

## **DELEGATED POWERS AND REGULATORY REFORM COMMITTEE**

### **ENTERPRISE BILL**

#### **Memorandum by the Department 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, with input from the Department for Communities and Local Government and the Treasury. It identifies the provisions of the Enterprise Bill (“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. The descriptions of the powers are arranged in the order that they appear in the Bill (Schedules are addressed in order of the clauses giving effect to them).
3. The Bill contains 28 individual provisions concerning delegated powers, 5 of which are “Henry VIII” powers.
4. The Department for Business, Innovation and Skills has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

##### **Overview of the Bill**

5. The Bill contains 9 Parts and 4 Schedules. This memorandum deals with the provisions for delegated legislation in each of these policy themes in turn.
6. Part 1 of the Bill (The Small Business Commissioner) creates a statutory office holder, the Small Business Commissioner (“SBC”), who will have functions of: giving general advice and information to small businesses; considering complaints brought by small business suppliers against larger businesses concerning payment issues, and making reports and recommendations to government. There is a power to abolish the office under certain circumstances.

7. Part 2 (Regulators) contains provisions requiring regulators to report on their compliance with the Regulators Code and the Growth Duty, and extending the Business Impact Target.
8. Part 3 (Extension of the Primary Authority scheme) makes provision for the extension of the existing “Primary Authority scheme” under Part 2 of the Regulatory Enforcement and Sanctions Act 2009 (co-ordination of regulatory enforcement).
9. Part 4 (Apprenticeships) contains provisions that are intended to promote and support the Government’s policy of expanding approved apprenticeships to improve the skills of the workforce and provide vocational training attracting the same high regard as a university education.
10. Part 5 (Late payment of insurance claims) makes amendments to the Insurance Act 2015 that imply into contracts of insurance provision to the effect that, if the insured makes a claim under the contract of insurance, the insurer must pay any sums due within a reasonable time.
11. Part 6 (Non-domestic rating) makes changes to the non-domestic rating system that enable the Valuation Office Agency to share HMRC data with local authorities who operate the rating system, their contractors, the Secretary of State and other prescribed persons, and to appeals relating to non-domestic rating.
12. Part 7 (Industrial development) amends the Industrial Development Act 1982 to increase the maximum level of the financial support government can give projects under that Act and extends the scope of the grants and loans which can be awarded.
13. Part 8 (Public sector employment: restrictions on exit payments) provides a power to make regulations capping the total costs of “exit payments” made to

public sector employees or post holders as a consequence of them leaving that employment or post.

14. Part 9 (General provisions) contains general and supplementary provisions.

## **Part 1: The Small Business Commissioner The Commissioner**

### ***Clause 2(2) to (10): Power to make “SBC scope regulations” about the meaning of “small business”***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative resolution*

Context and purpose

15. Part 1 of the Bill provides for the establishment of the Small Business Commissioner (the “SBC”). The Part gives the SBC certain functions, including giving general advice and information to small businesses and considering certain complaints made by small businesses.
16. “Small business” is defined in clause 2 as an undertaking, other than a public authority, which has fewer than 50 staff. It also has to have a turnover or balance sheet total of less than a “small business threshold”, if these financial criteria are applied by regulations made under clause 2(2). Other details concerning the small business definition will also be determined by regulations. These may include the time at which, or period for which, the criteria need to be met, the value of the “small business threshold” (if any) and how the headcount threshold will be calculated.

Justification

17. Clause 2 sets out the key elements of the definition of small business which may be applied, but relies on regulations to give a full definition and to apply the financial thresholds within the definition if appropriate. There are two key policy

drivers for the definition of small business. Firstly, the intention is that the overall thresholds for determining whether a business is a “small business” for SBC purposes should be consistent with those in existing legislation, to avoid confusion for businesses. Equally, the Department wishes to ensure that it is simple for businesses to establish whether they are in scope of the SBC’s remit, so that those businesses most in need of the SBC’s services are not discouraged from using them by tests or criteria which are disproportionately complex.

18. For these reasons, the definition of “small business” under clause 2 depends on thresholds consistent in substance with those for the corresponding definition in Commission Recommendation 2003/361/EC<sup>1</sup> and those for the definition to be made in regulations under sections 33 and 34 of the Small Business, Enterprise and Employment Act 2015 (the “SBBE Act”, which also draws on the Commission Recommendation); but it does not require all of the detail underlying those definitions to be applied. In the interests of simplicity, financial thresholds are not applied automatically, but the Department considers it important to be able to apply the financial criteria if it finds that there are businesses with relatively few employees but high financial worth which should be excluded from scope of the SBC provisions.
19. Whilst the definition for SBC purposes is to be as simple as possible, it does require technical aspects to be set out, for example to explain how and when the thresholds are to be calculated. In the Department’s view, this level of detail is more suited to secondary legislation.
20. Further, some flexibility is needed to adjust the definition in future, for a number of reasons. The EU definition may change and this may require corresponding amendments to the Bill’s definition (and the definition under the SBEE Act). The financial thresholds in the EU definition are expressed in euros and it may be necessary to adjust the sterling equivalents in the light of exchange rate changes. Future amendments to wider UK legislation may also mean that the

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<sup>1</sup> EU Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises - <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003H0361&rid=6>

detail of the SBC definition needs to be changed (for example, there may need to be reliance on concepts in wider UK legislation, such as ways of defining the “turnover” of various kinds of business organisation).

21. In the light of all these considerations, the Department considers that much of the detail of the proposed definition is more suited to secondary legislation than to primary. The Department considers that it has struck the right balance.
22. In doing so, the Department has been careful to ensure that there are, on the face of the power, clear indications of what the regulations are likely to provide.

#### Justification for procedure selected

23. Subsection (9) of clause 2 provides that the affirmative resolution procedure is to apply to the SBC scope regulations.
24. As explained above, the regulations will make detailed, and in many respects, technical provision. The intention is to follow the key thresholds in the definition of “small enterprise” in Commission Recommendation 2003/361/EC, and the power makes clear what provision can be made. However, as the power enables financial criteria to be applied by secondary legislation as part of the definition, the Department considers the affirmative resolution procedure to be appropriate and justified.

#### **Complaints scheme**

##### ***Clause 4(5)-(10): Power to exclude complaints from the SBC complaints scheme***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative resolution, save for regulations to specify the start date for the purposes of one exclusion, which is not subject to Parliamentary procedure*

Context and purpose

25. Clause 4(3) defines “relevant complaints”, being the complaints which the SBC may consider through its complaints handling function. A relevant complaint is a complaint made by a small business supplier about a larger business which it supplies, or which it has supplied or may supply in future. The complaint must relate to a payment issue, or to an attempt to prevent the small business from complaining to or having a complaint considered by the SBC.
26. Under subsection (5) of clause 4, there are certain specified exclusions from scope. A complaint will not be a relevant complaint and so may not be considered by the SBC if it relates to the appropriateness of the (proposed) price for goods or services, because the SBC’s function is not to consider whether either party is getting a good deal financially, but whether the approach to payment matters is fair and reasonable. A complaint will also not be a relevant complaint if it is subject to ongoing legal proceedings or falls within the jurisdiction of another ombudsman or similar body. Under clause 4(5)(e), the SBC will not consider a complaint about an act or omission which occurred before the SBC was established, nor about an act or omission which is allowed by a contractual term agreed before the SBC was established. This is because the Department considers that the parties should be aware when dealing with each other that their actions, and the terms they agree, in relation to payment could be considered by the SBC. This exemption applies by reference to an appointed start date. Clause 4(6) enables the Secretary of State to appoint the start date for this exemption by regulations. Subsection (8) enables different start dates to be specified for different areas.
27. Clause 4(5)(f) enables the Secretary of State to specify in regulations other exceptions from the scope of “relevant complaints”.

#### Justification

28. The complaints handling function is intended to enable the SBC to assist small and larger businesses to resolve issues in relation to payment matters, and to prevent such issues in future, by providing an impartial view on such issues. The key focus is on payment matters, because particular concerns have been raised by small businesses and their representative bodies about these matters.

The SBC is intended to complement, and not to cut across, the court system and services provided by sector-specific ombudsmen and complaints handling functions.

29. To enable the SBC's complaints handling function to run efficiently, and to provide some future-proofing, some flexibility is needed to further refine the scope once the scheme is operative. If a particular type of issue is raised frequently, which the SBC considers is better addressed by another route, it would be more efficient for both the SBC and small businesses wishing to resolve such an issue to be clear that this type of issue is out of scope, rather than the SBC considering it and then reaching this view.
30. The power in clause 4(5)(f) could only be exercised when the Secretary of State thinks it appropriate to make a particular exclusion from scope, as the Secretary of State will be subject to public law principles.
31. The exemption in clause 4(5)(e) applies by reference to an appointed start date, so that the exemption will reflect the date that the complaints handling scheme starts. The power in subsection (8) to make different provision for different areas provides further flexibility, so that the exemption would still fit with the relevant start date for the complaints handling scheme if the Department were to commence the complaints handling scheme on different dates for different geographical areas.

#### Justification for procedure selected

32. Clause 4(10) provides that regulations to make an exclusion from the definition of "relevant complaint" will be subject to the affirmative resolution procedure.
33. Regulations making an exclusion from the definition of "relevant complaint", would affect the scope of the SBC's complaints handling function. The complaints to be considered are fundamental to the complaints handling function, so the Department considers that the affirmative resolution procedure is appropriate.

