EXPLANATORY MEMORANDUM TO

THE FINANCIAL ASSISTANCE SCHEME (MISCELLANEOUS AMENDMENTS) REGULATIONS 2008

2008 No. 1903

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 These Regulations provide for early reduced payment of assistance from the Government's Financial Assistance Scheme (FAS) where a qualifying member is unable to work due to ill health. They also allow qualifying members of certain pension schemes which started winding-up with solvent employers to qualify for help from the FAS.

2.2 The Regulations also include a number of measures aimed at speeding up payments to members, as well as provisions to protect the value of FAS scheme assets and measures to allow the Board of the Pension Protection Fund (PPF) to be more closely involved in the development of the FAS.

2.3 In addition, the Regulations remove the option for FAS qualifying members to be reinstated into the State Additional Pension.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative background

4.1 These Regulations implement more of the reforms to the Financial Assistance Scheme announced by the then Secretary of State for Work and Pensions on 17 December 2007. This second set of Regulations builds on the changes contained in the Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2008 (S.I.2008/1432).

5. Territorial Extent and Application

5.1 Regulations 1 to 20 apply to all of the United Kingdom. Regulation 21 applies to England, Wales and Scotland and regulation 22 applies to Northern Ireland only.

6. European Convention on Human Rights

6.1 The Minister of State for Pensions Reform, Mike O'Brien, has made the following statement regarding Human Rights:

In my view the provisions of The Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008 are compatible with the Convention rights.

7. Policy Background

The Financial Assistance Scheme

7.1 The Financial Assistance Scheme (FAS) was designed to help those who had suffered significant losses to their pensions as a consequence of employer insolvency. Under the original scheme, announced on 14 May 2004, assistance was targeted on members closest to retirement as it was felt that these members were least likely to be able to make up any shortfall in their retirement income.

7.2 Some surviving spouses and civil partners of qualifying scheme members who died after their scheme started to wind-up were also eligible for a payment from the FAS, as were some of those who were in receipt of a beneficiary's pension before wind-up started.

7.3 From its inception the FAS has received significant public interest; and since 2005 three significant extensions have been announced to the FAS. The extensions in 2006 and 2007 were reflected in the Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2006 (S.I. 2006/3370) and the Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2007 (S.I. 2007/3581).

7.4 These Regulations relate to the third announced extension.

7.5 In April 2007, a review was set up to consider whether an alternative treatment of the residual funds in affected pension schemes could supplement the committed Government funding of FAS. The review, led by Andrew Young of the Government Actuary's Department, published its final report in December 2007.

7.6 Acting on the recommendations of that report the then Secretary of State for Work and Pensions announced on 17 December 2007 that Government would absorb all the available residual assets in the affected schemes and make associated payments as they fall due. A range of changes were also announced to the scheme including:

- All scheme members will be guaranteed 90% of their accrued pension at the date of commencement of wind-up, revalued to their retirement date (subject to a cap of £26,000 a year, the value of which will be protected).

- Payment of assistance derived from post-1997 service will be increased each year in line with inflation (subject to a 2.5% a year limit).

- Assistance will be paid from the scheme's normal retirement age (NRA) subject to a lower age limit of 60.

- People who are unable to work due to ill health will also be able to apply for early access to their payments from the age of 60, subject to actuarial reduction.[1]

- Where their share of scheme funds allows, members will be able to commute some portion of their FAS assistance to a lump sum.

- Assistance will be extended to members of schemes which wound up under-funded (after 1st January 1997 and before the employer was required to meet the full buy-out cost) where the employer is still solvent.

7.7 The additional cost of this package takes the total Government commitment to £12.5 billion in cash terms (£2.9 billion Net Present Value).

7.8 In implementing the changes announced in December 2007 the Government's immediate priority has been to increase payments to 90% (from the current 80%) and to make payments from NRA (rather than from age 65). The Regulations to implement those key elements of the December extension - the Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2008 (S.I. 2008/1432) - were brought before Parliament in May.

7.9 This set of Regulations was published for consultation on 28 March. They make provision for further elements of the package announced in December 2007, such as early access to assistance on ill health grounds. There will be further Regulations to deliver the remaining parts of the package which will move the FAS scheme to a position where assistance payments are calculated on a basis which is broadly comparable to that of

[1] A more generous ill health provision was subsequently proposed in the consultation document for the FAS (Miscellaneous Amendments) Regulations 2008 issued on the 28 March 2008. Details of this revised provision are explained at paragraph 7.16.

the Pension Protection Fund (PPF). The Government plans to consult on these further draft Regulations later this year with a view to laying the draft in spring 2009.

