is to give creditors confidence that the proposed sale represents a fair outcome. A connected person includes a director shared by the insolvent company and the purchaser company.

424. Clause 126 is in response to the Graham Review's package of recommendations.

425. This clause gives the Secretary of State the power to make regulations to prohibit an administrator from selling or disposing of property of a company in administration where the sale is to a connected party (as defined in the clause) or to impose requirements or conditions on such a sale.

426. The power allows regulations in particular to impose requirements for approval by the court, a person of a description specified in the regulations or creditors of the company, or to permit any of them to impose requirements or conditions.

427. The power must be exercised within 5 years beginning with the day on which it comes into force, otherwise it expires.

Justification for delegation

428. It is not appropriate to legislate to ban sales to connected parties or to impose conditions or restrictions on such sales at the current time. Government needs to give the industry time to adopt the voluntary measures proposed by the Graham Review.

429. The Government intends to review the sector as regards sales to connected parties ahead of exercising the power contained in this clause. The industry practice around sales to

connected parties may be very different when the Government comes to review the sector. The voluntary reforms may be embedded by then, and industry practice with regard to such sales may have changed. Accordingly, it is difficult to determine what measures will be required at that time. The Government needs to retain flexibility in the approach to adopt.

430. The Government would like to be in a position to legislate as quickly as possible after such a review of industry practice in relation to sales to connected parties is carried out. This power gives the Government that ability to legislate quickly if the insolvency industry has failed to act.

431. It is also considered that taking a legislative power now will act as an incentive to encourage the insolvency industry to adopt the voluntary proposals set out in the Graham Review. Without such a backstop power, there will be less incentive for the voluntary reforms to be adopted.

432. The power is well targeted because it will only apply to sales to connected parties in administration and not to all sales in administration.

433. In line with the Government's deregulatory agenda, the power expires after 5 years. This will give sufficient time to review the market and legislate if the Government considers that it is appropriate to do so.

Justification for procedure selected

434. The Government considers that the affirmative resolution procedure is appropriate for this power. The power to ban all sales in administration to connected parties, if exercised, would be a significant step and should be debated in Parliament. The affirmative procedure will provide the appropriate safeguard.

Dividends

Clauses 128 and 129: Creditors not required to prove small debts

Power conferred on: Lord Chancellor with the concurrence of the Secretary of State (England and Wales); Secretary of State (Scotland)

Power exercised by: Rules made by statutory instrument

Parliamentary Procedure: Negative resolution

Context and purpose

435. A creditor of a company or an individual who hopes to be paid (or to receive a dividend) in insolvency proceedings under the Insolvency Act 1986 must currently submit a written claim to the office-holder (e.g. the liquidator or the trustee) containing information prescribed by the Insolvency Rules 1986 made under the Act. The office-holder may ask for further evidence from the creditor before accepting the proof. This process creates a burden on both the creditor, in having to complete the claim form and on the office-holder in verifying the claim, such time being charged to the estate. It is possible that, for smaller claims in cases, this burden may itself deter creditors from making claims. As the office-

holder may already have details of the creditor's debt from the insolvent debtor's accounting records or the statement of affairs provided by the insolvent debtor, the burden may be regarded as disproportionate in relation to the level of the dividend received.

436. These clauses amend the rule making powers in the Insolvency Act 1986 to enable insolvency rules made under sections 411 and 412 to provide that a creditor can be treated as having proved a small debt without submitting a proof. The new paragraph 13A in Schedule 8 applies to rules about company insolvency proceedings and the new paragraph 18A in Schedule 9 applies to individual insolvency proceedings. The maximum size of debt which can be treated as proved will be set out in the Rules. The change will only apply to receiving a dividend. For other procedures in the Act, such as a creditor's voting rights, a proof will still be required.

Justification for delegation

437. The reasons why this is being done by secondary legislation are first to avoid adding further detail on the face of the Insolvency Act 1986 which is already a very complex piece of legislation. Sections 411 and 412 and Schedules 8 and 9 already provide extensive powers to make rules to complement the Act and it is the Government's view that in principle the detail of insolvency procedures should be contained in the Rules. Secondly to provide flexibility for the future as to the way in which the procedure will operate and the amount of size of debt that is to be treated as small. For instance, the Government anticipates that a small debt will initially be one below £1,000 but this figure may need to be increased in line with inflation.

Justification for procedure selected

438. Rules under sections 411 and 412 are made in England and Wales by the Lord Chancellor with the concurrence of the Secretary of State (and in respect of court rules the concurrence of the Lord Chief Justice) and in relation to Scotland by the Secretary of State. Before making such rules the Lord Chancellor is required by section 413 to consult the Insolvency Rules Committee. Rules are subject to annulment by either House. It is appropriate that the new provisions sit within the existing framework of Insolvency Rules, as they also govern the way insolvency legislation operates in practice.

Regulation of insolvency practitioners: amendments to existing regime, and power to establish single regulator of insolvency practitioners

Clauses 134, 137, 138, 141, 142, 143 and Schedule 11: Insolvency Practitioner provisions

Context and background

439. By way of general background to these clauses, insolvency practitioners are authorised and regulated under a system of self-regulation, largely by professional bodies which also regulate the accountancy and legal professions. Part 13 of the Insolvency Act 1986 allows the Secretary of State to recognise professional bodies which meet certain conditions to authorise and regulate persons acting as insolvency practitioners. The Secretary of State, acting through the Insolvency Service, is responsible for overseeing the effectiveness of the recognised professional bodies as regulators. At present, the Secretary of State's only means of dealing with a recognised professional body which is not regulating

effectively is to revoke its recognition, a sanction which would be disproportionate in all but the most serious of circumstances.

440. Clauses 134 to 140 will amend Part 13 of the Insolvency Act 1986 to strengthen the regulatory regime for insolvency practitioners. The clauses will create regulatory objectives to direct and focus the regulatory activities of recognised professional bodies. Recognised professional bodies will be required to act compatibly with those objectives in discharging their regulatory functions. The Secretary of State will be required have regard to the objectives when performing his functions as the oversight regulator.

441. The amendments will also introduce a range of more proportionate sanctions which the Secretary of State may use against a recognised professional body which fails to discharge its functions in a way which is compatible with the regulatory objectives. Where a recognised professional body's acts or omissions have an adverse impact on one or more of the objectives, the Secretary of State will be able to direct the body to take steps to mitigate, or prevent the adverse impact, fine the body or issue a reprimand. If the adverse impact is sufficiently serious, the Secretary of State will be able to limit a body's recognition so that is only capable of authorising individuals in relation to either corporate or personal insolvencies (if the body is not already limited in this way) or to revoke a body's recognition altogether. The Secretary of State will also be able to apply to the court to require an RPB to discipline an insolvency practitioner if disciplinary action appears to be in the public interest.