34. However, the power to specify the appointed start day for the exclusion in clause 4(5)(e) is not subject to Parliamentary procedure. This is the usual practice for an appointed day provision, and the Department does not consider there is a particular reason that a Parliamentary procedure is appropriate here.

***Clause 7: Power to make “scheme regulations”***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative resolution*

Context and purpose

35. Clauses 4 to 6, together with the definition of “small business” under clause 2, set out the scope of the SBC’s complaints handling function. The scope of the function is restricted to “relevant complaints”. Clause 5 sets out the key parameters of the complaints process, and provides that the SBC may make a determination by reference to what is fair and reasonable in all the circumstances. The clause does not set out a comprehensive list of what may be relevant in determining what is fair and reasonable, instead some of this detail is left to be provided in the scheme regulations.
36. Clause 6 similarly sets out key parameters for the SBC’s discretion to publish reports of its enquiry into, consideration and determination of complaints. Clause 6 provides that, if the SBC is to publish a report, both parties must be given the opportunity to make representations. The Department considers that this is an important procedural requirement that must be set out on the face of the Bill, but further detail may also be needed.
37. Clause 7 of the Bill provides that the Secretary of State must make scheme regulations setting out details of how complaints should be raised with the SBC, how it will consider and determine complaints, and how it will prepare and publish reports under clause 6.
38. The power requires that the scheme regulations must cover certain important aspects of the complaints procedure: in particular, to set out matters to be taken



into account by the SBC in deciding a complaint and factors to be taken into account by the SBC in deciding whether to name a respondent to a complaint under the discretion to publish reports in clause 6. The Department considers it essential that these are set out in legislation to ensure that the procedure is fair in these important respects. However, these matters are detailed aspects of the complaints handling function and it may be necessary to update these factors from time to time, so the Department considers it is appropriate to address these in secondary legislation rather than primary.

39. The power provides that the Secretary of State may cover various other matters within the scheme regulations. For example, the scheme regulations may enable the SBC to dismiss a complaint in certain circumstances. The Department has been careful to ensure that there are, on the face of the power, clear indications of what the scheme regulations may provide, to give a clear indication of the policy without setting requirements which may prove not to be appropriate.
40. Clause 7(8)(a) provides that the scheme regulations may confer a discretion on the SBC. This is to enable the SBC to have discretion to decide the appropriate course of action in exercising his/her complaints handling functions. For example, the regulations could say that the SBC may extend the time limit for raising a complaint where the SBC thinks the complainant has a good reason for not raising it sooner.
41. Clause 7(9) provides that the Secretary of State must consult such persons as it considers necessary before making such regulations.

#### Justification

42. It is important that businesses, both large and small, are given the best indications of when the SBC will act, how it will act in terms of procedure, and what it will take into consideration when considering a complaint. This may involve detailed and technical procedural provisions. The Department thinks that these provisions are more suited to secondary legislation.

43. Businesses which may be affected by the SBC's complaints service should have appropriate information available to them as to what procedure the SBC will adopt in determining complaints. The Department considers that these procedural rules may need adjusting more often than Parliament can be expected to legislate for by primary legislation. For example, some adjustment may be appropriate following an annual report by the SBC, or the Secretary of State's review of the SBC, under clauses 9 and 10.
44. Finally, the question of what is fair and reasonable may change over time as markets develop and change. Nevertheless, it is important for businesses to be aware of what kinds of considerations the SBC will take into account. The Department considers that setting out these considerations on the face of the Bill will be detrimental to the future proofing of the SBC's role, but has set out the key criterion of applicable law to provide an appropriate level of certainty, as this factor is considered crucial.

#### Justification for procedure selected

45. Clause 7(11) provides that the affirmative resolution procedure is to apply to the scheme regulations.
46. The regulations will cover important aspects of the complaints handling function, and provide guidance to businesses which may be affected by this function. The Department considers the affirmative resolution procedure to be appropriate and justified.

#### **Power to abolish**

##### ***Clause 11: Power to abolish the SBC***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument ("Henry VIII" power)*

*Parliamentary Procedure: Affirmative resolution*

Context and purpose

47. Clause 10 requires the Secretary of State to review the SBC's performance after approximately two years, and then after each successive period of three years. The review must consider how effective the SBC has been in carrying out his or her functions. A report of the review's findings must be published and laid before Parliament.
48. The outcome of a review may indicate that the continuing existence of the office of SBC is no longer desirable, perhaps because the behaviour change that the SBC is trying to precipitate has occurred or alternatively because the office is failing to bring about such change. To provide for this situation, clause 11 is a power for the Secretary of State to abolish the office of SBC by regulations.

#### Justification

49. Clause 11 enables the abolition of the office if the Secretary of State is satisfied that (i) it is no longer necessary for there to be an SBC carrying out the functions given under Part 1 of the Bill, or (ii) if the SBC's role has not been sufficiently effective to justify the office's continued existence.
50. Taking this power is necessary, since if the outcome of a review is that the SBC 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.
51. It is further necessary to have such a power since the office of the SBC will also incur costs to government, and the Department 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.
52. Where there are regulations to abolish the SBC, subsection (3) permits the regulations to amend or repeal the provisions of Part 1 (as enacted) or any other enactment for that purpose, which means that the power is a "Henry VIII" power. This is necessary to ensure the statute book is left in good order if the SBC is abolished, so that Part 1 of the Bill and cross-references inserted into other legislation (please see Schedule 1 of the Bill) may be repealed. A transitional provision is included because amendment might, for example, be

needed in order to allow the SBC to exercise only certain functions pending abolition.

#### Justification for procedure selected

53. Abolition would be an important decision involving an exercise of judgment by the Secretary of State, following a detailed review. It would also mean the end of an office created by primary legislation. Therefore it is considered that the affirmative procedure is appropriate.
54. Further, since the power allows amendments to primary legislation, it is considered appropriate that thorough Parliamentary scrutiny is given to any regulations made under this power.

## Part 2: Regulators

### Business impact target

#### ***Clause 13: Power to specify certain statutory regulators whose regulatory activities will be brought within the scope of the BIT***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative procedure*

#### Context and purpose

55. Following previous administrative targets to reduce the cost to business of regulation, sections 21 to 27 of the SBEE Act created the Business Impact Target (“BIT”). This requires future administrations to:
  - Publish a target for the Government regarding the economic impact on business activities of all measures (or provisions) that fall within the definition of “qualifying regulatory provisions” and that come into force or cease to have effect between two general elections.
  - To publish annual reports covering the impact of qualifying regulatory provisions in that year and in aggregate over the term of the Parliament.

- To appoint an independent verification body that must verify the assessments of economic impact of all measures in scope of the business impact target, and the classification of the regulatory provisions as qualifying regulatory provisions.
56. Currently, the target is limited to the regulatory activities of UK Ministers. This includes some non-statutory regulators who exercise regulatory functions for or on behalf of UK Ministers. The Department wishes to expand the scope of the target to capture the regulatory activities of statutory regulators which have a separate legal identity.
57. The Bill seeks to amend the BIT provisions by: (1) expanding the definition of “regulatory provision” to include provisions made by “relevant regulators”, who will be specified in regulations; and (2) creating a duty on those regulators to report the economic impact of their regulatory provisions in scope of the BIT to the Secretary of State, so that the Secretary of State can fulfil his reporting obligations under section 23 of the SBEE Act.
58. Once specified in regulations, the statutory regulators will be required to report on all measures for which they are responsible (within the scope of the BIT) for the entire Parliamentary period.

#### Justification

59. The Department does not consider it appropriate to specify the statutory regulators whose regulatory provisions will be covered by the extension of the target in primary legislation. The Department considers that identifying the regulatory bodies would best be done by delegated legislation because the identifying provision, which will list a large number of regulators, will need regular updating as the names and functions of regulators change due to machinery of Government and other organisational changes. There will be a public consultation as the Bill progresses as to which statutory regulators the provisions will apply to.

#### Justification for procedure selected

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

***Clause 13 and Schedule 2 (paragraphs 4 and 5): new section 24A(5) of the 2015 Act power to issue guidance from time to time in respect of the duties on relevant regulators to provide required documents and new section 26(9) power to issue guidance from time to time in respect of the duty on relevant regulators to provide updating documents.***

*Power conferred on: Secretary of State*

*Power exercised by: Guidance*

*Parliamentary procedure: None*

Context and purpose

61. As stated above, the Bill seeks to amend the BIT provisions by; (1) expanding the definition of “regulatory provision” to include the provisions made by “relevant regulators”; and (2) creating a duty on relevant regulators to report the economic impact of their regulatory provisions in scope of the BIT to the Secretary of State, so he can fulfil his reporting obligations under section 23 of the SBEE Act.
62. The two powers to give guidance identified above relate to the reporting duties to which relevant regulators will be subject as follows.
63. Paragraph 4 of Schedule 2 provides a new section 24A to be inserted into the SBEE Act. This provides that the relevant regulators will need to provide certain information to the Secretary of State, to enable him to fulfil his reporting duties in respect of the BIT. Specifically, relevant regulators must provide the following, which are referred to as the “required documents”:

- a. a list of all qualifying regulatory provisions for which the regulator is responsible which have come into force or ceased to be in force during the reporting period;
  - b. an assessment of the economic impact on business activities of each of those provisions (carried out in accordance with the methodology stipulated by the Government of the day) and verified by the Independent Verification Body to be appointed under the 2015 Act;
  - c. a summary of all regulatory provisions for which the regulator is responsible which do not fall within the scope of the BIT but which have come in to force or ceased to have effect in the reporting period.
64. Paragraph 5 of Schedule 2 contains new provisions to be inserted in section 26 of the SBEE Act regarding further information (referred to as “updating documents”) which must be provided to the Secretary of State in the event that certain aspects of the BIT are amended during the term of Parliament. If the Secretary of State amends the scope of the target (by amending the determination of qualifying regulatory provisions) or the methodology for calculating the economic impact of measures in scope, then relevant regulators must amend any documents and information they have previously provided to the Secretary of State, taking account of the changes. This may involve amending lists of qualifying regulatory provisions, amending assessments of such provisions, or providing backdated assessments of provisions which came into force in previous reporting periods, which were not previously in scope of the target.
65. In respect of both “required documents” and “updating documents”, the Secretary of State is being given a power to issue guidance to relevant regulators to assist them in complying with their duties. Such guidance will cover the practicalities relating to the timing and format of the documents and procedures for submitting information and documents to both the Independent Verification Body and the Secretary of State.