The Changes

7.10 The major changes in these Regulations concern: providing FAS ill health payments for qualifying scheme members unable to work due to ill health; extending the FAS to members of certain schemes which wound up under-funded with a solvent employer; and allowing the PPF to be more closely involved in developing the FAS. These and other changes in the Regulations are described in more detail in the following paragraphs.

Ill health payments and interim ill health payments (regulations 8 to 10, 12 and 15)

7.11 Following the changes made by the FAS (Miscellaneous Provisions) Regulations 2008 mentioned in paragraph 7.8, in most cases, FAS payments will begin from normal retirement age (NRA) but not before 14 May 2004, the date that the FAS was first announced. NRA has a lower age limit of age 60 and an upper age limit of 65.

7.12 The current FAS Regulations also allow for early payment of unreduced FAS annual or initial payments to qualifying members but only where the FAS scheme manager (the Secretary of State) is satisfied that they are ‘terminally ill’- i.e. they are suffering from a progressive disease and their death, in consequence of that disease, can reasonably be expected within six months.

7.13 However, the rules of many occupational pension schemes allow members to take pension benefits before NRA where they are in ill health or for general early retirement, although these options typically fall away once a scheme has started to wind-up.

7.14 The Regulations provide for two new types of FAS payment – ‘ill health payments’ and ‘interim ill health payments’ which will provide early payment of assistance, subject to actuarial reduction, to members where they are unable to work due to ill health and are likely to continue to be so unable to work until their NRA.

7.15 Where a scheme is still winding-up and unable to provide the FAS with final information on scheme settlements, interim ill health payments may be made to top up whatever interim pension payments are being made by their pension scheme. Like the award of FAS initial payments, making FAS interim ill health payments is discretionary and the payments will be on account of final ill health payments calculated once schemes have wound up.

7.16 Ill health payments and interim ill health payments can be made from the age 5 years before a qualifying member's NRA. For FAS purposes NRA has a lower age limit of age 60 and an upper age limit of 65. So, for example, if a person's NRA is 62 and they meet the ill health conditions, that person will be eligible from age 57. A member whose NRA is 60 or below will be eligible from age 55.

7.17 The Government considers that it is appropriate to allow members in ill health a facility to access their FAS payments up to five years before their FAS would normally be paid. This decision was made following representations that the announcement made in December 2007 to provide ill health payments from a minimum age 60 would have no practical effect for those whose NRA was 60.

7.18 Where the FAS scheme manager is satisfied that a qualifying member is unable to work due to ill health and is (in the opinion of the FAS scheme manager) likely to continue to be so unable to work due to ill health until NRA, that qualifying member will be eligible for an ill health payment from the day on which these Regulations come into force, the day on which the FAS scheme manager is first notified that the member is in those circumstances, or the day on which the member reaches the age five years before NRA, whichever is the latest.

7.19 The Regulations also provide for the survivors of FAS qualifying members who had qualified for early payments due to ill health payments to receive assistance after the member's death based on the member's early payment rate.

7.20 The evidence needed to establish that a member is in ill health and unable to work is not set out in the Regulations. The Government does not want to impose burdensome or overly prescriptive evidence requirements. Rather it intends members to be able to provide evidence that is readily available to them and which will enable the FAS scheme manager to establish whether they meet the requirement of being unable to work due to ill health and being likely to continue to be so unable to work due to ill health until NRA. Examples include:

- a letter from a doctor or other health professional indicating that they should refrain from work; or
- evidence of entitlement to relevant benefits.

Schemes with solvent employers (regulation 7)

7.21 The Regulations amend the FAS qualifying rules to allow certain schemes - which started winding-up between 1st January 1997 and before the employer was required to meet the full buy-out cost - to be FAS qualifying schemes where the employer remained solvent but has paid the relevant statutory debt. The provisions will mean that where the employer has discharged their legal responsibilities to the scheme, but the scheme is left under-funded because the regulatory framework of the time did not require the employer to pay full buy-out levels of debt, the scheme can still be a qualifying scheme even where there has been no insolvency event.