442. The order making powers conferred or amended as part of these changes are exercisable in relation to England, Wales and Scotland.

Clause 134: Authorisation of insolvency practitioners: recognition of professional bodies

Power conferred on: Secretary of State

Power exercised by: Order (amendment of existing order-making power).

Parliamentary procedure: Negative resolution

Context and purpose

443. This clause will continue to allow the Secretary of State to recognise a new professional body for the purposes of authorising and regulating insolvency practitioners if the Secretary of State is satisfied on an application made to him by the body that it meets certain conditions.

444. The amendments will insert a new section 391A into the Insolvency Act 1986 which will provide that any new body seeking an order for recognition as a professional body which may authorise and regulate insolvency practitioners must make an application to the Secretary of State in such form and manner as the Secretary of State may require, accompanied by the body's rules, policies, practices and any relevant guidance, and such additional information as the Secretary of State may require.

445. Clause 134 will amend section 391 of the Insolvency Act 1986 relating to recognised professional bodies. Section 391 confers powers on the Secretary of State by order to recognise a professional body for the purposes of granting full authorisation or partial

authorisation (in relation either to companies or to individuals) to its insolvency specialist members, or to recognise a professional body for the purposes of granting only partial authorisations.

446. The amendments will mean that in each case an order may be made only if the Secretary of State is satisfied on an application made by a body in accordance with the procedure set out in section 391A, that:

- the body regulates or is going to regulate the practice of a profession;
- the body has rules which it is going to maintain and enforce for securing that its insolvency specialist members are fit and proper persons to act as insolvency practitioners and meet acceptable requirements as to education, practical training and experience; and
- the body's rules and practices for or in connection with authorising and regulating persons to act as insolvency practitioners are designed to ensure that the regulatory objectives are met.

447. By virtue of section 419 of the 1986 Act, an order under section 391 will be subject to the negative procedure.

Justification for delegation

448. The power to recognise professional bodies which meet certain conditions to authorise their members to act as insolvency practitioners has been delegated since the Insolvency Act 1986 came into effect. The Deregulation Bill will allow insolvency practitioners who wish to specialise to become partially authorised to act only in relation to companies or only in relation individuals. Clause 18 of that Bill will introduce a power which allows the Secretary of State to recognise professional bodies which are capable of providing full or partial authorisations to their insolvency specialist members or which are capable of providing their insolvency specialist members with partial authorisations either in relation to companies or in relation to individuals.

449. The Government considers that such powers should continue to be delegated to the Secretary of State. Delegation will allow the Government the flexibility to determine in any specific case whether or not a body meets the requirements for recognition and is capable of granting both full and partial authorisations or providing partial authorisations only. It will enable the Government to recognise a body swiftly, if the body's application to the Government demonstrates that it is suitable for recognition.

Justification for procedure selected

450. The Government considers it appropriate that orders recognising professional bodies which regulate insolvency practitioners should continue to be made using the negative resolution procedure. Decisions relating to the recognition of bodies which regulate insolvency practitioners can be taken by the executive and do not merit the additional level of parliamentary scrutiny afforded by the affirmative procedure.

Clause 137: Authorisation of insolvency practitioners: revocation of recognition of professional body

Power conferred on: Secretary of State

Power exercised by: Order (extension of existing order-making power).

Parliamentary procedure: Negative resolution

Context and purpose

451. This clause will continue to allow the Secretary of State by order to revoke recognition of a professional body recognised for the purpose of authorising and regulating insolvency practitioners if certain conditions are met.

452. The power to revoke a body's recognition will form part of a range of sanctions which the Secretary of State may use against a recognised professional body. Under section 391L the Secretary of State, if satisfied that a body's act or omission or a series of such acts or omissions in discharging one or more of its regulatory functions, has had or is likely to have an adverse impact on the regulatory objectives, the Secretary of State may, by order, revoke the body's recognition, or revoke a body's recognition in relation to full and partial authorisations and replace it with a recognition in relation to partial authorisations only.

453. New section 391N will enable the Secretary of State by order at the request of a recognised professional body, to revoke the body's recognition or to revoke its recognition in relation to full and partial authorisations and replace it with recognition in relation to partial authorisations as the case may be. The Secretary of State may agree to such a request if satisfied that it is appropriate in all the circumstances of the case to do so. Before making an order under section 391N, the Secretary of State must publish a notice stating when the order is to take effect and the reason for the order.

454. The Secretary of State may make transitional provisions to treat the body's insolvency specialist members as fully or partially authorised, as the case may be, for a specified period after recognition is revoked.

455. Pursuant to section 419 of the Insolvency 1986 Act, an order under section 391M or 391N which revokes an order made under section 391 is subject to the negative procedure.

Justification for delegation

456. The power to revoke recognition of professional bodies which may authorise their members to act as insolvency practitioners has been delegated since the Insolvency Act 1986 came into effect. Clause 18 of the Deregulation Bill will retain the power enabling the Government to revoke a professional body's recognition if no longer meets the conditions for recognition and introduce a power which allows the Government to revoke recognition of a professional body in relation to full or partial authorisations and replace it with recognition in relation to partial authorisations if appears to the Secretary of State that the body is capable of providing its insolvency specialist members with partial authorisation only.

457. The Government considers that such powers should continue to be delegated to the Secretary of State. Delegation will grant the flexibility to determine in any specific case whether or not a body is regulating in a way which meets the objectives for the regime. It

will enable the Government to take swift action pursuant to its determination. A need to use primary legislation would inevitably lead to delay and difficulty.

Justification for procedure selected

458. The Government considers it appropriate that orders revoking the recognition of professional bodies which regulate insolvency practitioners should continue to be made using the negative resolution procedure. Such decisions can be taken by the executive and do not merit the additional level of parliamentary scrutiny afforded by the affirmative procedure.

Clauses 141, 142, 143 and Schedule 11: Single regulator of Insolvency Practitioners

Power conferred on: Secretary of State

Power exercised by: Order made by statutory instrument (Henry VIII power)

Parliamentary procedure: Affirmative resolution

Context and purpose

459. Insolvency practitioners are currently authorised and regulated by seven recognised professional bodies. There is concern as to whether the effectiveness of the regime is undermined by the existence of too many regulators to regulate a profession of only 1355 practitioners who take appointments.

