EXPLANATORY MEMORANDUM TO

THE HOUSING (TENANCY DEPOSITS SCHEMES) ORDER 2007

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government ("the Department") and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This instrument supplements the provisions relating to tenancy deposit schemes that are contained in sections 212 to 215 of, and Schedule 10 to, the Housing Act 2004 ("the Act").

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

3.1 None.

4. Legislative Background

4.1 Under section 212(1) of the Act the appropriate national authority must make arrangements for securing that one or more tenancy deposit schemes are available for the purpose of safeguarding tenancy deposits paid in connection with shorthold tenancies. By section 212(8) a shorthold tenancy is an assured shorthold tenancy within the meaning of Chapter 2 of Part 1 of the Housing Act 1988. A scheme may be:

- a custodial scheme, whereby the tenancy deposit that is paid to a landlord is then paid by the landlord into a designated account and held by the scheme administrator until it falls to be paid (wholly or in part) to the landlord or tenant under the tenancies (paragraph 1(2) of Schedule 10 to the Act); or
- an insurance scheme, whereby the deposit that is paid to a landlord is retained by him on the basis that, at the end of the tenancy such amount in respect of the deposit as is agreed between the tenant and the landlord will be repaid to the tenant, and any such amount not so repaid will be paid into an account held by the scheme administrator, where it will remain until it falls to be paid (wholly or in part) to the landlord or tenant under the tenancy. The landlord undertakes to reimburse the scheme administrator, in accordance with directions given by him, in respect of any amounts paid to the tenant by the scheme administrator, and insurance is maintained by the scheme administrator in respect of failure by a landlord to comply with such directions. (paragraph 1(3) of Schedule 10 to the Act).

In November 2006, three contracts were awarded to organisations that will run tenancy deposit schemes: one to a custodial scheme supplier, and two to insurance-based scheme suppliers.

4.2 By section 213(1) any tenancy deposit paid to a person in connection with a shorthold tenancy must, as from the time when it is received, be dealt with in accordance with one of the authorised schemes in force in accordance with arrangements under section 212(1).

4.3 Schedule 10 describes the procedures that apply in relation to tenancy deposits at the end of a tenancy. Under paragraph 11, the appropriate national authority may by order make such amendments to Schedule 10 as it considers appropriate.

4.4 By section 261(1) of the Act, the appropriate national authority is, in relation to England, the Secretary of State and, in relation to Wales, the National Assembly for Wales. This is the first time the power to make amendments to Schedule 10 has been exercised in relation to either England or Wales.

4.5 This Order will come into force simultaneously with other instruments being made under powers in section 213 of, and paragraph 3(5) of Schedule 10 to, the Act which relate to tenancy deposit schemes. The relevant instruments are:

The Housing (Tenancy Deposit) (Prescribed Information) Order 2007 (SI No. XXXX) (for which there is separate explanatory memorandum); and

The Housing (Tenancy Deposits) (Specified Interest Rate) Order 2007 (SI No. XXXX) (for which no explanatory memorandum is produced since, by section 250(5) of the Act, the instrument is not laid. The Order has the effect of requiring that when a deposit is paid to the landlord or tenant at any time after the tenancy has ended, it is paid with interest equivalent to the base rate of the Bank of England less 2.32 percent.)

5. Extent

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Baroness Andrews, Parliamentary Under Secretary of State in the Department has made the following statement regarding human rights:

"In my view the provisions of the Housing (Tenancy Deposit Schemes) Order 2007 are compatible with the convention rights."

7. Policy background

7.1 The tenancy deposit protection provisions in the Act have two main aims:

- To safeguard tenancy deposits and
- To facilitate the resolution of disputes arising in connection with such deposits.

7.2 Government statistics have consistently indicated that of the tenants who pay a deposit, around 20% consider that in the previous 3 years their landlord has unreasonably withheld all or part of the deposit. However, landlords, too, are often faced with losses, particularly when the last month's rent is withheld by their tenant in lieu of the deposit, if the tenant has caused damage to the property, or left the property without paying his bills. A Government consultation in 2002 showed that most people wanted a better system of deposit management; that paved the way for the implementation of tenancy deposit protection in the Housing Act 2004.

7.3 When preparing tenancy deposit protection proposals, and throughout the initial implementation process, the Office of the Deputy Prime Minister (which was responsible for the policy until May 2006) and the Department (which has been responsible since May 2006) consulted landlords, tenants and their representative bodies, for both England and Wales.

7.4 Inclusion of tenancy deposit protection into the Housing Bill commanded wide cross-party support, as well as support from tenant and landlord/agent representative organisations including Shelter, Citizens Advice, the National Federation of Residential Landlords and the Association of Residential Letting Agents. A scoping study carried out in early 2005 included discussions with these, and other bodies, about the implementation of tenancy deposit protection. A report was published in August 2005. The Tenancy Deposit Protection Advisory Group (including other government departments, landlord, tenant and letting agent representative bodies and other stakeholders in the private rented sector) was set up in March 2005 to inform the implementation process.