Justification

66. The guidance under these two sections will provide further details as to the type, form and timing of all information to be provided to the Secretary of State in order to enable the Secretary of State to report on the BIT. The basic framework of the reporting requirements on relevant regulators is set out in the primary legislation, so the guidance will simply contain practical and procedural details as to how those statutory requirements can be met. It is anticipated that this guidance may need updating more frequently than Parliament can be expected to legislate for by primary legislation. It is also anticipated that the guidance will be detailed in a way which would be inappropriate for primary legislation (but will be of assistance to the relevant regulators). It is not expected that the guidance would be considered controversial, and accordingly it is considered appropriate to use guidance for this purpose.

#### Justification for procedure selected

67. Parliament will approve the reporting requirements being imposed on regulators as set out in the Bill. The information to be included in the guidance will have the aim of assisting the relevant regulators in complying with their statutory requirements. The guidance may require updating following engagement with relevant regulators, and/or to reflect practical or procedural improvements which can be made to the BIT reporting processes. Relevant regulators must have regard to the guidance but they can of course depart from it if they have good reason to. Accordingly, it is considered appropriate in all the circumstances that no parliamentary procedure is required.

#### Reporting requirements

***Clause 14: new section 23A(5) of the Legislative and Regulatory Reform Act 2006 [“LRRRA”]: power to provide that a Minister of the Crown can give guidance from time to time in respect of a duty on a relevant regulator under 23A(1) to publish a performance report.***

*Power conferred on: Minister of the Crown*

*Power exercised by: Guidance*

*Parliamentary procedure: None*



## Context and purpose

68. Section 22 of the Legislative and Regulatory Reform Act 2006 (“LRRRA”) enables a Minister of the Crown from time to time to issue a code of practice (“the Code”) in relation to the exercise of regulatory functions and it is subject to the affirmative resolution procedure (the current code is called the Regulators’ Code and came into force on 6<sup>th</sup> April 2014). The Code applies to regulatory functions specified by way of affirmative order under section 24 of LRRRA. Section 22 imposes duties on regulators to have regard to the Code in the exercise of its regulatory functions but, the Code does not directly apply in relation to the exercise of regulatory functions at an operational level (as a result of subsections (2) and (3)).
69. Clause 14 inserts section 23A into LRRRA to require a relevant regulator (a person, other than a local authority, with regulatory functions to which section 22 applies) to publish a performance report (“the report”) for each reporting period. The report must set out, the effect of performance of the duties in section 22 on the way it exercised its regulatory functions. The report must also include their assessment of the views of businesses about this effect and its impact, and the effect the regulator expects performance of the duties in section 22 to have on the way it exercises its relevant functions in future.
70. Section 23A(5) gives a power to a Minister of the Crown to issue guidance, which a relevant regulator must follow when preparing and publishing their report, unless the regulator considers there is a good reason not to do so. Subsection (6) provides that the guidance may in particular, include guidance as to: information or other matters to be included in a report, information to be obtained and the means by which it should be obtained for the purposes of the report.
71. Section 23A(10) provides that a regulator must give to a Minister of the Crown any information that Minister may from time to time request, including

information which relates to any aspect of a report in relation to which it appears to the Minister that guidance under subsection (5) has not been followed.

#### Justification

72. Since the guidance may in particular include guidance as to information to be included in a report, information to be obtained and the means by which it should be obtained for the purposes of the report, it is anticipated that this guidance may need updating more frequently than Parliament can be expected to legislate for by primary legislation. Given the nature of the guidance, it is not expected it would be considered controversial. It is considered appropriate to use secondary legislative powers by means of guidance for this purpose.

#### Justification for procedure selected

73. Under existing duties in the LRRRA, Parliament is required to approve by affirmative procedure the code and functions in respect of which the reporting duty relates. The nature of the information to be included in the guidance is anticipated to include matters such as obtaining certain information by way of customer surveys. The guidance may be updated periodically to reflect regular stakeholder engagement. It is guidance which a regulator can depart from if they have good reason to. It is therefore considered appropriate in all the circumstances that no parliamentary procedure is required.

***Clause 15: new section 110A(4) of the Deregulation Act 2015: power to provide that a Minister of the Crown can give guidance from time to time in respect of a duty on a regulator under section 110A(1) to publish a performance report.***

*Power conferred on: Minister of the Crown*

*Power exercised by: Guidance*

*Parliamentary procedure: None*

Context and purpose

74. Section 108(1) of the Deregulation Act 2015 requires a person exercising a regulatory function, to have regard in the exercise of that function, to the desirability of promoting economic growth (the “growth duty”). The order specifying the regulatory functions to which the growth duty will apply is subject to the affirmative procedure (section 109(5) Deregulation Act 2015). It is expected that the order will be laid before Parliament in 2016.
75. The provisions in section 22(2) and (3) of LRRRA, are not replicated in the Deregulation Act (see above). As a result, the growth duty applies not only at a policy level, but also at an operational level.
76. Clause 15 inserts section 110A into the Deregulation Act 2015 to require a regulator to which section 108 applies, to publish a performance report (“the report”) for each reporting period. The report must set out the effect of performance of the duty in section 108(1) (the growth duty) on the way the regulator exercised its regulatory functions. The report must include their assessment of the view of businesses about this effect and its impact, and the effect the regulator expects performance of the duty in section 108(1) to have on the way it exercises its functions in future. Given the application of the growth duty to regulatory functions at an operational as well as a policy level, the reporting requirements do not require a regulator to report on or give to a Minister information about the exercise of functions in relation to a particular person. As a result, regulators will not be required to report on individual operational matters.
77. Section 110A(4) gives a power to a Minister of the Crown to issue guidance which a relevant regulator must follow when preparing and publishing their report, unless the regulator considers there is a good reason not to do so. Subsection (5) provides that the guidance may, in particular, include guidance as to: information or other matters to be included in a report; information to be obtained and the means by which it should be obtained for the purposes of the report.
78. Section 110A(9) provides that a regulator must give to a Minister of the Crown any information that the Minister may from time to time request, including

information which relates to any aspect of a report in relation to which it appears to the Minister that guidance under subsection (4) has not been followed.

#### Justification

79. Since the guidance may in particular include information to be included in a report, information to be obtained and the means by which it should be obtained for the purposes of the report, it is anticipated that this guidance may need updating more frequently than Parliament can be expected to legislate for by primary legislation. Given the nature of the guidance, it is not expected it would be considered controversial. It is considered appropriate to use secondary legislative powers by means of guidance for this purpose.

#### Justification for procedure selected

80. Under the Deregulation Act 2015 Parliament is required to approve by affirmative procedure the functions in respect of which the reporting duty relates. The guidance is anticipated to include matters such as obtaining certain information by way of customer surveys. The guidance may be updated periodically to reflect regular stakeholder engagement. It is guidance which a regulator can depart from if they have good reason to. It is therefore considered appropriate in all the circumstances that no parliamentary procedure is required.

### **Part 3: Extension of the Primary Authority Scheme**

81. Clause 17 (Extending the primary authority scheme under RESA 2008) makes provisions for the extension of the existing Primary Authority scheme by substituting Part 2 of the Regulatory Enforcement and Sanctions Act 2008 (“RESA”). Schedule 3 replaces Schedule 4 of that Act with Schedule 4A. In this part of the memorandum, references to section X are to the existing sections of Part 2 of RESA and references to new section Y are to the section numbers in the new Part 2A inserted by clause 17.

**Clause 17: Extending the primary authority scheme under RESA 2008: new section 22B(4)(b) enables the Secretary of State to specify in regulations a person who is a “specified regulator”.**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative resolution*

Context and purpose

82. Under section 26, only local authorities may be nominated as a primary authority. New section 22B(4)(b) enables the Secretary of State to specify in regulations a person (other than a local authority) who is a “specified regulator”. A “specified regulator” is a “qualifying regulator” for the purposes of Part 2 and may be nominated by the Secretary of State as a primary authority under new section 23A. The Secretary of State is required to obtain the consent of Welsh Ministers under section 22B(5) to specify a regulator whose functions relate only to Welsh ministerial matters. (“Welsh ministerial matter” is defined by section 74 of the RESA.)

Justification

83. The Department considers that the listing of specified regulators and their functions is appropriate for delegated legislation because of the need to be able to list such regulators at different times, for example, when the practical arrangements are in place to enable a regulator to be part of the primary authority scheme as a qualifying regulator or when a new regulator is created or acquires new functions.