460. Clauses 141 to 143 will enable the Secretary of State to make an order which pass responsibility for authorising and regulating insolvency practitioners to a single independent regulator in place of the seven recognised professional bodies and to confer the following functions either on a body corporate which is established by the order or on a body which is already in existence whether that body is a body corporate or an unincorporated association:

a. establishing criteria for determining whether a person is a fit and proper person to act as an insolvency practitioner;
b. establishing the requirements as to education, practical training and experience which a person must meet in order to act as an insolvency practitioner;
c. establishing and maintaining a system for providing full authorisation or partial authorisation for persons who meet those criteria and requirements;
d. imposing technical standards for persons authorised to act as insolvency practitioners and enforcing compliance with those standards including through the use of financial penalties;
e. imposing professional and ethical standards for persons authorised to act insolvency practitioners and enforcing compliance with those standards, including through the use of financial penalties;
f. monitoring the performance and conduct of persons authorised to act as insolvency practitioners; and
g. investigating complaints made against, and other matters, concerning the performance or conduct of persons authorised to act as insolvency practitioners.

461. The power will enable the Secretary of State to make an order with regard to the body's status, its funding, fees that the body may charge for meeting its expenses in discharging its regulatory functions, the extent to which the body must consult others before

exercising any of its functions, the imposition of financial penalties by the body, and the body's reports and accounts.

462. Designation of an existing body will only be permitted if the body is willing and able to exercise the functions that would be conferred upon it, and the body has arrangements in place to ensure the functions are exercised effectively and in accordance with any other requirements in the order.

463. If a new body is to be established by an order, the Secretary of State will, amongst other things, be able to make provision concerning the appointment of members and a chair, permitting the body to employ people and setting their terms and conditions of employment, establishing committees to exercise its functions, providing training or other services and charging for training or other services on a commercial basis

464. The power will allow the Secretary of State to make any necessary transitional and supplementary provision.

Justification for delegation

465. The aim of these provisions is to improve the level of confidence in the regulatory regime for insolvency practitioners. They are in a position of considerable trust over the affairs of insolvent companies and individuals and their decisions and actions can have a significant financial impact on those affected. Hence, there is a need for a strong regime. The Government considers that the regulatory powers introduced by these changes will enable the Secretary of State to better ensure that the current recognised professional bodies are committed to an effective regulatory regime.

466. The changes proposed by clauses 134 to 140 will be reviewed within a reasonable time of commencement. If there is still a lack of confidence in the insolvency practitioner regulatory regime, then the Secretary of State will consider whether to act to bring an end to the system of self-regulation by creating a single independent regulator which will apply consistent standards of regulation and will not be perceived to act in the interests of insolvency practitioners over creditors. The order-making power will provide certainty for the Government and insolvency professionals alike that swift action can be taken without the need to take up Parliamentary time.

467. The intention is that the power would only be used once a full review, consultation and impact assessment exercise has been carried out. If the power is not exercised within seven years of enactment, it will not remain on the statute book. For the moment, it will provide the Secretary of State with a lever to work with the current recognised professional bodies to ensure a successful regime going forward.

Justification for procedure selected

468. If exercised, the order-making power will create a single independent regulator to replace the current system of self-regulation of insolvency practitioners. Not only will this be an important and controversial change for the profession, the power will amend primary legislation since it will revoke provisions in Part 13 of the Insolvency Act 1986 pertaining to the recognition of professional bodies and the Secretary of State's powers of sanction. For

these reasons, and because the power is a Henry VIII power, the exercise of the power merits a greater level of Parliamentary scrutiny than the negative procedure affords.

469. There is a de-hybridising provision in clause 143(4). This is necessary as if regulations made under section 141 were used to appoint an existing body as the single regulator of insolvency practitioners, the instrument would be highly likely to be hybrid as it would be treating such a body differently than others of the same class. The Government is satisfied that the private interests of such a body would be sufficiently protected to allow such an appointment, since the Secretary of State may only make an appointment if it appears to the Secretary of State that the body is able and willing to exercise such functions (clause 142).

PART 11: EMPLOYMENT

Whistleblowing

Clause 144 (new section 43FA Employment Rights Act 1996): Protected disclosures: reporting requirements

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative resolution, unless provisions made under sections 43FA(2), (3) or (4), in which case negative resolution

Context and purpose

470. Clause 144 inserts a new section 43FA in to the Employment Rights Act 1996 giving the Secretary of State a power to make provision by regulations to require certain prescribed persons as set out in the Public Interest Disclosure (Prescribed Persons) Order 2014(PID(PP)O) to publish an annual report on disclosures made to them by workers (who fall within the extended definition of worker in Part 4A of the Employment Rights Act 1996). These reports will be published in a manner determined by the regulations and may make provision about the time period within which a report must be produced and published. The power also enables the Secretary of State to make further amendments to the content of the annual report and to change its method of publication.

471. The prescribed persons are comprised of a number of different types of bodies including regulators, as well as individuals who hold positions of public authority e.g. Scottish and Welsh ministers. Regulations made under this provision will ensure more systematic processes and consistency across all prescribed bodies in the way public interest disclosures are handled.

Justification for delegation

472. It is necessary to maintain a degree of flexibility in relation to this provision, in order to allow the Secretary of State to make the decision as to the level of reporting duties on each prescribed person and not to impose unnecessary burdens on regulators who will each have

established approaches to reporting. **The issue of how the Government should implement the reporting requirement was the subject of a consultation which closed on the 30th September. The Government is currently considering the responses, which will determine how this power should be exercised. Secondary legislation will be drafted in skeleton by the Lords Committee stage of the Bill.**

473. As the PID(PP)O may be amended at any point, the Secretary of State cannot foresee which bodies may be added in the future. In light of this it is appropriate that the Secretary of State has the power to impose the relevant level of reporting duties on new prescribed persons.

Justification for procedure selected

474. It is considered appropriate that the first set of regulations, setting out the persons subject to the duty, the publication requirements, the timing of the report and the content of the report, as well as any further regulations setting out new prescribed persons subject to the reporting obligation are subject to the affirmative resolution procedure. Since exercising the power will introduce a new duty on regulators, it is considered that this provides the appropriate level of parliamentary scrutiny.