7.22 These Regulations allow the FAS scheme manager discretion to treat the relevant condition as satisfied where he is satisfied that an appropriate proportion of the debt was discharged or is likely to be discharged; and it was reasonable that the debt has not been discharged. This will allow the scheme manager discretion to treat the relevant condition as satisfied where, for example, the employer has agreed with the trustee that the debt will be paid over a period of time, or where the statutory debt has not been paid in full and the trustee has decided not to pursue a small remaining portion of the debt where the cost of doing so may not make recovery viable.

7.23 Members of schemes with solvent employers which began to wind-up on or after the date from which legislation enabled the trustee to require the employer to pay full buy-out should generally either receive their accrued pension in full or their employer would have entered into a compromise agreement, which would mean their scheme should seek to qualify under existing FAS rules introduced in December 2007.

Managing the transition of pension schemes from their current position to the point where the Government can take on their assets (regulation 13)

7.24 The review by Andrew Young, which informed the Government’s third extension of the FAS, concluded that, to provide a guaranteed benefit level, the best value will come from Government absorbing all the residual assets in schemes which do not have binding commitments to annuitise and then making the associated payments. As the Government will be taking in scheme assets it has a clear interest in monitoring those assets, and ensuring that they are managed appropriately to avoid, for example, trustees choosing to make high risk investments knowing that the Government will meet the cost of providing assistance to scheme members should the investment provide only low returns.

7.25 The Regulations include provisions to allow the scheme manager to direct trustees of qualifying schemes in wind-up, or other appropriate persons, with a view to ensuring that any reduction in the scheme's assets is kept to a minimum or that the scheme’s assets are invested in a way which is appropriate in the opinion of the scheme manager.

7.26 The draft does this by modifying section 134 of the Pensions Act 2004 (directions) which is an existing power of the Board of the PPF in relation to the PPF.

Functions in relation to the FAS for the Board of the PPF (regulations 6 and 13)

7.27 The Regulations will provide for the Board of the PPF, on the request of the FAS scheme manager, to provide advice to the FAS scheme manager in relation to the FAS. In addition the Regulations enable the Board of the PPF to make arrangements relating to the proposed transfer of assets from FAS qualifying pension schemes to Government (or any other person in order to fulfil the needs of the extended FAS as announced last December), including project managing pension schemes through the wind up process to a point where their assets can be transferred. The Government thinks it is sensible to benefit from the expertise the Board of the PPF has built up since its launch in dealing with pension schemes in wind-up.

7.28 The Regulations specify that the Secretary of State will pay a grant to the Board of the PPF for the work done in connection with the new functions.

Simplifying the payment of initial payments from the FAS (regulation 11)

7.29 The Regulations remove the necessity for trustees or scheme managers to apply for initial payments from the FAS, and provide that the FAS scheme manager, using his discretion, may make initial payments in anticipation of annual payments being payable.

Provision of information (regulations 16 to 18)

7.30 The Regulations make amendments to the FAS (Provision of Information and Administration of Payments) Regulations (S.I 2005/2189) to place a specific obligation on trustees or pension scheme managers to provide information used in determining and making FAS annual and initial payments and the new ill health and interim ill health payments, at certain times relevant to members of those schemes.

7.31 The Regulations amend the current periods allowed for trustees or pension scheme managers to supply information for annual and initial payments to reflect the ‘payment from NRA’ change introduced by the FAS (Miscellaneous Provisions) Regulations 2008 (S.I. 2008/1432) in June this year. The Regulations also shorten the timescale for providing information to speed up the payment process.

7.32 The Regulations also introduce timescales for providing information linked to the new provisions for FAS assistance on ill health grounds.

Reviews and Appeals (regulations 19 and 20)

7.33 The Regulations make consequential changes to amend the Financial Assistance Scheme (Internal Review) Regulations 2005 (S.I.2005/1994) to provide that certain determinations made in relation to members being unable to work due to ill health and being likely to continue to be so until NRA and the amount of any ill health payments are made reviewable determinations. This will enable such decisions to be subject to the same internal review processes as currently apply in relation to other corresponding determinations and allow the appeals process to be followed in respect of any review decisions.

7.34 The Regulations also make changes to the Financial Assistance Scheme (Appeals) Regulations (S.I. 2005/3273), so that "ill health eligibility decisions" and "ill health payment assessment decisions" follow the appeals process provided under the Appeals Regulations.

7.35 The Regulations also seek to address an omission in the existing FAS Appeals Regulations, relating to survivors' rights of appeal. Although a survivor can make an appeal under current regulations, they are not included in certain related provisions in regulations which deal respectively with notices of appeals and the time and place of oral hearings.