Justification for procedure selected

84. The Department considers the affirmative resolution procedure is appropriate for this measure (provision is made for this in new section 30C(2)). This level of Parliamentary scrutiny will provide a significant safeguard in relation to bringing new regulators into scope of the primary authority scheme, as full consideration and debate as to which regulators will be within scope will ensure that the

primary authority scheme is extended to appropriate regulators. This is in line with the approach in relation to other better regulation measures, where regulators are brought in scope by affirmative procedure – for example, any orders bringing regulators in scope of the economic growth duty are subject to the affirmative procedure (section 109(5) Deregulation Act 2015).

***Clause 17: Extending the primary authority scheme under RESA 2008: new section 22C(1)(b) enables the Secretary of State to specify the reserved regulatory functions of local authorities in Scotland to which Part 2 applies.***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

Context and purpose

85. The purpose of new section 22C(1)(b) is to enable Part 2 of RESA to apply to local authority functions in Scotland. It enables the Secretary of State to make regulations that specify the regulatory functions of local authorities to which Part 2 applies. New section 22C(2) provides that those functions must be a “relevant function” in relation to local authorities in England and Wales or equivalent to such a function. New section 22C(4) provides that the order may only apply to reserved matters. New section 22C(1)(b), (2) and (4) re-enact section 24(1)(b), (2) and (3) of the Act.
86. In relation to England and Wales, the “relevant functions” of local authorities to which Part 2 applies are defined in section 4 of RESA. A “relevant function” is one that is exercised by a local authority under a “relevant enactment”. Under section 4(2) and (3) a relevant enactment is defined as an enactment specified in Schedule 3 to the Act or an enactment made under such an enactment, or an enactment made under section 2(2) of the European Communities Act 1972 that relates to the subject matters listed in section 4(3). Section 4(4), which is subject to the affirmative resolution procedure, gives the Secretary of State the power to amend Schedule 3 and section 4(3).

## Justification

87. The power to specify by order the definition of “relevant function” enables the Secretary of State to keep the definition under review and amend it in line with changes to the devolution settlement in Scotland.

## Justification for the procedure selected

88. In line with the precedent set by section 24(1)(b), the power is subject to the negative resolution procedure under new section 30C. Schedule 3 and section 4(3) set the limits on what may be a “relevant function” in Scotland, as the order may only include regulatory functions that are “relevant functions” in relation to local authorities in England and Wales or equivalent to such a function. New section 22C(1)(b) enables the Secretary of State to prescribe a subset of those functions. As the power is limited in this way, the negative resolution procedure is appropriate.

***Clause 17: Extending the primary authority scheme under RESA 2008: new section 22C(1)(c) enables the Secretary of State to specify the regulatory functions of local authorities in Northern Ireland to which Part 2 applies.***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

## Context and purpose

89. The purpose of new section 22C(1)(c) is to enable the new Part 2 of RESA to apply to local authority functions in Northern Ireland. It enables the Secretary of State to make regulations that specify the regulatory functions of local authorities to which Part 2 applies. New section 22C(2) provides that those functions must be a “relevant function” in relation to local authorities in England and Wales or equivalent to such a function. (The definition of “relevant functions” in relation to England and Wales is explained above in the paragraphs about the application of Part 2 to local authority functions in relation

to reserved matters in Scotland). New section 22C(5) provides that the regulations may not include transferred matters. New section 22C(1)(c), (2) and (5) re-enact section 24(1)(c), (2) and (4) RESA.

#### Justification

90. The power to specify by order the definition of “relevant function” enables the Secretary of State to keep the definition under review and amend it in line with changes to the devolution settlement in Northern Ireland.

#### Justification for the procedure selected

91. In line with the precedent set by section 24(1)(c), the power is subject to the negative resolution procedure under new section 30C. Schedule 3 and section 4(3) set the limits on what may be a “relevant function” in Northern Ireland, as the order may only include regulatory functions that are “relevant functions” in relation to local authorities in England and Wales or equivalent to such a function. New section 22C(1)(c) enables the Secretary of State to prescribe a subset of those functions. As the power is limited in this way, the negative resolution procedure is appropriate.

***Clause 17: Extending the primary authority scheme under RESA 2008: new section 22C(1)(d) enables the Secretary of State to specify the regulatory functions of specified regulators to which Part 2 applies.***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

#### Context and purpose

92. Under new section 22B(4)(b), the Secretary of State may specify in regulations a person (other than a local authority) who is a “specified regulator”. A “specified regulator” is a “qualifying regulator” for the purposes of Part 2 of RESA (see new section 22B(1)) and may be nominated by the Secretary of State to be a primary authority. The Secretary of State must specify the regulatory functions



of specified regulators for Part 2 to apply to those regulators and new section 22C(1)(d) gives the Secretary of State the power to do this.

93. New section 22C(3) provides that the regulatory functions must be a “relevant function” in relation to local authorities in England and Wales or equivalent to such a function. (The definition of relevant functions in relation to local authorities in England and Wales is explained above in the paragraphs about the application of Part 2 to local authority functions in relation to reserved matters in Scotland).
94. New section 22C(4) and (5) provides the regulations may only include reserved matters in relation to Scotland and must not include transferred matters in relation to Northern Ireland. This is in line with the Secretary of State’s power to specify regulatory functions that are relevant functions for purposes of Part 2 in relation to local authorities in Scotland and Northern Ireland.
95. New section 22C(6) provides that regulations require the consent of the Welsh Ministers to specify a regulatory function, so far as exercisable in Wales, which relates to a Welsh ministerial matter.

#### Justification

96. The power to specify by regulations the regulatory functions in respect of which a specified regulator can be part of the primary authority scheme enables legislation to be updated more frequently than Parliament can be expected to legislate for by primary legislation, for example where a specified regulator acquires new regulatory functions.
97. Provision is made in subsection (7)(b) for regulations to make different provision for different areas. This is to enable regulatory functions to be specified for a particular area if the changing regulatory landscape in the future gives bodies regulatory functions for a particular area (for instance city mayors or as part of regional devolution).

Justification for the procedure selected

98. It is considered that the negative resolution procedure is appropriate for orders under section 22C(1)(d) (provision is made for this in new section 30C(2)), since such orders may only specify a regulatory function which is a “relevant function” in relation to local authorities in England and Wales or equivalent to such a function. This is in line with the precedent established in relation to local authority functions in Scotland and Northern Ireland.

***Clause 17: Extending the primary authority scheme under RESA 2008: new section 25A(2) enables the Secretary of State to specify what is and is not “enforcement action” for the purposes of Part 2.***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

Context and purpose

99. New section 25A(1) contains a definition of types of “enforcement action” to which the enforcement action procedures in new sections 25B and 25C apply. New section 25A(2) enables the Secretary of State, with the consent of the Welsh Ministers, to specify in regulations what is and is not enforcement action for the purposes of Part 2. It re-enacts (with minor drafting changes) the existing provision in section 28(6) of RESA.

Justification

100. A delegated power enables the Secretary of State to change the definition of enforcement action in the future, for example, in order to change the definition of enforcement action in response to changes in legislation. New section 25A(2) re-enacts section 28(6), under which the Co-ordination of Regulatory Enforcement (Enforcement Action) Order 2009<sup>2</sup> is made. This Order has been updated three times since it was made, in order to reflect changes in the regulatory matters within the scope of Part 2 of RESA.

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<sup>2</sup> S.I. 2009/665

101. Having a delegated power will also enable the Secretary of State to amend the definition for other reasons, for example, where a review of the new primary authority scheme shows that types of action need to be included in, or excluded from, the definition of enforcement action.

Justification for procedure selected

102. The limits on what may be enforcement action are prescribed in primary legislation (new section 25A(1) which re-enacts section 28(5)). Given these limits, and the technical nature of these regulations, it is considered that the negative procedure provides the appropriate level of scrutiny (see new section 30C). This is in line with the existing provision being re-enacted.

***Clause 17: Extending the primary authority scheme under RESA 2008: new section 25D(1) requires the Secretary of State to prescribe the circumstances in which the procedures in new sections 25B and 25C and Schedule 4A do not apply.***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

Context and purpose

103. New sections 25B and 25C contain provisions that set out the procedures to be followed by regulators when enforcement action pursuant to a partnership function is proposed. However, it will not always be appropriate for an enforcing authority to follow those procedures, for example, where action is required urgently to avoid harm to human health, the environment, or the financial interests of consumers.

104. The power in section 25D(1) obliges the Secretary of State to make regulations, with the consent of the Welsh Ministers, that prescribe where the procedures in

new sections 25B and 25C and Schedule 4A do not apply. It re-enacts with minor amendments section 29 of RESA.

#### Justification

105. It is considered necessary to take a power to set out the exceptions to the enforcement action procedures in greater detail than would be reasonable to expect to see in primary legislation. However the key requirements to be included in the regulations made under new section 25D(1) are prescribed in section 25D(2).

106. Further, the circumstances in which the enforcement procedures should not apply will be directly affected by an order under new section 25A(2), which enables the Secretary of State to specify actions that are and are not enforcement action. As new section 25A(2) is a delegated power, new section 25D(1) needs to be a delegated power, so that the Secretary of State may make amendments to reflect any changes to the definition of enforcement action.

