HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

13th Report of Session 2014-15

Small Business, Enterprise and Employment Bill: Clauses 71 to 158 and Schedules

Pension Schemes Bill: Government Response

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 15 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Andrews
Baroness Drake
Baroness Farrington of Ribbleton
Baroness Fookes
Countess of Mar
Lord Marks of Henley-on-Thames
Baroness O'Loan
Baroness Thomas of Winchester (Chairman)
Lord Trimble
Viscount Ullswater

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is dprr@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and other acts specified in the Committee's terms of reference.

Thirteenth Report

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL: CLAUSES 71 TO 158 AND SCHEDULES

1. We reported on clauses 1 to 70 of this Bill on 10 December 2014 (11th Report, HL Paper 79). The memorandum prepared by the Department for Business Innovation and Skills (BIS) to explain the delegated powers in the Bill deals with the remaining clauses of the Bill from page 34 onwards.

Paragraph 2 of Schedule 3 – Guidance about the meaning of significant influence or control

2. Schedule 3 to the Bill inserts a new Part 21A into the Companies Act 2006. The primary function of that Part is to impose a duty on companies to gather information about, and to maintain a register of, those persons (primarily individuals) who exercise significant control over a company. Section 790C of the Companies Act 2006 sets out definitions of key terms used in Part 21A, and provides for references to a person having "significant control" to be a person who meets one or more of the conditions specified in new Schedule 1A to the Companies Act 2006 (which is to be inserted by paragraph 2 of Schedule 3 to the Bill). While most of the conditions set out in Part 1 of Schedule 1A are based on objective criteria (for example, paragraph 3 which specifies as a condition that the person must hold 25% of the voting rights), the condition in paragraph 5 is less clear-cut. It refers to the circumstance where a person "has the right to exercise, or actually exercises, significant influence or control over" the company. Paragraph 24(1) of Schedule 1A requires the Secretary of State to publish guidance about the meaning of "significant influence or control". Paragraph 24(3) requires regard to be had to that guidance in interpreting those words.

3. By virtue of paragraph 24(2) of Schedule 1A the guidance must be laid before Parliament. There is no provision however for Parliamentary scrutiny of the guidance. The reasons given in paragraph 285 of the memorandum for not making the guidance subject to scrutiny are the fact that it will be worked up in consultation with stakeholders and the fact that it will not conflict with the statutory provisions in Part 21A. We do not find these reasons convincing. Section 790F of the Companies Act 2006 will make it an offence if a company fails to comply with the duty to gather information about persons who exercise significant control. It seems to us that the existence of the offence will give greater importance to the guidance, since those involved are likely to see compliance with the guidance as necessary in order to avoid the risk of committing an offence. Accordingly, the guidance is liable to play a significant role in determining the meaning of "significant influence or control" and therefore the range of persons who fall within the scope of the new Part 21A of the 2006 Act. **In the light of this, we consider that guidance under paragraph 24(2) of Schedule 1A should be subject to Parliamentary scrutiny. In our view the draft negative procedure would provide an appropriate level of scrutiny.**

Clause 84 – Power to provide for exceptions from the requirement that directors must be natural persons

4. Clause 84 amends the Companies Act 2006 to repeal section 155 of that Act which requires at least one director of a company to be a natural person, and to replace it with sections 156A to 156C. Section 156A establishes the general rule that every director of a company must be a natural person. Section 156B then confers a power on the Secretary to make regulations allowing a person who is *not* a natural person to be a director in specified circumstances and subject to specified conditions. Regulations under section 156B are subject to the limitation that they must include provision for a company to have at least one director who is a natural person. The regulations are subject to the negative procedure.

5. We consider that the powers which are generally conferred by section 156B are in the nature of Henry VIII powers because they allow for the modification of section 156A, and in particular the rule in that section that each director of a company has to be a natural person. Accordingly, in our view this leads to a presumption that the powers should be subject to the affirmative procedure unless a strong case can be made that the nature of the powers in the particular case justifies the negative procedure applying. We do not consider the reasons given for the negative procedure in this case to be at all strong. It is asserted in paragraph 311 of the memorandum that the negative procedure is appropriate as it allows for changes to be made more quickly in response to the changing corporate environment. But no examples are given of the kind of circumstances in which the affirmative procedure is likely to cause an unacceptable delay, and we find it difficult to imagine that such circumstances are likely to arise. **Accordingly we consider that regulations under section 156B of the Companies Act 2006 should be subject to the affirmative procedure.**