Reinstatement into the State Additional Pension (regulations 21 and 22)

7.36 The Regulations amend the Occupational Pensions Schemes (Contracting out) Regulations 1996 so that, from the commencement of the provision, any person qualifying for FAS will no longer meet the conditions for reinstatement into the State Additional Pension. There is one exception to this - where someone has, before the commencement of the provisions, been offered the opportunity to be reinstated by his scheme. They will still be able to select this option if they follow the appropriate procedure of making a written application in accordance with the 1996 Regulations.

7.37 The Regulations also make identical amendments to the Occupational Pension Schemes (Contracting out) Regulations (Northern Ireland) 1996.

Consultation

7.38 Under the Pension Schemes Act 1993 and the Pensions Act 2004, the Secretary of State was required to consult such persons as he considered appropriate. This requirement did not extend to regulation 22, made under the Pension Schemes (Northern Ireland) Act 1993, but that regulation was included in the consultation draft also.

7.39 The written consultation period started on 28 March and closed on 9 May. Following concerns expressed by key campaigners around the timescales for delivery and after careful consideration of all the issues and stakeholders involved, the written consultation period for the draft Regulations was limited to 6 weeks. The shortened consultation period aimed to ensure that these FAS changes are delivered as soon as possible, while giving sufficient time for individuals and organisations to comment. Given this shortened timescale, the Department held meetings during the consultation period with representatives from trades unions and the Pensions Action Group to facilitate their responses.

7.40 We received 28 written responses (and held a number of meetings with campaigners and trade unions). Government proposals linked to ill health and schemes with solvent employers generated the most interest. Responses from trade unions, and campaigners tended to focus on the ill health proposals whilst comments from the pensions industry tended to highlight issues around solvent employers. These responses mainly concentrated on the following issues:

- early payments due to ill health – where respondents wanted earlier access (possibly from age 50), backdating of entitlement, and removal of the proposed actuarial reduction. The Government believes that a priority is to introduce ill health provisions quickly for those nearest to retirement. We will, however, consider the issues relating to the qualifying age for entitlement to ill health payments, and the period to which that entitlement should relate, again along with other issues later this year.
- schemes with solvent employers – the draft Regulations issued for consultation sought to amend the FAS qualifying rules to allow schemes with solvent employers - which started winding-up between 1st January 1997 and 10th June 2003 - to be eligible for the FAS where the employer has paid the relevant statutory debt. A number of responses set out examples where the statutory debt may quite reasonably not have been paid, for example because the legal costs of pursuing the debt may be larger than the debt itself. It is not the Government's intention for schemes to fall outside the FAS where trustees have acted entirely properly. Following the examples that have been raised with us, the re-drafted Regulations give the FAS scheme manager some discretion to treat the relevant condition as having been met where he is satisfied than an appropriate proportion of the debt was discharged or is likely

to be discharged; and in his opinion, it was reasonable that the full amount of the debt has not been discharged;

7.41 In addition, following discussions with the Board of the Pension Protection Fund (PPF), and taking into account other consultation responses, we have included an additional function for the Board to manage the transfer of assets of FAS qualifying pension schemes. The Government thinks that PPF project managing pension schemes to wind-up makes best use at this time of the synergies between the current PPF activities and processes now needed in FAS.

7.42 A full response to the consultation was published on the FAS website - http://www.dwp.gov.uk/fas - at the time these Regulations were laid.

Guidance

7.43 Details of the proposed changes have been published on the FAS website. The Government has also been liaising with trustees and scheme managers to assist them in understanding the impact of the changes. Public-facing leaflets and guidance will be updated.

Consolidation

7.44 Consolidated versions of the Regulations will be available in the Law Relating to Social Security (Blue Volumes). These can be found at http://www.dwp.gov.uk/advisers/docs/lawvols/bluevol/index.asp.These are updated quarterly and are available on the internet at no cost to the public.

8. Impact

8.1 A full impact assessment has not been published for this instrument as it has only a negligible impact on the private or voluntary sectors.

8.2 The impact on the public sector is negligible.[2]

9. Contact

9.1 Any enquiries about the contents of this memorandum should be addressed to Stephen Balchin at:
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[2] In administrative terms the impact of the instrument on the public sector is negligible. The additional costs of increased amounts of payment are included in the cost of the total Government commitment to the FAS provided in paragraph 7.7.

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