#### Justification for procedure selected

107. The negative resolution procedure (see section 30C) is considered the appropriate level of Parliamentary scrutiny for procedural matters such as this. This is in line with the current procedure in section 29 of RESA.

***Clause 17: Extending the primary authority scheme under RESA 2008: new section 28A(1)(a) and (8) enables the Secretary of State to prescribe by regulations a person with regulatory functions who is a “supporting regulator” for the purposes of new section 28A (“Support of primary authorities by other regulators”) and new section 28A(10) enables the Secretary of State to designate the regulatory functions to which the section applies.***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

Context and purpose

108. The purpose of new section 28A is to enable regulators to support a primary authority in the preparation of a primary authority's advice, guidance and inspection plans under Part 2 of the Act. This is a new policy and power.
109. New section 28A(1) provides that the section only applies to a person who has regulatory functions and who is specified as a "supporting regulator". New section 28A(1)(a) and (8) enables the Secretary of State to make regulations that specify a supporting regulator. Regulations under subsection (8) require the consent of Welsh Ministers to specify a person whose functions relate only to Welsh ministerial matters.
110. New section 28A(1)(b) provides a supporting regulator must exercise a designated function which is, or is relevant to, the exercise of a partnership function (as defined in new section 23A(2)). New section 28A(10) enables the Secretary of State to specify the regulatory functions that are designated functions of supporting regulators. A designated function must not be a relevant function (as defined in new section 22C) of the supporting regulator. This means that, in relation to the designated function, the supporting regulator could not be a qualifying regulator, eligible for nomination as a primary authority under new section 23A.
111. New section 28A(11) provides that regulations under subsection (10) may only include reserved matters in relation to Scotland and may not include matters that are not transferred in relation to Northern Ireland. Subsection (11) also provides that the regulations require the consent of the Welsh Ministers to specify a regulatory function, so far as exercisable in Wales, which relates to a Welsh ministerial matter.
112. New section 28A(3) provides that where a supporting regulator has provided support to a primary authority in the preparation of that primary authority's advice, guidance or inspection plan and have consented to the advice, guidance or plan, the regulator must act consistently, so far as possible, with that advice, guidance or inspection plan. Section 28A(6) enables a supporting regulator to

charge a regulated person or co-ordinator such fees as it considers covers the costs reasonably incurred of providing support.

#### Justification

113. The Department considers that it is appropriate to list supporting regulators in delegated legislation because of the need to be able to list such regulators at different times, for example, when the practical arrangements are in place to enable a regulator to support a primary authority or when a new regulator is created or acquires new functions, such that it can support a primary authority.
114. The power to specify by regulations the regulatory functions that are designated functions enables legislation to be updated more frequently than Parliament can be expected to legislate by way of primary legislation, for example where a supporting regulator acquires new regulatory functions, which may not necessarily be done by primary legislation.
115. Provision is made in subsection (12)(b) for regulations to make different provision for different areas. This is to enable regulatory functions to be specified for a particular area if the changing regulatory landscape might in the future give bodies regulatory functions for a particular area (for instance as part of regional devolution).

#### Justification for procedure selected

116. The effect of the regulations will be to enable other regulators to support primary authorities in the preparation of advice, guidance and inspection plans and to charge for that support. The effect of a regulator's inclusion in regulations under new section 28A(1) is that such a regulator can elect whether to support a primary authority – the regulator would not be compelled to assist a primary authority. Similarly, a regulated person is not obligated to seek and pay for the support of a supporting regulator as part of its participation in the scheme under subsection (6). Given that it is not a duty which is imposed on a supporting

regulator or regulated person or member, but a choice that may be made, it is considered that the negative resolution procedure is sufficient.

117. The procedure in relation to designated functions is in line with the precedents that apply to relevant functions of qualifying regulators, where the negative resolution procedure is considered to be appropriate (see section 30C).

**Clause 17: Extending the primary authority scheme under RESA 2008: new section 28B(1)(a) and (7) enables the Secretary of State to prescribe by regulations a person with regulatory functions who is a “complementary regulator” for the purposes of new section 28B (Other regulators to act consistently with primary authority advice).**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative resolution*

Context and purpose

118. The purpose of new section 28B is to require the regulators specified in the section to act consistently, so far as possible, with primary authority advice and guidance where they exercise a designated function (specified under new section 28B(9)) in relation to the regulated person or a member of the regulated group. This is a new policy and power.

119. New section 28A(1) provides that the section only applies to a person who has regulatory functions and who is specified as a “complementary regulator” in regulations made under subsections (1)(a) and (7). Regulations under subsection (7) require the consent of Welsh Ministers to specify a person whose functions relate only to Welsh ministerial matters.

120. New section 28B(1)(b) provides a complementary regulator must exercise a designated function which is, or is relevant to, the exercise of a partnership function (as defined in new section 23A(2)). The function must be exercisable in relation to the regulated person or regulated group.

## Justification

121. The Department considers that the listing of complementary regulators and their functions is appropriate for delegated legislation because of the need to be able to list such regulators at different times, for example, when a new regulator is created or acquires new functions.

## Justification for procedure selected

122. The Department considers the affirmative resolution procedure is appropriate for this measure and provision is made for this under new section 30C. Parliamentary scrutiny will provide a significant safeguard where regulations require complementary regulators to act consistently, so far as possible, with primary authority advice and guidance. It will allow extensive consideration and debate as to which regulators will be within scope of section 28B. This is in line with the approach in relation to other better regulation measures, where regulators are brought in scope by affirmative procedure – for example, any orders bringing regulators in scope of the economic growth duty is to be by affirmative procedure (section 109(5) Deregulation Act 2015).

***Clause 17: Extending the primary authority scheme under RESA 2008: new section 28B(7) enables the Secretary of State to specify the regulatory functions of complementary regulators for the purposes of that section (“Other regulators to act consistently with primary authority advice”).***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

## Context and purpose

123. As outlined above, the purpose of new section 28B is to require the regulators specified in the section to act consistently, so far as possible, with primary authority advice and guidance where they exercise a designated function in relation to the regulated person or a member of the regulated group.



124. New section 28B(9) enables the Secretary of State to make regulations that specify the regulatory functions of a complementary regulator for the purposes of section 28B. New section 28B(1)(b) provides that the complementary regulator must exercise a function which is, or is relevant to, the exercise of a partnership function (as defined in new section 23A(2)). Subsection (10) provides that regulations under subsection (9) must identify the partnership function to which the designated function is equivalent. The function must be exercisable in relation to the regulated person or member of the regulated group.
125. New section 28B(11) provides that regulations under subsection (9) may only include reserved matters in relation to Scotland and may not include matters that are transferred in relation to Northern Ireland. Subsection (11) also provides that the order requires the consent of the Welsh Ministers to specify a regulatory function, so far as exercisable in Wales, which relates to a Welsh ministerial matter.
126. Subsection (12) allows regulations to make different provision for different areas. This is to allow the regulations to reflect different regulatory arrangements in different areas, particularly if regulatory functions are transferred to regional regulators in the future.

#### Justification

127. The power to specify by order the regulatory functions in respect of which a complementary regulator is required to act consistently with primary authority advice and guidance, enables legislation to be updated more frequently than Parliament can be expected to legislate by way of primary legislation, for example where a specified regulator acquires new regulatory functions.
128. The listing of relevant functions in the existing Part 2 of RESA is by way of negative procedure. It is considered that the negative resolution procedure is appropriate for orders under new section 28B(9). Where regulations specify a complementary regulator under section 28B(1)(a) and (7), as well as the

functions exercised by complementary regulators, the regulations will be subject to the affirmative resolution procedure (see new section 30C).

**Clause 17: Extending the primary authority scheme under RESA 2008: new section 30A(1) enables the Secretary of State to give guidance to regulators and co-ordinators about the operation of Part 2 of RESA.**

*Power conferred on: Secretary of State*

*Power exercised by: Guidance*

*Parliamentary procedure: None*

Context and purpose

129. New section 30A(1) enables the Secretary of State to give guidance to qualifying regulators, supporting regulators, complementary regulators and co-ordinators about the operation of Part 2 RESA. These persons must have regard to any such guidance given. In relation to qualifying regulators, this is based upon the existing power to give guidance to local authorities under section 33.
130. New section 30A(2) provides that the Secretary of State may, in particular, issue guidance about: how a primary authority makes arrangements for the discharge of its advice and guidance functions under new sections 24A(3); the procedures in relation to enforcement action under Schedule 4A; how a primary authority brings an inspection plan of to the notice of regulated persons, co-ordinators and other qualifying regulators, under new section 26A(8); and the charging of fees by primary authorities under section 27A. This is based upon the precedent established under section 33 RESA.
131. New section 28A(3) provides that the Secretary of State may give guidance to supporting regulators about the circumstances in which a function is relevant to the exercise of a partnership function under section 28A and the charging of fees under that section.

132. The Secretary of State is required to consult such persons as the Secretary of State considers appropriate. The Welsh Ministers must be consulted on guidance given under subsections (2)(d) and (3).

Justification

133. It is important that qualifying regulators and relevant regulators act consistently in the application of the statutory provisions in the new Part 2 of the Regulatory Enforcement and Sanctions Act 2008. The guidance, on which the Secretary of State is required to consult, is intended to ensure that this objective is achieved.

Justification for procedure selected

134. Those to whom the guidance is given are only required to have regard to this guidance. As the guidance is not binding, it is not considered necessary for the guidance to be scrutinised by Parliament.