475. It is appropriate that any amendments to the regulations to change the content of the reports or how or when they must be published under subsections 43FA(2), (3) and (4) are subject to the negative resolution procedure. The principle that reporting is required of a particular prescribed person will have already been established by the regulations under the affirmative procedure, as such, a lower level of scrutiny is sufficient for minor modifications to the report. This is consistent with the approach taken in section 857 of the Companies Act 2006.

Employment tribunals: failure to pay sums

Clause 145: Financial penalty for failure to pay sums ordered by Employment Tribunal etc.

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary procedure: Affirmative Resolution (Henry VIII Power)

Context and purpose

476. This clause inserts new sections 37A to 37Q into the Employment Tribunals Act 1996 ("ETA"), creating a new financial penalty regime to address non-payment of Employment Tribunal awards (including any costs awarded to allow a worker to recover Tribunal fees) and sums due under settlement agreements reached following the procedure in sections 18 to 19A of the ETA.

New section 37N: Powers to vary elements of the penalty and associated time limits

477. New section 37N confers the following powers on the Secretary of State; the power to vary the minimum and maximum amount of the financial penalty that can be imposed, the power to amend the percentage figure which is to be used in the calculation of a financial penalty and the percentage reduction applied in cases of early payment, and the power to amend some procedural time limits (the minimum time for responding to a warning notice, the minimum time for complying with a penalty notice, the time limit for qualifying for reductions in the amount of a penalty that depend on early payment). These are all powers to amend the primary legislation.

Justification for delegation

478. These powers will enable the Government to change the rules for calculating financial penalties, and the procedural time limits mentioned above, if this is considered necessary in light of evidence on how the new regime is working in practice. As the effect of the regime on employers cannot be predicted exactly, including the impact of the proposed rules on early payment, it is considered desirable to have a power to make reactive changes by way of secondary legislation if necessary. For example, it may be helpful to amend the early payment regime or procedural time limits if evidence shows that a higher discount rate for early payment or a longer payment period could be more effective in delivering the principal objective of the clause: the timely payment of Employment Tribunal awards to workers. Amendments may also be desirable to reflect changes to financial penalty regimes that have been a model for this one. However, the provisions ensure that amendments remain within clear boundaries: there is no question of changing the core elements of the procedure for imposing penalties.

479. These powers are similar to those in section 12A(12)(a) and (b) of the ETA and section 19A(8) of the National Minimum Wage Act 1998 (the latter is concerned with penalties for underpayment of the national minimum wage), although they go slightly wider. In particular, the powers to change the early payment regime and the procedural time limits are new (but justified, for the reasons given above).

Justification for procedure selected

480. The affirmative procedure is considered appropriate for these powers as they could be used to change key aspects of the new financial penalty regime, including the amount of the penalties. The affirmative procedure applies in the precedents cited above.

Clause 145: Power in new section 37O for the Secretary of State to apply financial penalty provisions with modifications in cases of multiple financial awards or settlement sums.

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

481. In a straightforward case, financial penalties under new sections 37A to 37Q of the ETA will be based on unpaid sums owed by an employer to a single worker. However, in

practice, many workers may be part of the same claim or settlement. The power in new section 37O allows the other financial penalty provisions to be applied with modifications in these cases. This would, for example, allow regulations to provide that enforcement officers should issue only one warning notice and one penalty notice in these cases (instead of one per worker).

Justification for delegation

482. Again, it is necessary for this power to be delegated to allow the Government to respond quickly to evidence about how the new financial penalty regime is working in practice. It may be that issuing several notices in cases with multiple workers serves as an effective deterrent and is not overly burdensome for enforcement officers. It may also be easier in practice to deal with possible variations from worker to worker in these cases if there are multiple penalty notices. If this proves to be the case, the power will not be exercised. However, if the lack of specific provision about multiple worker cases proves problematic, in particular for businesses, it is desirable to have a mechanism for making the necessary adjustments to fix the regime without having to resort to primary legislation.

Justification for procedure selected

483. The affirmative procedure is considered appropriate for this power as multiple worker cases are not rare and changes in this area may be of similar practical significance to changes effected by the exercise of other powers included in clause 145.

Clause 145: Power for the Secretary of State to alter the definition of "claim" in new section 37Q

Powers conferred on: Secretary of State

Powers exercised by: Regulations (Henry VIII Power)

Parliamentary procedure: Affirmative resolution

Context and purpose

484. "Claim" is currently defined in the same way as in section 12A of the ETA. However, there is a power in section 12A(12)(c) to amend the definition of "claim" there. Such amendments may, for example, respond to evidence on how the financial penalty regime introduced by section 12A is working in practice. However, evidence about the operation of the financial penalty regime introduced by this clause may point in a different direction. For example, the Government may wish to exclude different proceedings from the scope of this new financial penalty regime or none at all. Section 37Q will allow for this.

Justification for delegation

485. It is necessary for this power to be delegated to allow the Government to respond quickly to evidence about how the new financial penalty regime is working in practice and, in particular, to respond quickly where changes are made by secondary legislation to the comparable regime in section 12A. Moreover, there is precedent for delegation in this way. As well as the similarity to the power in section 12A(12)(c) of the ETA, there is also a

resemblance to those in sections 4(4) and 18(8) of the ETA (powers to amend the list of proceedings to which particular aspects of Employment Tribunal and Acas procedure apply).

Justification for procedure selected

486. The affirmative procedure is considered appropriate for this power as the power could be used to amend the scope of the financial penalties regime, adding or removing jurisdictions from the regime, and it is considered that such changes require a greater level of scrutiny. The affirmative procedure applies in relation to the powers in sections 4(4) and 12A(12)(c) of the ETA.

Employment tribunals: postponements

Clause 146: Employment Tribunal procedure regulations: postponements

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose

487. In order to reduce unnecessary delays and costs in cases going before Employment Tribunals ('ETs'), the Government wishes to introduce new rules into the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 regarding the granting of postponements. The purpose of this clause is to amend sections 7, 13 and 13A of the Employment Tribunals Act 1996 ('the ETA 1996'). The clause inserts new provisions into the aforementioned sections relating to the procedure governing the granting of postponements in cases going before an ET. These are:

1) A power to make provision in regulations about postponement of hearings which limits the number of postponements available to a party in the proceedings.

2) A duty on the Secretary of State to ensure that any provisions on costs included in employment tribunal procedural regulations, includes provision requiring a tribunal to consider the use of a costs order following a successful late notice postponement application; and

3) A duty on the Secretary of State to ensure that any provision on preparation time included in procedural regulations, includes provision requiring a tribunal to consider the use of an order in respect of preparation time following a successful late notice postponement application.