7.5 Parliament envisaged during the passage of the Housing Bill that revision of Schedule 10 might be necessary, should problems on its operation come to light. (Hansard 20/10/04 col 881.) In the event, that is what has transpired.

7.6 In November 2005, the Department published a consultation document seeking comments on what information a landlord should be required to pass to a tenant, and whether or not landlords should be required to provide their tenants with an inventory at the beginning of a tenancy.

7.7 The majority of landlords and letting agent representatives who responded to that consultation raised concerns about the requirement in the Act for joint authorisation in the custodial scheme for the release of the deposit at the end of a tenancy, even where there existed rent arrears or damage and the tenant could not be contacted.

7.8 The Department also conducted a number of presentations to over 2000 landlords, agents and other stakeholders. It has received comments at these presentations, and in writing and in telephone calls about the need to revise this requirement. Landlords and landlord organisations, agents and agent organisations, the Tenancy Deposit Protection Advisory Group and the scheme providers - all overwhelmingly support the Department's view that changes to Schedule 10 of the Act that are made by this Order are required to facilitate the smooth running of the schemes. A description of the changes follows.

7.9 The Act as passed only permits the release of a deposit held in the custodial scheme, following joint agreement by the landlord and tenant or, in the absence of agreement, by a decision of a court. Consultation with stakeholders has identified that in some instances where agreement will be impossible, for example, following abandonment of the property by a tenant; or where the parties are contactable, but one will not co-operate with the other, one party should be able to apply for the release of the deposit without the need to obtain a decision of the court. The amendment to Schedule 10 will enable a party to do this. He would supply a statutory declaration to the scheme explaining the basis of his claim. If the other party cannot be contacted by the scheme, the application will succeed, but if the other party can be contacted, then the parties will need to either agree (with or without the use of the scheme's dispute resolution service) or obtain the decision of a court.

7.10 Where the deposit is secured through an insurance scheme, there may be occasions when a landlord is no longer contactable, or is being un-cooperative. Again, the Act as passed will require the tenant to seek a decision of the court if he is unable to obtain the agreement of the landlord as to repayment of all or part of the deposit due to the tenant. A further change to Schedule 10 will enable the scheme administrator to serve a notice on the landlord requiring him to indicate whether he is content for any dispute about the deposit to be resolved through the dispute resolution service of the scheme. If the scheme administrator is satisfied that the landlord has received the notice but the landlord fails to respond, the scheme administrator may treat the absence of a response as consent by the landlord to have the dispute dealt with by the resolution service. However, this would not apply if the landlord were entirely un-contactable, since the Department considers that the landlord should be given the opportunity to give his consent.

7.11 The third change to Schedule 10 results directly from negotiations with potential scheme providers, when it became apparent that Schedule 10 of the Act currently does not properly set out rules to deal with the situation where a landlord is ejected from an insurance-based scheme (e.g. for breaching scheme rules or failing to comply with a direction given to it by the scheme) or where a landlord simply wishes to move to another scheme. In these situations the Act requires an insurance scheme to continue to protect a deposit held under it (including insuring against breaches of directions) even though the scheme may be receiving no membership fees from the landlord. This is a highly undesirable situation for a commercial insurance organisation and, therefore, the Order amends Schedule 10 to allow a landlord to secure the deposit in one

of the other schemes and sets out the procedures to follow when this happens. In particular the scheme administrator will need to continue to protect the deposit for up to three months from the date that either a landlord gives notice that he no longer wishes to protect the deposit in that scheme, or the scheme gives notice that it proposes to terminate protection in relation to a deposit or to terminate the landlord's membership. The scheme will need to give at least 2 month's to the landlord and the tenant of the date when the deposit will no longer be protected under its scheme. The landlord will have to comply afresh with all the requirements in section 213 of the Act for supplying information to the tenant as to how the deposit is being protected. The tenant will be able to take proceedings to ensure the deposit is secured in another scheme and the landlord will be at risk of incurring the sanctions in sections 214 and 215 if he fails to secure it in another scheme.

7.12 The Department wants to encourage the parties both to co-operate with each other and, where possible, to make use of the scheme's dispute resolution service facilities, so as to reduce the costs and time taken to resolve disputes, The Order provides that where a party is contactable but does not indicate which method he wants to use to resolve the dispute, he will be treated as having consented to the use of the schemes facilities. Finally it makes consequential amendments to Schedule 10 and in particular states when documents sent by the administrator to a party are to be treated as having been received.

7.13 The publicity campaign for tenancy deposit protection is employing multi-media to publicise the schemes to up to 1.7 million tenants, 870,000 landlords and 12,000 letting agents. Leaflets will be produced for distribution in February 2007: one directed at tenants and one directed at landlords and agents. A direct link to the Department's tenancy deposit protection website has been set up and can be found at www.tenancydeposit.gov.uk. Advertisements will be placed in the print media and on radio, beginning in February 2007 and running until April/May 2007. Posters will also be produced. Tenancy deposit protection roundtables have been held successfully in Leicester, Brighton and Manchester, with a final one planned for Wales in February 2007.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 There is no impact on public bodies. The total budget for the publicity campaign relating to tenancy deposit schemes (£1.37 million) will rest with central government. Leaflets explaining the schemes will be supplied to stakeholders free of charge. From 6 April 2007, the responsibility for the marketing of tenancy deposit protection will pass to the three authorised schemes.