***Clause 17: Extending the primary authority scheme under RESA 2008: new section 30B enables the Secretary of State to amend the time limits that apply to procedures under Part 2 of RESA***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument (“Henry VIII power”)*

*Parliamentary procedure: Affirmative resolution*

Context and purpose

135. New section 30B enables the Secretary of State to amend by regulations any time limits that apply in Part 2.

136. In the Part, time limits are set with respect to procedures relating to: provision of membership lists by co-ordinators, notification of enforcement action, decisions regarding disputes about enforcement action that are referred to the Secretary of State and procedures about inspection plans.

Justification

137. In relation to enforcement action, the time limits that apply under new section 25B and 25C and new Schedule 4A have a significant impact on qualifying regulators, regulated persons and members of regulated groups, as enforcement action may not be taken during the relevant periods. In relation to inspection plans, the time limits that apply under section 26B are required to ensure that primary authorities respond in a timely fashion to requests from other qualifying regulators who wish to act otherwise than in accordance with the inspection plan. It is important that these time limits are clear to all those affected by them and for this reason they have been included in the primary legislation.
138. However, it is also important that these time limits are kept under review, as changes to the regulatory framework over time may mean that the time limits need to be amended. Therefore, a delegated power has been taken to ensure that it will be possible to amend the time limits where it is appropriate to do so. The delegated power is limited to amending the periods of time that apply to the relevant procedures.

#### Justification for procedure selected

139. As the delegated power enables the Secretary of State to amend primary legislation by regulations, it is considered that the affirmative resolution procedure provides the appropriate level of Parliamentary scrutiny (see new section 30C).

***Clause 17 and Schedule 3: Extending the primary authority scheme under RESA 2008: paragraph 9 of new Schedule 4A enables the Secretary of State to make regulations about the procedures that are to be followed for the purposes of the Schedule***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

Context and purpose

140. Under new Schedule 4A, the primary authority, the regulated person or member of the regulated group, or the enforcing authority may, with the consent of the Secretary of State, refer a dispute about enforcement action to the Secretary of State for a determination. New Schedule 4A establishes the circumstances in which a matter may be referred to the Secretary of State and the procedures that are to apply. Paragraph 9 of the Schedule enables the Secretary of State to make detailed provision in regulations for those procedures. This is based upon the existing provisions in section 28(7) of, and Schedule 4 to, the Act.

#### Justification

141. The overall procedure is established under new Schedule 4A. Paragraph 9 enables the Secretary of State to make provision for the detailed procedures that are to apply. This follows the precedent established in paragraph 6(2) of Schedule 4 to the Act, which applies to the existing procedure for consent to a reference under section 28 of the Act.

142. It is considered necessary to have such a power to enable the Secretary of State to review and amend detailed technical procedures, for example, in response to changes in technology.

#### Justification for procedure selected

143. The key framework for references to the Secretary of State is contained in the primary legislation. The power is drawn narrowly to enable detail to be provided for procedural matters only. For these reasons, it is therefore considered that the negative procedure is sufficient scrutiny (see new section 30C).

## **Part 4: Apprenticeships**

### ***Clause 18: Public Sector apprenticeship targets***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative procedure for the first exercise, negative procedure for all subsequent sets of regulations*

## Context and purpose

144. Clause 18 would insert new sections A9 (public sector apprenticeship targets) and A10 (further provision about apprenticeship targets) into Chapter A1 of Part 1 of the Apprenticeships, Skills, Children and Learning Act 2009 (apprenticeships: England).
145. Section A9(1) provides powers for the Secretary of State to prescribe public bodies and set apprenticeship targets for them. The regulations must specify the relevant period to which each apprenticeship target relates. Section A9(4) is a power to require public bodies to provide all of the information the Secretary of State needs for the purposes of exercising functions under the section.
146. Section A10(1)(b) confers power to prescribe additional information to be sent to the Secretary of State. (There is certain other information which must be provided in accordance with section A10(1)(a) and (2).) Section 10(3) contains examples of the additional information which may be prescribed. Section 10(4) says that the regulations may specify how the information is to be published or sent. Section 10(6) is a power to direct in writing that a body only has one reporting period in a target period not exceeding 12 months if the primary legislation would otherwise require two reporting periods. Section 10(7) allows the Secretary of State to specify which reporting period is to apply where a target is set for more than one public body.

## Justification

147. The Secretary of State's power to prescribe public bodies (section A9(1)) has been left to delegated legislation because, although the intention is for most public bodies to be prescribed, there may be particular circumstances where that would not be suitable (for example, in the case of smaller public bodies, which could be those with fewer than a specified number of employees, or some other exceptional reason relating to the operations of the body). It follows that the list will require on-going review and updating to reflect changes to public

bodies themselves as well as the reasons for not including bodies within the scope of the legislation.

148. The Secretary of State's discretion to set apprenticeship targets is necessary to ensure that the targets are appropriate having regard to the circumstances when the target is set. The appropriateness of the relevant period for the apprenticeship target will also depend on the context and circumstances prevailing at the time that the target is set. The power for the Secretary of State to require public bodies to provide all of the information the Secretary of State needs for the purposes of exercising functions under the section (section A9(4)) is justified in order to ensure that the purposes of the legislation are not frustrated.
149. The power of the Secretary of State to direct in writing that a body may have one reporting period rather than two (section 10(6)) is appropriate to reduce the reporting burden on bodies where there would otherwise be more than one reporting requirement in 12 months. In that case it is appropriate for the Secretary of State to be able to exercise a discretion to reduce the number of reporting periods where, having regard to the circumstances, it would otherwise be excessively burdensome.
150. Section 10(1)(a) and (2) provides the minimum information which the bodies must send to the Secretary of State. There is a reasonable prospect, however, that additional information will be needed in some or all cases having regard to particular bodies, particular targets and whether the minimum information is sufficient to achieve the policy aim. It is not possible to anticipate in the primary legislation what information is needed in every case resulting in the need for the additional powers.

#### Justification for procedure selected

151. The affirmative resolution procedure is selected for the first set of regulations because the intention is for that to be the main set of regulations and to provide a further opportunity to debate apprenticeships in this Parliament. The expectation is that most of the public bodies to be prescribed will be as set out

in those regulations. Even if that expectation is not realised, it is considered that the negative resolution procedure would be sufficient for subsequent sets of regulations. The intention is for the Secretary of State to have power to apply targets to the whole of the public sector at his discretion as exercised through the making of regulations. It follows that not prescribing a public body may be seen as an exclusionary policy choice in terms of the overall scope of the power.

152. Further, having regard to the intention of the legislation that there should be apprenticeship targets in the public sector, it would be a disproportionate use of Parliamentary time to have debates in each House for adding or removing from scope what is likely to be a relatively small number of bodies in subsequent sets of regulations. Although the Department is considering what those exceptional cases might be (for example, not including public bodies with a small number of employees) it is recognised that this decision will need to be reviewed from time to time and the legislation updated accordingly.
153. After the first set of regulations, an affirmative procedure would be excessive and unnecessarily time consuming in relation to the targets themselves and the additional information to be sent to the Secretary of State. The Department considered providing that the Secretary of State may set the targets by direction to ensure that there is no delay caused by parliamentary procedure. In the interests of transparency and to allow for parliamentary scrutiny, however, the Department has decided to adopt the negative procedure for the target and information powers. The first targets would be subject to the affirmative procedure because these targets will be in the first set of regulations (which is also expected to prescribe most of the bodies).
154. There is no express procedure for directions that the Secretary of State may make to require public bodies to provide all of the information the Secretary of State needs for the purposes of exercising functions under the primary legislation. It is possible that the Secretary of State may need information from bodies in order to decide whether those bodies should be included within the scope of the regulations. The power is limited to what is necessary in order to



ensure that the purposes of the primary legislation are not frustrated. On that basis it is not considered that a more prescriptive procedure is justified. There is also no statutory procedure for directions that a body may have one reporting period rather than two in a relevant period not exceeding more than 12 months. That is a power which can only be used to reduce the number of reporting periods in limited circumstances to ensure that the reporting requirements in the primary legislation are not unnecessarily burdensome.

## **Part 6: Non-Domestic Rating**

### ***Clause 22: disclosure of Revenue and Customs information in connection with non-domestic rating: New section 63A(3)(g) and (5) of the Local Government Finance Act 1988: Power to prescribe qualifying person***

*Power conferred on: Secretary of State or Welsh Ministers*

*Power exercisable by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative resolution*

Context and purpose

155. Clause 22 inserts new sections 63A and 63B into the Local Government Finance Act 1988. New section 63A confers power on officers of the Valuation Office Agency to disclose information held in relation to their functions to specified “qualifying persons”. The Valuation Office Agency (VOA), which is part of Her Majesty’s Revenue and Customs (HMRC), is responsible for compiling and maintaining non-domestic rating lists under the Local Government Finance Act 1988. Local authorities and (for certain properties) the Secretary of State for Communities and Local Government are responsible for calculating and collecting non-domestic rates using the information on those rating lists.

156. In the course of exercising their functions, the VOA collects information from non-domestic ratepayers, such as the identity of the non-domestic ratepayer and plans of the property, which is necessary or useful to persons carrying out non-domestic rating functions. Officers of the VOA are prohibited from

disclosing such information to local government or the Secretary of State or Welsh Ministers, other than in limited circumstances, by section 18 of the Commissioners for Revenue and Customs Act 2005 (duty of confidentiality).