Amendments to Section 7

Context and Purpose

488. Section 7(1) of the ETA 1996 contains a general power to make regulations as to ET procedure. Section 7 also contains more specific powers to make regulations about particular

aspects of ET proceedings. Regulations made under Section 7 are found in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which contains the Employment Tribunals Rules of Procedure ('the Rules').

489. The clause inserts a new subsection (3ZB) into section 7. This confers on the Secretary of State the power to make regulations which limit the number of postponements available to a party in proceedings, which are granted following an application by that party.

490. Therefore this power enables the Secretary of State to prescribe a maximum number of postponements that a party may be granted in a case and criteria that the ET should apply when deciding whether to grant a postponement to a party who has already exhausted the prescribed number. If a party has used up the prescribed number of postponements they will not be granted further postponements, unless the criteria that the regulations prescribe are satisfied. It is the policy intention that the rules will provide that applications in these circumstances can be granted in exceptional circumstances.

491. The power enables the Secretary of State to identify proceedings in which the limit on the number of postponements available to a party will apply. This is to allow the regulations to provide for situations in which proceedings involve more than one complaint listed on the claim form and being brought before the ET (e.g. a party may bring complaints for both unfair dismissal and discrimination) and/or proceedings in which there is more than one defendant (e.g. a discrimination claim can be brought against another employee as well as the employer). The policy intention is that the rules will provide that where a claimant brings proceedings which contain one or more complaints which will be heard concurrently before the Tribunal, any successful postponement application requested by a party should count towards the total limit available to them.

492. This power will also enable the Secretary of State to prescribe specified circumstances in which a postponement application will not count for the purposes of the rule. An example of such an exemption includes where a postponement is requested as a direct result of the hearing date being relisted at short notice by the ET itself but the applicant has already used up their prescribed number of postponements.

Justification for delegation

493. It is standard practice for any detailed procedural requirements in ETs to be set out in secondary rather than primary legislation. Procedural regulations can often be quite lengthy and setting them out in secondary legislation avoids having too much technical detail on the face of the Act. The added benefit of this is that all ET procedural rules can then be found in one place.

494. In addition, procedural requirements may require subsequent amendment. For example, the Government may find following consultation with stakeholders or through practical application that different criteria should be applied to applications for postponement. Having the procedure prescribed in secondary legislation ensures flexibility in responding to changing circumstances. It enables Government to make necessary changes quickly in light of experience without the need for primary legislation but maintaining an appropriate degree of Parliamentary scrutiny.

495. By way of precedent, there is currently a general power under section 7(1) which allows the Secretary of State to make provision in regulations in respect of ET proceedings, followed in subsection (3) by a number of specific powers which are exercised in making the ET Rules, for example the power to prescribe the procedure to be followed in proceedings before the tribunal, the power to require people to give evidence or produce documents and the power to authorise the proceedings to be determined without a hearing in certain circumstances. This includes section 7(3)(f)(ia) which is similar to the new power in subsection 3(f)(ib) introduced by this clause in that it allows the Secretary of State to prescribe the procedure for postponements which are granted for the purpose of giving an opportunity for the proceedings to be settled without a final hearing.

Justification for procedure selected

496. All powers contained within section 7 of the ETA 1996 are subject to negative procedure and therefore the procedure adopted for this power will be consistent with the rest of those in section 7. Moreover the Government considers that the negative procedure and the level of scrutiny it entails is sufficient and appropriate for regulations setting out procedural rules of ETs which are administrative in nature.

Amendments to section 13 and section 13A

Context and Purpose

497. While this clause inserts two separate provisions into sections 13 and 13A, these two sections are closely related and the powers contained in them exercised together in the ET Rules. Therefore the two new provisions are addressed together in this memorandum.

498. The Government wishes to ensure that ETs give consideration to making a costs order against a party who has been granted a late postponement of a hearing. Doing so would ensure that the Tribunal considers ordering that the respondent to the application for postponement be reimbursed where appropriate for any costs incurred as a result of the late postponement.

499. Section 13 of the ETA 1996 contains a general power allowing the Secretary of State in ET procedure regulations to make provision for the award of costs or expenses.

500. The clause inserts a new subsection (3) into section 13. This requires the Secretary of State to ensure that any provision on costs included in employment tribunal procedural regulations includes provision requiring a tribunal to consider the use of a costs order following a successful late application for postponement. The duty enables the Secretary of State to prescribe the number of days before a hearing that constitutes a late application and circumstances in which the rule will not apply.

501. As explained above, the powers in section 13 and 13A are related and exercised together in the Rules. Therefore as well as ensuring that ETs give consideration to making a costs order, the Government wishes to ensure that ETs also consider making a preparation time order in respect of postponements granted at late notice. Preparation time orders can be made by ETs in favour of a party which has not been legally represented but has spent time preparing for the case.

502. Section 13A of ETA 1996 contains a general power allowing the Secretary of State in ET procedure regulations to make provision for the authorisation of preparation time orders.

503. The clause inserts a new subsection (2)(A) into section 13A. Similarly to the new duty inserted in section 13, this requires the Secretary of State to ensure that any provision on preparation time included in procedural regulations includes provision requiring a tribunal to consider the use of a preparation time order following a successful late application for postponement. The duty enables the Secretary of State to prescribe the number of days before a hearing that constitutes a late application and circumstances in which the rule will not apply.

Justification for delegation

504. As explained above, it is standard practice for any detailed ET procedural requirements to be set out in secondary rather than primary legislation. This includes procedural rules surrounding costs and preparation time orders. The general and specific powers in sections 13 and 13A of the ETA 1996, are all exercised in one place in the Rules. Inserting a provision into the ETA 1996 which requires the Secretary of State to make regulations on the cost consequences of late notice postponements as well as a duty to make equivalent regulations on preparation time orders will be consistent with the existing legislation and approach.

505. Moreover, as argued in relation to the amendment to section 7, procedural requirements may require subsequent amendment. For example the Government may find that a postponement granted at what is deemed as 'short notice' before a hearing (i.e. the number of days before a hearing that will be prescribed in the Rules) will need to be amended in light of practical application. Such amendments are administrative in nature and therefore having procedure prescribed in secondary legislation ensures Government can make necessary changes quickly and without the need for primary legislation.