Clause 103 – Matters to be taken into account in determining unfitness to be a Director

6. Clause 103 replaces the provisions of the Company Directors Disqualification Act 1986 which set out the matters which are to be taken into account in determining whether a person is unfit to be a director. It does this primarily by substituting a new Schedule 1 to the 1986 Act which sets out the specific matters which must be taken into account. Section 12C(7) of the 1986 Act as proposed to be inserted by clause 103 confers a power on the Secretary of State by order to modify Schedule 1. The power conferred by section 12C(7), despite being a Henry VIII power, is subject to the negative procedure.

7. The Department's reasons for choosing the negative procedure are set out in paragraphs 396 and 397 of the memorandum. It is suggested that a lower level of Parliamentary scrutiny is acceptable because the power would only be used to "highlight certain factors and behaviours that the court would in any event have a discretion to take into account". In our view, this ignores an important difference between matters which a court is required to take into account and matters which it has a discretion to take into account. The Department also refers to the fact that the existing provision of the Company Directors Disqualification Act 1986 which allows modifications to be made to Schedule 1 (section 9(4)) is subject to the negative procedure. In our view, the force of this precedent is less because it dates back to a time before

this Committee was established. We also note that the equivalent existing provision for Northern Ireland, and the equivalent replacement provision in the Bill for Northern Ireland, are both subject to the affirmative resolution procedure. No substantive explanation is given as to why the affirmative procedure is appropriate in that case but not in relation to the modification of Schedule 1 to the Company Directors Disqualification Act 1986. **We consider that the power, conferred by section 12C(7) of the 1986 Act, to modify Schedule 1 to that Act should be subject to the affirmative procedure.**

Clauses 119 and 120 – Decisions by creditors and contributories in company insolvency proceedings

8. Clause 119, together with Schedule 9, amends the Insolvency Act 1986 to remove the requirement for decisions in relation to company insolvency proceedings to be made at meetings of the creditors and contributories of a company. This is generally achieved by amending the provisions of that Act, which require the holding of meetings of creditors or contributories to decide matters, so that instead they provide for matters to be decided by the creditors or contributories, without any express reference as to how a decision is to be made.

9. Sections 246ZE and 246ZF of the Insolvency Act 1986 (both of which are inserted by clause 119) contain provisions which apply generally to regulate how decisions of creditors and contributories are to be made. There is provision for a deemed consent procedure, under which the person with conduct of the insolvency proceedings proposes a decision which has effect unless a prescribed proportion of creditors or contributories object. Otherwise, decisions of creditors and contributories are to be taken by means of a qualifying decision procedure. Sections 246ZE and 246ZF in essence set out the framework for the making of decisions by creditors and contributories. The detailed provisions will be contained in insolvency rules made under section 411 of the Insolvency Act 1986. For example, insolvency rules will make provision about qualifying decision procedures, about the circumstances in which a particular kind of qualifying decision procedure may or may not be used and about the proportion of creditors or contributories for requiring a decision to be taken at a meeting. Insolvency rules will also be able to make provision about the circumstances in which the deemed consent procedure may not be used and about the proportion of creditors or contributories required to object to a proposed decision under the deemed consent procedure.

10. Clause 120 makes similar changes to the Insolvency Act 1986 in relation to individual insolvency. Again the amendments have the effect of removing the requirement for decisions of creditors to be taken at meetings; and enable other decision making procedures to be used instead, including a deemed consent procedure. As with the provisions inserted by clause 119, the detailed matters relating to the decision making procedures of creditors will fall to be set out in insolvency rules under section 412 of the Insolvency Act 2006.

11. Insolvency rules under section 411 and 412 of the Insolvency Act 2006 are subject to the negative procedure, and accordingly the detailed provision to be made about the use of qualifying decision procedures and the deemed consent procedure will be contained in rules subject to the negative

procedure. In paragraph 415 of the memorandum, the Department suggests that the negative procedure is appropriate because that is the procedure which applies generally to insolvency rules. **Despite this, it seems to us that there is a strong case for requiring the affirmative procedure to be used for the first exercise of the powers to make rules about qualifying decision procedures and the deemed consent procedure. The new provisions represent an important structural change in the conduct of insolvency proceedings, with most of the detailed provisions governing the operation of the new system to be set out in subordinate legislation**.