#### Justification

157. New section 63A(3) lists the qualifying persons to whom information may be supplied and who may retain and use the information. Although the power to supply information is permissive and therefore the VOA has discretion to decide who to supply information to, it is considered an important safeguard to the principle of taxpayer confidentiality to specify the persons to whom information could be supplied in the primary legislation. However, because the categories of persons to which information can be supplied are specified in primary legislation, the VOA are constrained from supplying information to other persons who might be conducting non-domestic rating functions or assisting local authorities in doing so. The Department considers that non-domestic rates will play an increasingly important part in devolving powers to large cities and other locations and in relation to economic growth generally. As more partners take a role in economic development it may be necessary to add to the organisations to which information may be supplied. Section 63A(3)(g) and (5) therefore confers a delegated power on the Secretary of State in England, or Welsh Ministers in Wales, to prescribe other persons to which information may be supplied.
158. Subsection (6) provides that the consent of the Commissioners for Her Majesty's Revenue and Customs is required before the power can be exercised. This provides a safeguard to ensure that any extension to the persons to whom the VOA would be permitted to supply information is appropriate and proportionate.

#### Justification for procedure selected

159. Regulations made under this power are subject to the affirmative parliamentary procedure (section 143(4ZA) of the Local Government Finance Act 1988 is to be amended by subsection (3) of clause 22). Given the importance of the need

to protect taxpayer confidentiality, it is appropriate that this power should be subject to the affirmative resolution procedure to ensure that adequate parliamentary scrutiny is afforded to instruments which extend the remit of the powers to disclose information to other persons not listed in the primary legislation.

***Clause 22: new section 63A(4)(c) and (5): disclosure of HMRC information in connection with non-domestic rating: power to prescribe other qualifying purposes***

*Power conferred on: Secretary of State or Welsh Ministers*

*Power exercisable by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative resolution*

Context and purpose

160. Section 63A specifies that the VOA may only supply information to qualifying persons for a qualifying purpose and the recipient of the information may only retain and use the information for a qualifying purpose. To provide certainty about the purpose for which information may be supplied and used, the qualifying purpose is specified in the primary legislation as enabling or assisting a qualifying person to discharge any function under Part 3 of the Local Government Finance Act 1988 which are not functions of the Secretary of State or Welsh Ministers. Information may also be supplied and used for the purpose of enabling or assisting the Secretary of State or Welsh Ministers to carry out their functions in relation to the central rating list under that Part of the Act. The purpose is tied to non-domestic rating functions under Part 3 to restrict the supply and use to the legislative functions specified in the Local Government Finance Act 1988.

Justification

161. However, given the increasing importance of non-domestic rating for local government funding and economic growth it may become necessary for information to be supplied for a purpose which whilst connected to non-domestic rating is not related to the carrying out of a specific function under Part

3. For example, the Department expects devolution deals with cities and other areas to go beyond economic growth and include aspects such as transport and social care. As these deals evolve and include an increasingly important role for locally collected non-domestic rates it may be necessary to enable information to be shared for wider purposes than the specific functions under Part 3 of the Local Government Finance Act 1988. New section 63A(4)(c) and (5) therefore confers a delegated power on the Secretary of State in England, or Welsh Ministers in Wales, to prescribe other purposes for which information may be supplied and used but those purposes must still relate to non-domestic rating.

162. Subsection (6) provides that the consent of the Commissioners for Her Majesty's Revenue and Customs is required before the power can be exercised. This provides a safeguard to ensure that any extension to the purposes for which the VOA would be permitted to supply information is appropriate.

Justification for procedure selected

163. Regulations made under this power are subject to the affirmative parliamentary procedure (section 143(4ZA) of the Local Government Finance Act 1988 is amended by subsection (3) of clause 22). Given the importance of the need to protect taxpayer confidentiality, it is appropriate that this power should be subject to the affirmative resolution procedure to ensure that adequate parliamentary scrutiny is afforded to any proposals to extend the purposes for which the VOA may disclose information.

***Clause 23: alteration of non-domestic rating lists***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution, affirmative resolution for civil penalty provisions.*

Context and purpose

164. The amendments to section 55 of the Local Government Finance Act 1988 have the effect of allowing different approaches to appeals relating to alteration of non-domestic rating lists for England and Wales. The amendments provide further provision to allow for alteration of the process in relation to England. These allow for additional matters to be included in regulations setting out the review and appeal processes, including: steps which must be completed prior to a proposal being submitted by a person to the Valuation Office Agency; that disclosure and exchange of information should be frontloaded in the system; and, timeframes for completing the steps required and for bringing an appeal. The amendments also allow for fees to be introduced for appealing to the Valuation Tribunal for England.
165. Provision is also made for a power to impose financial penalties where a person knowingly, recklessly or carelessly provides information which is false in a material particular. This is introduced to allow regulations to provide an additional deterrent to persons providing information. A criminal offence already exists in relation to responses to requests for information by the VOA (see Local Government Finance Act 1988, Schedule 9, Para 5(4)). The civil penalty is intended to deal with less serious cases relating to the provision of information within the new appeals process.

#### Justification

166. The power to make regulations providing for the alteration of non-domestic ratings lists will continue to be delegated as they have been previously. The additional matters set out in the amendments have been left to delegated legislation to allow future flexibility in the system for reviewing and appealing non-domestic ratings lists. This is considered necessary since the introduction of a new system in England may require fine-tuning during its implementation and also on future reviews of the system to ensure the policy aim of an efficient and effective review and appeal process continues to be achieved. In relation to the introduction of a power for fees for appealing to the VTE, including this as a delegated power follows precedent of powers to set fees for other tribunals, and further, it retains sufficient flexibility that the imposition and level of fees may be

reviewed periodically to ensure that they remain appropriate. In relation to the penalties, the details of this system (e.g. the level / calculation of the penalty, subject to an upper limit of £500) are left to secondary legislation. Secondary legislation on the civil penalties will be subject to the affirmative resolution procedure (section 143 of the Local Government Finance Act 1988 is amended by subsection (5) of clause 23).

#### Justification for procedure selected

167. Regulations on civil penalties made under section 55 are subject to the affirmative resolution procedure. Since these will allow for the imposition of financial penalties and the level of such a penalty it is appropriate that Parliament has the opportunity to consider these before the power can be exercised.
168. Regulations, other than those making provision as to the civil penalties, made under section 55 are subject to the negative resolution procedure. Since the proposed amendments only act to slightly expand the power to cover those matters listed in the amendments it is considered appropriate that section 55 regulations remain subject to the negative resolution procedure (section 143 of the Local Government Finance Act 1988 is amended by subsection (5) of clause 23).

### **Part 8: Public Sector Employment: Restrictions on Exit Payments** **Clause 26 and Schedule 4: Restriction on public sector exit payments**

*Power conferred on: the Treasury, Scottish Ministers, Minister of the Crown*

*Powers exercisable by: Regulations made by Statutory Instrument (includes Henry VIII power in new section 153A(7)(c) and in paragraph 4 of Schedule 4)*

*Parliamentary procedure: Negative resolution and affirmative resolution*

Context and purpose

169. Clause 26 inserts new sections into the SBEE Act, with supplementary provisions made in Schedule 4. These confer a power to make provision to secure that the total amount of exit payments made to a person in respect of relevant public sector exits does not exceed a given amount. The intention is to allow a cap to be placed on the total exit payments that may be paid to a worker in consequence of their leaving employment or office in the public sector. The cap applies to the total payments made within a 28 day period so as to capture the situation where an individual has more than one employment or office and is made redundant from those positions at a similar time.
170. The provision builds upon the existing provisions in the SBEE Act on recovery of exit payments from those returning to work in the public sector. The idea is that whilst it may be reasonable for workers to receive some payment to compensate and support them in leaving or losing their post, that cost is ultimately met by the taxpayer. In terms of fairness, the public finances, and accountability of public sector employers, it is therefore important that such payments stay at a responsible level and do not confer vast benefits on a few individuals.

#### Justification

171. The aim of the clause is clear and the key figure of £95,000 is set out on the face of the Bill (although subject to adjustment: see below). To give proper, practical effect to the policy in the context of the variety of existing arrangements governing public sector exit payments, across different bodies and different types of compensation scheme, the Department proposes to set out a number of details in secondary legislation. That approach is in line with the recovery of public sector exit payments and with other recent cross-cutting public sector reform such as the Public Service Pensions Act 2013.
172. As was explained in relation to the recovery of public sector exit payments, regulations will enable account to be taken of changes in the bodies which form part of the public sector, changes in the types of payments covered, changing economic circumstances, and the changing nature of the workforce.

173. The regulations will be able to make detailed provision setting out:

- a) which public sector authorities are included (new section 153A(2));
- b) what types of payments the provision applies to (new section 153A(3));
- c) exemptions from the cap in particular circumstances (new section 153A(7)(a));
- d) amendments to relevant public sector schemes in consequence of the cap (new section 153A(7)(b));
- e) amendments to any legislative provision in consequence of the cap (new Section 153A(7)(c));
- f) an increase or decrease in the £95,000 cap (new section 153A(8));
- g) that a public sector scheme may be added to the definition of “relevant public sector scheme” (new section 153A(10)(h)); and
- h) who may relax a restriction imposed by regulations under new section 153A(1) and in what circumstances (including the role of the Treasury (new section 153C).