506. There are currently powers in sections 13 and 13A which enable the Secretary of State to make regulations for the award of costs or expenses and preparation time orders and for making wasted costs awards against legal representatives. There is also a specific power in section 13(2) which requires the Secretary of State to make costs regulations in respect of postponements or adjournments granted in specific circumstances in proceedings bought under section 111 of the Employment Rights Act 1996. The clause simply adds additional express provision on postponements to these sections.

Justification for procedure selected

507. All powers in sections 13 and 13A of the ETA 1996 are subject to negative resolution procedure and therefore having the same procedure for these provisions would achieve consistency. Regulations made under these provisions would not be creating any new powers for the Tribunal; instead they would require Tribunals to consider using their existing powers in particular circumstances. The Government believes therefore that the level of parliamentary scrutiny present in negative resolution procedure is sufficient and appropriate for provisions for making employment tribunal procedural regulations, all of which currently operate by negative procedure.

Clause 148: Exclusivity terms unenforceable in zero hours contracts

Power conferred on: Secretary of State

Powers exercisable by: Regulations

Parliamentary procedure: Affirmative resolution

Context and purpose

508. This clause inserts new sections 27A and 27B into the Employment Rights Act 1996 ("ERA"). New section 27A renders unenforceable exclusivity terms in zero hours contracts, to allow workers on zero hour contracts to work for multiple employers. Zero hours contracts are defined at subsection (1), and what constitutes exclusivity is defined in subsection (3).

509. The Secretary of State has a power to make further provision in this regard. This is to allow regulations to address circumstances where zero hours workers (defined in section 27B(2)) are restricted by any other provisions in their contracts from working for other employers, and to address any measures that may be adopted by employers in an attempt to avoid the effects of this legislation. Regulations may prescribe other types of contract to which the restrictions on exclusivity should apply. New section 27B(1) also provides a power to prescribe substantive rights and remedies to parties who already fall under new section 27A.

510. New section 27B(2) creates a power for the Secretary of State to specify that zero hour workers includes certain individuals working under other workers' contracts. The purpose is to extend the regulation of exclusivity clauses to individuals working under other contractual arrangements if this is considered appropriate.

511. New section 27B(3) provides that the Secretary of State, in making regulations under section 27B(2)(c), may have regard to provisions in workers' contracts about the income of the worker, any rate of pay or any working hours. This means that when the Secretary of State makes regulations determining which workers' contracts will be affected, he can do so by reference to the income, pay or working hours of that worker. For example, a worker earning below a certain threshold or working below a certain threshold of hours may be considered to work under a contract which should be regulated under these provisions.

512. New section 27(B)(5) provides that regulations made under section 27B(1) may include provision for modifying contracts, and arrangements imposing financial penalties on employers, requiring employers to pay compensation to zero hour workers, conferring jurisdiction on employment tribunals and conferring rights on zero hour workers.

513. The purpose of the power is to allow the Secretary of State to provide additional protection for workers in the event that the provisions in new section 27A prohibiting exclusivity clauses are not sufficient to protect affected workers. For example, the power to create new causes of action, and jurisdiction to hear such claims, will allow for regulations to address as yet unforeseen types of claim which may arise as a result of the new law.

Justification for delegation

514. These powers allow the Secretary of State to regulate contracts and arrangements in very narrow circumstances, - namely where they restrict a worker from working for other employers.

515. The delegated powers will allow the Government to consider whether certain working practices are acceptable or unacceptable and therefore determine whether different types of employment arrangement should or should not be covered by this legislation. The delegations are justified as they will allow the Government to address other categories of workers' contracts which should have terms about exclusivity made unenforceable by this legislation, and to address any steps taken by employers to avoid the effects of these provisions.

516. For example, where evidence shows that employers are seeking to avoid the effect of the primary provisions, by varying zero hours contracts to provide one hour of guaranteed work under a contract, the power in section 27B would enable this to be addressed. If evidence showed that employers sought to penalise workers as a consequence of taking work for other employers, these powers would allow regulations to confer rights on workers who had suffered detriment in these circumstances.

517. Given that the content of secondary legislation under these powers will depend on further evidence, it is necessary for this power to be delegated in order to allow the Government to respond to that evidence. **The Government published a consultation in August 2014 on the possible use of these delegated powers, which closed on 3 November 2014.** The Government will consider carefully the evidence received from stakeholders and interested parties in determining how to exercise these powers.

Justification for procedure selected

518. The affirmative procedure is considered appropriate to allow full Parliamentary scrutiny of what could be significant secondary legislation.

Clause 149: Power to recover payments made to public sector workers as a consequence of leaving their role, upon the worker's return to service in the public sector

Power conferred on: The Treasury

Powers exercisable by: Regulations

Parliamentary procedure: Negative resolution

Context and purpose:

519. Clause 149 confers a power upon the Treasury to make regulations that introduce provisions which allow public sector bodies to recover some or all of an exit payment from a worker who returns to work in the public sector (either as an employee, a contractor, or an office holder) within a defined period. Further details of this power are contained in clause 150.

520. The payment recovery provisions are subject to a power of waiver contained in clause 151, further details of which are given below.

Justification for the delegation

521. The Government notes that there are a number of formal and informal arrangements within the public sector which govern how workers who leave employment or office are compensated for the loss of that employment or office. It also notes that while some of these have recently been reformed, many have not been reformed for some considerable time or indeed at all.

522. The Government notes that the purpose of an exit payment is to provide the worker who leaves employment or office with a financial bridge to new employment or into retirement. However, when the worker returns to work in the public sector, the exit payment does not fulfil that purpose, but instead enriches the worker at the taxpayer's expense. The Government accordingly considers that it is fair and proportionate for such a worker to repay some or all of the exit payment that is not required for its original purpose.

523. In line with many current public sector arrangements, and with the statutory provisions for such compensation which apply to all employment, it intends to set the requirements for repayment so that workers who are only away from work in the public sector for a very short time will repay all of the payment, but workers who are away for a longer amount of time will repay only a part of the payment, with this part decreasing proportionally over time. It intends to set a time limit on this repayment period, with workers who are away from work for longer than this limit exempted from any repayment. It also intends to put in place mechanisms to require the returning worker to declare the fact that an exit payment has been made, to place a duty upon them to repay it, and to provide for consequences of failure to take steps to repay the money.

524. The clause builds upon reforms made to the Civil Service Compensation Scheme in 2010, which modified that scheme and have delivered value for money through a duty to repay compensation payments when a former civil servant re-joins the civil service within a certain time period. The clause enables similar reforms to be delivered across the wider public sector.