Clause 149 – Powers to require repayment of public sector exit payments

12. Clause 149(1) allows the making of regulations to require the repayment of some or all of a payment made to a public sector employee on leaving employment. The kinds of exit payment to which the regulations apply, the circumstances in which repayment is to be made, and the public sector employments to which the regulations apply are all to be provided for in the regulations themselves. Examples are given in subsection (4) of the kinds of exit payment which may be included within the scope of the regulations. But these constitute a non-exhaustive list. Similarly, clause 150(1) identifies particular circumstances in which a requirement to repay may be imposed. These are where a former public sector employee subsequently becomes an employee or contractor of a public sector authority or a holder of a public sector office. However, the circumstances identified in clause 150(1) are not exhaustive of the circumstances in which repayment can be required.

13. As well as providing for regulations to be able to require repayment of qualifying exit payments, subsection (2) of clause 149 also allows the regulations to make "such other provision in connection with qualifying exit payments as the Treasury think fit".

14. The stated reason for including the powers conferred by clause 149(1) (see paragraph 519 of the memorandum) is to allow the recovery of some or all of an exit payment from a worker who returns to work in the public sector. The supporting explanation in paragraphs 520 to 524 also makes it clear that the intention is to enable the recovery of an exit payment where the worker returns to public sector employment (whether as a public sector employee, an office holder or as a contractor of a public sector authority). However, no explanation is given as to why, if the sole purpose of the power is to allow for recovery of exit payments where a person returns to public sector employment, the power conferred by clause 149(1) is framed far more widely so as to allow *any* description of exit payment to be recovered in any circumstances. Also, no explanation is given as to why the very broad powers conferred by clause 149(2) are required.

15. Regulations under clause 149 are subject to the negative procedure. We find it very difficult to accept that the negative procedure is appropriate given the wide and open-ended nature of the powers being conferred. But more importantly we are not convinced that the delegation of powers is appropriate, particularly in the absence of any explanation for the breadth of the powers being conferred. Clause 149(1) places no limit on the kinds of circumstances in which a requirement to repay an exit payment might be imposed or after what period repayment might be required. Nor is there any

limit on the types of exit payment to which the requirement to repay might be applied. Clause 149(4) provides a very wide-ranging list of the kinds of payment but even that is not exhaustive. **Accordingly, we recommend that the House seek further explanation from the Minister as to the scope of the powers conferred by clause 149, how they will be exercised and why they provide for repayment in circumstances other than those referred to in the memorandum. In our view, clause 149 as it stands constitutes an inappropriate delegation of powers.**

Clause 154(5) and (6) – "Rolling-up" of different scrutiny procedures

16. Clause 154 contains provisions which supplement the provisions of the Bill which confer regulation making powers. Subsections (5) and (6) enable higher levels of Parliamentary scrutiny to be applied to regulations under the Bill at the discretion of the person making the regulations. So subsection (5) provides that a provision, which under the Bill is subject to no procedure, may be made by regulations subject to the negative or affirmative procedure, and subsection (6) provides that a provision which under the Bill is subject to the negative procedure may be made by regulations subject to the affirmative procedure.

17. **The issues raised by subsections (5) and (6) are identical to the ones raised by the equivalent provisions of the Recall of MPs Bill which we considered on 10 December 2014. We have the same concerns about clause 154(5) and (6) as we had in relation to the equivalent provisions of that Bill. Those concerns are set out in paragraphs 23 to 27 of our 11th Report of this Session (see extract from the 11th Report in Appendix 2).**

Clause 152 – Powers to "otherwise modify" primary legislation

18. Clause 152(1) allows a Minister of the Crown by regulations to make consequential provision. Under subsection (2), the power expressly includes a power to "amend, repeal, revoke or otherwise modify" any provision made by or under any enactment. The reference to an enactment includes a provision of primary legislation generally and more specifically a provision of the Bill itself. Subsections (3) and (4) make provision about the procedures for Parliamentary scrutiny. As a general rule regulations under clause 152(1) are subject to the negative procedure unless they amend, repeal or revoke any provision of primary legislation. Where the regulations amend, repeal or revoke a provision of primary legislation they are (except in one case) subject to the affirmative procedure.