174. New section 153B makes supplementary provision, in particular as to Parliamentary control.

175. Paragraph 4 of Schedule 4 gives another, particular power to amend public sector schemes. It is relevant to mention that some public sector schemes are contractual rather than statutory. Also, the power to amend public sector schemes once they are prescribed is, to the extent that such a scheme is established “in an enactment” which is an Act, a “Henry VIII” power. However, no such schemes have been identified to date and therefore it may not be necessary to use the “Henry VIII” power. Some public sector schemes allow an individual who is leaving employment or office and is close to retirement age to have immediate access to an unreduced pension. This pension “top up” is funded by the employer and enables an employer to in effect buy out the actuarial reduction in an employee’s pension when they retire before normal



pension age. The new provision is designed to ensure that where a pension “top up” is within the scope of the regulations made under s153A(1), there is power to amend relevant public sector schemes in consequence of the restriction imposed by those regulations. The new provision ensures that public sector schemes can reflect that any entitlement to an unreduced pension is subject to the restrictions imposed by the cap. Further, in the circumstances where a pension “top up” would only slightly exceed the cap, the new provision ensures that rather than the individual having to receive a fully actuarially reduced pension, or being able to buy out the full reduction, they can be given the option of a partial buy-out. The partial buy-out could be funded by the individual or the employer (within the limitations imposed by the cap) such that the individual could receive immediate payment of their pension reduced only by the amount of the actuarial reduction they have chosen not to meet. This is an issue where greater flexibility may be required in some scheme rules than currently exists, and so amendments to those rules may be necessary.

176. The powers to introduce the cap will be exercisable by the Treasury; or by Scottish Ministers in certain cases. Regulations to amend compensation schemes may also be made by a Minister of the Crown with the consent of the Treasury. That would, for example, allow the responsible Minister (such as the Minister for the Cabinet Office, in relation to the Civil Service) to make amendments to implement the cap alongside other changes they might need to make at the same time.
177. New section 153C allows the cap to be relaxed, by a Minister of the Crown, or, in certain cases, the relevant devolved administration. It is anticipated that in some circumstances it may be appropriate to relax the restrictions imposed by the cap, either in part or in full, for example if there were exceptional circumstances such that it would be unfair or unreasonable to impose the cap. Regulations made by the Treasury may also confer that power on the Welsh Ministers, in relation to exit payments by a person who exercises functions within National Assembly competence.

178. The Treasury may make regulations providing for the relaxation power in new section 153C to be exercisable, on behalf of a Minister of the Crown, by another person; and may provide for such a requirement to be relaxed only with Treasury consent or following a Treasury direction. Regulations may also provide for the publication of information about any such relaxation of a requirement. Regulations to be made by Scottish Ministers may make similar provision.

#### Justification for the procedure selected

179. The first set of regulations under new section 153A(1) to be made by the Treasury are to be subject to the affirmative procedure. The Department recognises that it is appropriate for the introduction of these provisions to be subject to the more stringent form of Parliamentary control. Equally, the first use of the powers by the Scottish Ministers will be subject to the equivalent procedure.

180. On a related point, paragraphs 1 to 3 of Schedule 4 amends section 154 of the SBEE Act (regulations in connection with recovery of public sector exit payments) to make a correction to that power along the lines above: the intention there was also that the Treasury and the Scottish Ministers should follow the affirmative procedure when each first uses the power, not that only the first of them to implement the provisions need do so. In addition, the Schedule contains an amendment to the section 154 power to ensure that payments *in respect of* a person can count as exit payments: for instance, so-called “top-up” payments by an employer to buy out the actuarial reduction in an employee’s pension when they retire before normal pension age.

181. Regulations under new section 153A(7)(c) allow consequential amendments of legislation, including primary legislation which means the power is a Henry VIII power. This is necessary since amendment might be needed in order to give effect to the restrictions imposed by regulations made under new section 153A(1) or to make clear that a previous entitlement to an exit payment in breach of any restriction imposed by the regulations is overridden. Accordingly, as usual, it is subject to the affirmative procedure.

182. Regulations to change the figure of the cap (new section 153A(8)) are subject to the affirmative procedure. That is in recognition of the need for Parliament to debate the reasons for a reduction, and the serious impact such a change could have on employers and individuals who would also need to adjust to it. Provision to increase the cap also merits a full debate in both Houses because the £95,000 figure is clearly set out on the face of the clause and the power allows a departure from that.
183. Finally, regulations to add a public sector scheme to the definition of “relevant public sector scheme” (new section 153A(10), paragraph (h) of the definition of “relevant public sector scheme”) are subject to the affirmative procedure. A scheme that is defined to be a “relevant public sector scheme” can be amended using regulations made under new section 153A(1) (new section 153A(7)(b) and paragraph 4 of Schedule 4) and therefore provision to amend the definition merits the use of the affirmative procedure.
184. The Department considers that the other powers introduced by this clause are legitimately exercisable under the negative procedure. The main outline of the new policy – in particular, the significant issues as to which public sector bodies and which types of payment will be covered, as well as the exemptions that will apply and the amendments to public service compensation schemes – will be subject to a debate in both Houses when first brought in. Subsequent adjustments or revisions to the provisions over time are not considered likely to need time for debates on every occasion. The power in paragraph 4 of the Schedule to deal with pension “top-up” payments is meant to enable practical flexibilities to be included in schemes and avoid unintended consequences: in particular, to avoid a disproportionate impact from the cap on certain people. It is felt that the negative procedure makes sense in the context of this closely defined purpose, and of the existing powers to amend these sorts of schemes.
185. As was pointed out in relation to recovery of public sector exit payments (and the Department does acknowledge the comments made by the Committee as to the very broad scope of those powers initially proposed to be subject to the negative procedure, which were later amended), questions of management of

public service workers have traditionally been a matter for Ministers. The provision to be made following the first implementation of the policy are likely to be matters of detail and updates to reflect other changes in the public sector. The Department still considers the negative procedure to be consistent with its use in other contexts, such as pensions, which also affect the public sector workforce, and to be necessary for responding promptly to changes in wider circumstances.

## **Part 9: General Provisions**

### ***Clause 27: Power to make consequential amendments, repeals and revocations***

*Power conferred on: Secretary of State, The Treasury*

*Power exercisable by: Regulations made by Statutory Instrument (“Henry VIII” power)*

*Parliamentary procedure: Affirmative or negative resolution*

#### Context and purpose

186. Clause 27(1) confers a power on the Secretary of State and the Treasury to make consequential amendments. Clause 27(2)(a) makes clear that this power includes power to make transitional, transitory and saving provisions.

187. Clause 27(2)(b) provides that this power includes the power to amend, repeal, revoke or otherwise modify any provision made by or under an enactment (including any enactment passed or made in the same Session as this Act). The power is a “Henry VIII” power to the extent that the regulations are concerned with an enactment in an Act.

188. 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.

#### Justification for delegation

189. The power in clause 27 is required to enable the Secretary of State or the Treasury to ensure a smooth transition between legislative provisions.
190. The power in clause 27 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.
191. There are numerous examples of a power in this form. A recent example would be section 159 of the SBEE Act.

#### Justification for procedure selected

192. The Parliamentary procedure to be followed depends on the content of the regulations. If the regulations textually amend, repeal or revoke any provision of primary legislation (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.
193. If the regulations do not textually amend, repeal or revoke primary legislation, the negative resolution procedure applies. This is considered appropriate for amendments or modifications of secondary legislation given that the regulations will only be making consequential changes to the secondary legislation.
194. 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” 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.

195. The Bill 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 27 power, the government is willing to confirm that it will exercise its power under clause 27(2)(b) to include the modification in an affirmative instrument. It is hoped that this will meet the Committee’s concerns about non-textual modifications.

***Clause 28: Power to make transitional, transitory and saving provision***

*Power conferred on: Secretary of State, The Treasury*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: None*

Context and purpose

196. Clause 28 provides that the Secretary of State or the Treasury 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

197. Clause 28 ensures that a Minister of the Crown can provide a smooth commencement of new legislation and 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 100 of the Enterprise and Regulatory Reform Act 2013 and section 160 of the SBEE Act.

Justification for procedure selected

198. The Government considers that the power to make transitional regulations 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 100 of the Enterprise and Regulatory Reform Act 2013 and section 160 of the SBEE Act. The substance of the provisions will be considered during the passage of the Bill through Parliament.

**Clause 29: Commencement**

*Power conferred on: The Treasury, Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: None*

Context and purpose

199. Clause 29(1) lists the provisions which come into force on Royal Assent and clause 29(2) those which come into force two months after Royal Assent. Clause 29(3) provides for sections 20 and 21 (late payment of insurance claims) to come into force at the end of the period of one year beginning with the day on which this Act is passed. Clause 29(4) provides that section 26 and Schedule 4 (restriction on public sector exit payments) come into force at such day as the Treasury may by regulations appoint. The clause also provides at subsection (5) that all the other provisions come into force on whatever day the Secretary of State specifies in regulations. Subsection (7) provides that regulations under clause 29 may appoint different days for different purposes and for different areas.

Justification for delegation

200. The commencement power at subsection (4) will enable the Treasury to commence section 26 and Schedule 4 (restriction on public sector exit payments) at an appropriate time taking into account, for example, any time needed to prepare relevant public sector schemes for the amendments made by the Bill. The commencement power at subsection (5) will enable the Secretary of State to commence the provisions of the Bill not covered by subsections (1)

to (4) 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.

201. There are numerous examples of powers to make commencement regulations 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

202. The Government considers that the power to make commencement regulations 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**

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