525. The regulations will be able to make detailed provision about:

(a) What types of payments made to public sector workers are qualifying exit payments.

(b) Which public sector bodies and offices are included within the payment recovery provisions.

(c) What proportion of the qualifying exit payment will be liable to be repaid, depending upon the value of the payment and the length of time the worker has been away from work in the public sector.

(d) How workers who have received an exit payment and returned to work in the public sector are to declare this information.

(e) How these workers are to repay the monies that are owed.

(f) What the consequences are for workers who do not take steps to repay the monies that are owed.

526. Given the level of detail required and the need for such provisions to be updated regularly (to account for changes in the bodies which form part of the public sector, changes in the types of payments covered, changing economic circumstances, or the changing nature of the public sector workforce), the Government considers that it is appropriate to set out the details of the payment recovery provisions in secondary legislation. To do so by way of regulations will ensure transparency and allows accountability for how the power has been used. It is also consistent with the way other cross-cutting public sector reforms (such as pension reform) have been delivered, by taking a framework power and placing the detail in secondary legislation.

527. It is considered essential to include powers to make transitional provision. It is intended that public bodies which are caught by the payment recovery provisions will reform their exit payment arrangements to allow for payment recovery by April 2016. They may be in the process of negotiating staff exits on the date that they reform, and so transitional powers will be needed to ensure that on-going negotiations can proceed without having to stop and start again on a different basis. Transitional powers will also be needed to ensure that public bodies added to the list of those who come within the scope of the payment recovery provisions after April 2016 have enough time to reform their arrangements to comply with the regulations. Both are necessary to ensure a smooth transition to the new arrangements provided for by the regulations made under this Bill.

528. It is considered essential to include powers to make consequential provision by amending legislation, to ensure that the payment recovery provisions operate effectively and deliver the intended result. This is to allow for technical modifications to be made to any legislation containing or providing for the exit payment arrangements of public sector bodies, and to any wider framework legislation in the employment law area. These powers are entirely confined to making amendments that are consequential, incidental, or supplementary to putting in place the payment recovery provisions, and cannot be used more widely for other purposes.

Justification for procedure selected

529. The negative procedure delivers a consistent and appropriate balance of accountability and scrutiny. Parliament will have the ability to scrutinise the regulations, and object to them if they consider any objection to be necessary. Questions of management of public service workers, including questions of pay and conditions, have historically been a matter for Ministers rather than Parliament, and the negative procedure is consistent with that. Also, affirmative debates on every change to the payment recovery provisions would take up a disproportionate amount of Parliamentary resource and so would not be appropriate. The negative procedure also enables the Government to legislate quickly to respond to new economic circumstances or changes in the makeup of the public sector.

510. The power to amend secondary legislation is confined entirely to matters that are consequential, incidental, or supplementary to putting in place the payment recovery provisions. They are likely to be used only for minor and technical changes to ensure that the powers taken in the Bill can operate as intended.

Clause 151: Power to waive the requirements of the payment recovery provisions

Power conferred on: Secretary of State

Powers exercised by: Ministerial decision

Parliamentary procedure: None

Context and purpose

512. The Government recognises that there will occasionally be cases which require flexibility in how the payment recovery provisions operate. Clause 151 accordingly confers upon the Secretary of State a power to waive the requirements of the payment recovery provisions. It is anticipated that this power may be delegated to the appropriate Minister or senior official, Devolved Authority, or local authority (as appropriate, given the relevant accountability for expenditure), but the Government does not believe that express provision would be required for such delegation. To ensure that the delegated power is used properly and consistently, there is the potential for the Treasury to issue guidance or exercise a veto.

Justification for delegation

513. The Government recognises that the payment recovery provisions may sometimes be too inflexible to deal with a number of situations. For example:

(a) (a) A sudden change in the machinery of Government (such as the abolition of a public sector body) may require more flexibility around the exit terms of staff who are affected.

(b) It may be unfair in some circumstances to require monies to be repaid, such as when this would be in contravention of assurances given to individuals upon their exit, or where to do so would cause hardship.

(c) It may be necessary in the wider public interest to recruit individuals with a specialised skill base or to perform a certain important task, and the recruitment would be hindered by the operation of the payment recovery provisions.

(d) It may be necessary in the public interest to make ex gratia payments to achieve cost-effective solutions, such as avoiding legal costs by appropriately settling litigation, and it may not be appropriate to recover such monies.

514. The Government anticipates that the waiver will only be used in exceptional circumstances. To ensure that this is the case, and that the power is used properly and consistently, clause 151 enables regulations made under the power in clause 149 to contain provisions which require the Treasury consent for the use of a waiver in prescribed circumstances, or to set out a statement of general principles according to which the power will be used.

Justification for procedure selected

515. Decisions about how the public sector workforce is made up, and the terms on which workers are retained and dismissed, properly fall to the role of the executive. It is accordingly

for the executive (both at a central and local level), as the employer, to make these decisions. Currently, there is no Parliamentary scrutiny of these decisions, and so this clause does not change the status quo.

PART 12: GENERAL

Clause 152: Power to make consequential amendments, repeals and revocations

Power conferred on: Minister of the Crown

Power exercisable by: Regulations (Henry VIII power)

Parliamentary procedure: Affirmative or negative resolution

Context and purpose

530. Clause 152(1) confers a power on a Minister of the Crown to make consequential amendments. Clause 152(2)(a) makes clear that this power includes power to make such transitional and transitory provisions and savings considered necessary or expedient in consequence of any provision made by the Bill.

531. Clause 152(2)(b) provides that this power includes the power to amend repeal, revoke or modify any enactment considered necessary or expedient in consequence of any provision made by or under this Bill.

532. The clause includes a power, where relevant, to amend Acts of the Scottish Parliament, Acts or Measures of the National Assembly for Wales, and Northern Ireland legislation.

533. The clause also makes specific provision in relation to the provisions in the Bill about home businesses. The policy areas covered by these provisions are devolved, so Welsh ministers, and not a minister of the Crown, may make consequential provision as appropriate as the measure applies in Wales.

Justification for delegation

534. The power in clause 152 is required to enable a Minister of the Crown to ensure a smooth transition between legislative provisions.

535. The power in clause 152 to make amendments is provided in order to ensure that any consequential amendment which has not yet been identified as being required or which is difficult to include within the Bill may be made as necessary. This power is confined to amendments that are consequential on provisions in the Bill.