19. We have expressed concern in the past about equivalent provisions in other Bills which allow regulations to make consequential amendments by amending, repeal, revoking or otherwise modifying a provision of primary legislation, but only require the affirmative procedure where the regulations amend, repeal or revoke a provision of primary legislation. A non-textual modification of primary legislation is capable of making changes which are no less significant than textual amendments. Accordingly, it seems to us that in principle the same level of Parliamentary scrutiny should apply. In the past the Government's response to these concerns has generally been to amend the provision to make the "otherwise modifying" power also subject to the affirmative procedure where it modifies a provision of primary legislation.

20. The memorandum explains in some detail (paragraphs 530 to 542) why the Government have taken a different approach here. The point is made that the kinds of modification which can be made to primary legislation are very diverse; and within this wide spectrum there are many in respect of which, because the modification of primary legislation is only very indirect, or because it only operates for limited purposes, it is inappropriate that it should be treated as equivalent to an amendment of the primary legislation and therefore made subject to the affirmative procedure. Indeed it is suggested that it will only be very rarely that a non-textual modification of primary legislation is made that is akin to a textual amendment.

21. Accordingly, the Department suggests an alternative approach in paragraph 542 of the memorandum. It is suggested that, because modifications of primary legislation which are equivalent to textual amendments are very rare, the default scrutiny procedure should be the negative procedure. It is stated that, were a modification to be made that is akin to a textual amendment of primary legislation, the Government would undertake to use the power under clause 154(6) which allows regulations which are subject to the negative procedure to be made subject to the affirmative procedure instead.

22. We accept that the negative procedure may be appropriate for some modifications of primary legislation, particularly those which limit the modification so that it only applies in a limited set of circumstances. However, we do not consider that the approach suggested in paragraph 542 of the memorandum provides an appropriate solution, since it relies on the flexible scrutiny provisions in clause 154. In our view, an underlying difficulty with the flexible scrutiny provisions is that they allow a lower level of Parliamentary scrutiny to be provided for (and justified) on the basis that the legislation will allow a higher level of Parliamentary scrutiny to be applied in individual cases. We consider that the fundamental problem with this approach is that the discretion to determine the appropriate level of Parliamentary scrutiny in a particular case is conferred on the person exercising the powers; and therefore it becomes wholly a matter for the Minister (and not Parliament) to decide whether a particular modification of primary legislation warrants the negative or affirmative procedure. **In our view, if the Government consider that particular kinds of modification of primary legislation only require the negative procedure, those particular cases should be set out on the face of the Bill. Otherwise, the general principle should remain that modifications of primary legislation are subject to the affirmative procedure.**

23. Clause 152(2) specifically allows regulations making consequential provision to amend provisions of the Bill itself, therefore in effect allowing provisions of the Bill to be re-written by subordinate legislation after its enactment. No explanation is given in the memorandum as to why it might be necessary for the power to make consequential provision to include a power to amend the Bill itself. We consider that a power to amend the Bill, allowing as it does the re-writing of provisions after enactment, should be exceptional and that it is only appropriate if there are compelling reasons. **Accordingly, we take the view that extending the power under clause 152 to allow the making of amendments or modifications to the Bill itself is inappropriate, unless the Minister is able to explain to the satisfaction of the House why the powers are needed in this case.**

PENSION SCHEMES BILL: GOVERNMENT RESPONSE

24. We considered this Bill in our 12th Report (HL Paper 83). The Government have now responded by way of a letter from Rt Hon. Steve Webb MP, Minister of State for Pensions, printed at Appendix 1.

APPENDIX 1: PENSION SCHEMES BILL: GOVERNMENT RESPONSE

I am grateful for the Delegated Powers and Regulatory Reform Committee's twelfth report of session 2014-15, which was published on 19 December, and the recommendations it contained. I am responding as lead Minister for the Bill.

The report makes four recommendations for regulations to be subject to the affirmative parliamentary procedure. On two of these, regarding clause 76 (pensions for fee-paid judges) and clauses 9-11 and 21 (regulations regarding the arrangements for collective benefits), we propose to accept the Committee's recommendations in full.

Of the remaining two recommendations, I would like to first of all set out how we would like to respond to the report's recommendation that the power in clause 8(3)(b) which allows regulations to exclude the provisions relating to collective benefits applying to certain benefits, be subject to the affirmative procedure.