536. There are numerous examples of a power in this form. A recent example would be the Enterprise and Regulatory Reform Act 2013 (section 99) which makes provision for a power to make transitory provisions and consequential amendments where, amongst other things, a transfer of functions occurs.

Justification for procedure selected

537. The Parliamentary procedure to be followed depends on the content of the regulations. If the regulations textually amend or repeal any provision of primary legislation (including an Act of the Scottish Parliament, a Measure or Act of the National Assembly for Wales or Northern Ireland legislation), they may not be made unless a draft has been laid before and approved by each House of Parliament, as is fitting for a power which amends primary legislation. This is the default procedure for amendments of primary legislation and there is no reason to diverge from it as the general rule on this Bill

538. If the regulations do not textually amend or repeal primary legislation (or do so only in connection with there ceasing to be any share warrants), the negative resolution procedure applies. This is considered appropriate for amendments or other modifications of secondary legislation given that the regulations will only be making consequential changes to the secondary legislation. In the case of there ceasing to be any share warrants, the negative procedure is considered appropriate because the power will be used solely to tidy up legislation and remove redundant references as a consequence of the abolition of share warrants.

539. The negative procedure will also apply to non-textual modifications of primary legislation. The position here is more complicated. In comparable cases on other Bills, the Committee has suggested that the government should either drop the words "or otherwise modify" from clause 152(2)(b) and (6)(b) or should extend the affirmative procedure to non-textual modifications of primary legislation. It is suggested that neither approach is ideal and that, in the context of this Bill, it would be better to adopt an alternative solution.

540. On the first approach, the words "or otherwise modify" in clause 152(2)(b) and (6)(b) are included to set up an implication for the purposes of clause 152(3), (4) and (7) that "amend", "repeal" or "revoke" means textually amend, repeal or revoke in those contexts (because the words "or otherwise modify" are not used there). The words are not needed in clause 152(2)(b) and (6)(b) to found a power to make non-textual modifications because, once it is clear that the power can be exercised to make textual amendments, repeals and revocations of primary legislation, it would be surprising if the power were not also wide enough to make non-textual modifications (the greater including the lesser). And, after all, clause 152(2) and (6) are only examples of how the main consequential powers might be exercised. On this view, dropping the words "or otherwise modify" would leave any power to make non-textual modifications unaffected and would most probably leave the negative procedure applying to any such modifications.

541. The second approach produces some uncertainty as to the precise circumstances in which the affirmative procedure should be applied because it will not always be clear what is, and is not, a non-textual modification of primary legislation. Such modifications can take a variety of forms. They may operate directly by making non-textual amendments of, or glosses to, primary legislation which apply to everyone (for example, "section 20 has effect as if X were read as Y"). They may operate directly by making non-textual amendments of, or glosses to, primary legislation which are applicable to specific cases (for example, "section 20 has effect, in its application to overseas insurance companies, as if X were read as Y"). They may operate indirectly by textually amending secondary legislation in a way that affects primary legislation (for example, adding a new body to a list of bodies in secondary legislation that are to be treated as "public authorities" for the purposes of a particular Act

will alter the effect of that Act). And they may operate even more indirectly by making free-standing provision which alters the effect of primary legislation (for example, they might make provision for the service of notices under the Act which creates a contrary intention for the purposes of section 7 of the Interpretation Act 1978). All of these changes are capable of being described as modifications of primary legislation and yet it is suggested that not all of them should be subject to the affirmative procedure. It is also suggested that it would be difficult to find general words which would accurately distinguish between those to which the procedure should apply and those to which it should not apply.

542. The Bill therefore adopts an alternative solution. It takes as its starting point the fact that the negative procedure should apply to all non-textual modifications of primary legislation. This produces certainty as to the procedure to be followed and it is suggested that it is, in any event, the right approach for the more remote forms of "modification" described above. As for the cases where there will be a non-textual modification of primary legislation which is akin to a full textual amendment (ie "section 20 has effect as if X were read as Y"), these will be rare, in practice, because such modifications are generally unhelpful to the reader of legislation and so are avoided wherever possible. However, should a non-textual modification of this kind prove to be necessary under the clause 152 power, the government is willing to confirm that it will exercise its power under clause 154(6) to include the modification in an affirmative instrument. It is hoped that this will meet the Committee's concerns about non-textual modifications.

Clause 153: Power to make transitional, transitory and saving provision

Power conferred on: Minister of the Crown

Power exercised by: Regulations

Parliamentary procedure: None

Context and purpose

543. Clause 153 provides that a Minister of the Crown may by regulations make necessary transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill.

Justification for delegation

544. Clause 153 ensures that a Minister of the Crown can provide a smooth transition between existing legislation and the Bill without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, for example section 276 of the Enterprise Act 2002 and (again, as a recent example) section 100 of the Enterprise and Regulatory Reform Act 2013.

Justification for procedure selected

545. The Government considers that the power to make transitional orders need not be subject to any Parliamentary procedure as the power is just to ensure a smooth transition between existing law and the Bill. This is consistent with the precedents in section 276 of the Enterprise Act 2002 and section 100 of the Enterprise and Regulatory Reform Act 2013. The

substance of the provisions will be considered during the passage of the Bill through Parliament.

Clause 157: Commencement

Power conferred on: Minister of the Crown

Power exercised by: Regulations

Parliamentary procedure: None

Context and purpose

546. Clause 157 lists the provisions which come into force on Royal Assent, those which come into force two months after Royal Assent, and provides that all the other provisions come into force on whatever day a Minister of the Crown specifies in regulations. Welsh ministers have the equivalent power in relation to the provisions about home businesses. The Secretary of State must consult the Department of Enterprise, Trade and Investment in Northern Ireland before making regulations in relation to clause 109 and Schedule 8, since such provisions will extend to Northern Ireland.

Justification for delegation

547. The commencement power will enable a Minister of the Crown to commence the principal provisions of the Bill at an appropriate time taking into account, for example, the period of time between Royal Assent and the next common commencement date and whether this would provide sufficient time for businesses to prepare for the Bill's commencement.

548. There are numerous examples of powers to make commencement orders for the substantive provisions of a Bill, without a Parliamentary procedure applying. A recent example is the Groceries Code Adjudicator Act 2013 (section 25).

Justification for procedure selected

549. The Government considers that the power to make commencement orders need not be subject to any Parliamentary procedure as the power sets the date of when the new provisions will come into force. The substance of the provisions will be considered during the passage of the Bill.

BIS
November 2014