This power was included in the Bill to ensure that we could, from the outset, ensure the definition of "collective benefits" would not catch any personal pension schemes set up by insurers that offer "with profits" arrangements which might otherwise fall within the definition. We may also need to use the power at a later date if new developments in scheme and benefit design result in benefits falling within the definition contrary to policy intention. This latter use of the power might require a very quick response to avoid members' benefits being affected and to avoid schemes being subject to expensive requirements around the setting of targets, actuarial valuations etc. which are not appropriate.

Therefore, whilst it would be possible to accept the recommendation that this power be subject to the affirmative procedure, this could limit our ability to respond quickly to industry developments should we need to. We therefore think it appropriate to amend the Bill so this power is subject to the affirmative procedure for the first use only.

Finally, we have also carefully considered the report's recommendation that the powers taken under subsections (3) and (7) of clause 48 should be subject to the affirmative parliamentary procedure.

Clause 48 deals with the safeguard requiring schemes to check that individuals have received 'appropriate independent advice' before transferring safeguarded benefits (i.e. benefits other than cash balance or money purchase benefits) to schemes in which they could be taken flexibly using the range of options being introduced by the Taxation of Pensions Act 2014. The pensions tax flexibilities delivered by the Act, will come into force in April 2015. Regulations under subsection (7) of clause 48 of the Pensions Schemes Bill, will set out the definition of 'appropriate independent advice' that underpins the advice safeguard, ensuring this safeguard is operational by April 2015 when the new flexibilities come into force.

We recognise the concerns raised in relation to the lack of the definition of "appropriate independent advice" in the Bill. In the response document to the consultation on freedom and choice in pensions we set out that 'appropriate independent advice' would be delivered by an advisor who is 'authorised by the Financial Conduct Authority (FCA)'. In response to the concerns raised we are looking into bringing forward an amendment to clause 48 at Report stage to provide more detail about the meaning of "appropriate independent advice" on the face of the Bill.

I can now tell you that our intention is to define 'appropriate independent advice' in regulations by reference to activity regulated by the Financial Conduct Authority. To facilitate this, the Treasury intends to legislate to add a new activity to the FCA's Regulated Activity Order. This will be done by means of a statutory instrument, amending the Financial Services and Markets Act (Regulated Activity) Order 2000. It is not possible to refer to this on the face of the Pension Schemes Bill, but this statutory instrument, which we intend to lay in the New Year, will be subject to the affirmative procedure. In order to ensure that the definition in the Bill fits with any definition in the Regulated Activity Order, we will still need to leave at least some of the detail of the definition in clause 48 to regulations. We think that it is appropriate that such regulations be subject to negative procedure especially if the parameters of the definition can be expanded upon on the face of the Bill.

Clause 48 can deliver a meaningful safeguard only if the definition of 'appropriate independent advice' is fully in place by 6 April 2015. The process that I have outlined above will ensure that the House has the opportunity to comment and scrutinise the new definition, whilst ensuring that regulations to be made under subsection (2) setting out what trustees and managers must do to check that an individual had received appropriate independent advice operate as intended. This will ensure that those who wish to transfer in the context of the new flexibilities are properly advised to support members to make an informed choice.

Subsection (3) of clause 48 provides for regulations to be made which set out exceptions to the 'appropriate independent advice' safeguard. If regulations made under clause 48(3) were subject to the affirmative procedure, they would not be in place by April2015. We set out in the consultation response document on freedom and choice in pensions, published July 2014, that we intended to exempt those with pensions wealth below £30,000 from having to obtain advice if they wished to transfer safeguarded benefits. This remains our only intended use of the exemption, however, once the new flexibilities come into force, it may prove necessary to create an exemption for other special circumstances. If the regulations under subsection (3) were not in place by April 2015, individuals with small amounts of safeguarded benefits, would not be able to transfer without taking advice. The cost of advice could represent a significant proportion of their wealth, therefore this provision not being ready by April may act as a significant barrier to those who wish to transfer to access their funds in the manner they thought most appropriate and, of course, have a current legal right to transfer.

The freedom and choice in pension consultation response document describes in more detail the only exception we currently intend to make to the advice requirement - for members with small amounts of safeguarded benefits. The consultation document indicated this exemption threshold would be £30,000 and below, which will need to adjusted and up-rated over time, and therefore we feel the affirmative procedure would not be suitable. However, we care also looking into bringing forward an amendment at report stage to subsection (3) to ensure that exemptions to the advice safeguard, other than for members with small amounts of safeguarded benefits, would be subject to the affirmative procedure. This would ensure that the House had the opportunity to scrutinise any further exemptions that are required to the appropriate advice safeguard.

I hope you find this response to the Delegated Powers and Regulatory Reform's report satisfactory. I will place a copy of this letter in the Libraries of both Houses.

Rt Hon. Steve Webb MP

Minister of State for Pensions

6 January 2015

APPENDIX 2: EXTRACT FROM 11TH REPORT

Clause 21(7) & (8) – "Rolling-up" of different scrutiny procedures

23. Subsections (7) and (8) of clause 21 provide for an approach to the use of Parliamentary scrutiny procedures that appears to us to be unconventional in its extent. Taken together, the two subsections would allow powers that attract the affirmative procedure, powers that attract the negative procedure and powers that are not subject to any form of Parliamentary scrutiny to be exercisable in a single affirmative instrument. We are aware that particular Acts have enabled provision that would otherwise be subject to annulment to be included in an affirmative instrument. But it is rare for an Act to enable provision that is not subject to any form of Parliamentary control to be included in the same instrument as provision that is subject to such control (we are aware only that section 1292(3) of the Companies Act 2006 does so).

24 In terms of its potential consequences for the effective Parliamentary control of subordinate legislation, the proposed provision in subsections (7) and (8) appears to us to have a number of objections. First, if not used sensibly, it could allow an affirmative instrument to comprise provision that is mainly (and possibly almost wholly) not provision made under a power requiring the affirmative procedure. An imbalance of that kind could distract the House from the particular provisions that do require affirmative approval, and it could well prolong debates in the discussion of provisions that do not.

25. Secondly, the practice could potentially neutralise the effect of this Committee's own recommendations, in the sense that it could subvert judgments that the House has taken (on the basis of those recommendations) about the appropriate (if any) level of scrutiny to be accorded to each delegated power in a Bill. In that respect, the practice could be seen to represent a further shifting of the legislative initiative from Parliament to the Executive, because it would leave to Ministers and not to Parliament the decision whether or not particular provision to be made by them should be subjected to a higher (or some) level of Parliamentary scrutiny.

26. Finally, because statutory instruments are not amendable in Parliament (for instance, in a way which might enable certain provisions to be severable from others), with the result that each is presented to either House on what amounts to a "take it or leave it" basis, the practice can only accentuate the difficulty faced by members of the House where only some of the provisions in a substantial instrument are regarded as objectionable. Should the entire instrument be not approved, or be annulled, merely because of those provisions? It would be particularly wrong in principle to subject to that risk provision that the House has accepted should have no Parliamentary control.

27. We do not therefore believe that there should be any systematic extension of the present piecemeal and occasional flexibility whereby 'negative' provision may in appropriate circumstances be included in an affirmative instrument. We would be very concerned if the practices envisaged by subsections (7) and (8) of clause 21 were to become a commonplace feature of the arrangements for making statutory instruments, and for those subsections to be replicated as a matter of course in government Bills. (In this respect, we note that there are identical subsections in clause 154 of the Small Business, Enterprise and Regulatory Reform Bill, to which we shall return in a later

report.) We are aware of an initiative on the part of the Government, as part of its well-publicised drive for 'de-regulation', to reduce the numbers of statutory instruments, and we do not know whether subsections (7) and (8) are a feature of that initiative; but we are quite sure that it would be wrong in principle for any reduction in the numbers of instruments to be achieved at the expense of their effective Parliamentary scrutiny. **We draw these concerns to the attention of the House.**

APPENDIX 3: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the business relating to the Small Business, Enterprise and Employment Bill (considered by the Committee on 10 December 2014 and 7 January 2015), Members declared the following interests:

Baroness Drake

Trustee, O2 Pension Scheme (trust company)

Non-executive Director, Pensions Advisory Service Board

Viscount Ullswater

Chairman, Lonsdale Settled Estates Ltd.

Director, Lowther Trustees Limited

Attendance:

The meeting on the 7 January 2015 was attended by Baroness Andrews, Baroness Drake, Baroness Farrington of Ribbleton, Baroness Fookes, Countess of Mar, Baroness O'Loan, Baroness Thomas of Winchester, Lord Trimble and Viscount Ullswater.