9. Contact

9.1 Phil Alker of the Department for Communities and Local Government, tel: 020 7944 3540 or e-mail: Phil.alker@communities.gsi.gov.uk can answer any queries regarding this instrument.

HOUSING ACT 2004 - SECTIONS 214-217 AND SCHEDULE 10 - TENANCY DEPOSIT SCHEMES

FULL REGULATORY IMPACT ASSESSMENT

This RIA addresses the introduction of an Order which is necessary to implement tenancy deposit protection ("TDP") in England and Wales. References to "landlord" should also be taken to include any other person who takes a deposit on the landlord's behalf e.g. a letting agent. References to "CLG" should also be taken to include references to the former Office of the Deputy Prime Minister (ODPM).

Purpose and intended effect of measure

Objective

1. The objective of the Order is to amend Schedule 10 of the Housing Act 2004 ("the Act") to:

   a) Enable either a landlord or his tenant to apply in certain circumstances to the administrator of the custodial scheme to enable release of the deposit at the end of a tenancy without joint authorisation by landlord and tenant, thereby reducing the incidence of disputes going to court;

   b) make greater use of deposit schemes' facilities for the resolution of disputes (referred to throughout this document as "alternative dispute resolution" or "ADR") and in particular to make the use of ADR **the default way** in which disputes are resolved where a landlord or tenant is in contact with the other party but the other party is being uncooperative and not electing to resolve a dispute - either through ADR or court; and

   c) provide for landlords who are retaining a deposit under in an insurance based scheme to cease retaining it under that scheme and transfer the protection of the deposit to the custodial scheme or another insurance-based scheme.

2. These amendments aim to streamline the way in which schemes work in a number of ways. The amendments will:

   - reduce the number of incidences where a landlord or tenant needs to take court action to claim all or part of the deposit when the other party is missing;

   - ensure that the deposit is paid or repaid without unnecessary delay;

- encourage greater use of ADR in certain circumstances, rather than the courts;

- provide for transfer of protection out of the insurance-based scheme where a scheme administrator or landlord wishes to initiate that move.

This Order will affect landlords who take deposits for Assured Shorthold Tenancies (ASTs) in England and Wales.

Background

3. It is common practice for landlords to require a deposit (usually equivalent to one month's rent (but no more than 2 months rent)) from tenants at the beginning of a residential letting. In theory, at the end of a letting, if a landlord is content with the condition of the property, and if the tenant owes no rent or other expenses, the landlord will return the tenant's deposit promptly and in full. If there is damage, or expenses are outstanding, the landlord will deduct an appropriate amount from the deposit, or, in some cases, retain it in full.

4. Sections 212-215 of, and Schedule 10 to, the Act contain provisions to give protection to tenancy deposits for ASTs. These provisions are aimed at removing the risk of misappropriation of tenants' deposits by landlords and letting agents. The Act requires the Government to make arrangements for securing one or more tenancy deposit schemes to safeguard all new deposits paid in connection with ASTs.

5. Findings from the Survey of English Housing 2005-06[1] (SEH 05/6) reveal that 17% of households which had a private tenancy ending in the previous three years said that part or all of the deposit from their most recent tenancy was unreasonably withheld. With some 1.7m ASTs identified by SEH 05/6, that amounts to 289,000 deposits. This "unreasonableness" on the part of landlords might not hold up to independent adjudication in all cases, but it creates a widespread perception amongst tenants that unfair deposit withholding is commonplace. Moreover, 10% of those tenants who had part or all of their deposit withheld at the end of their most recent tenancy said that their landlord or agent gave no reason for withholding their deposit.

6. Tenants frequently report that poor practice on the part of their landlord in the course of the tenancy leads them to withhold their final month's rent in the belief that their deposit would otherwise be unreasonably retained. Some tenants who default on their last month's rent without agreement will also have caused damage, sometimes extensive, which the landlord will then have to cover in full.

7. Expectations that problems are likely to arise over the return of deposits are damaging to the image of the private rented sector and, consequently, to landlords.

Rationale for Government intervention - the Housing Bill/Act

[1] All figures quoted from the SEH 2005-06 are provisional and do not indicate published results

8. For some years, the Government has been aware of bad practice on the part of a minority of landlords, regarding tenants' deposits - as the statistics quoted above show. In order to address this, in 2000 the Government introduced a voluntary tenancy deposit scheme, whose members included representatives of the National Federation of Residential Landlords. However, take-up was low, the voluntary approach clearly did not work, and the scheme was wound up. Following a consultation paper in 2002,[2] a Housing Bill was introduced into the House of Commons in January 2004. It did not include measures to protect tenants' deposits because these were intended to be included in a draft Law Commission Bill on tenure reform, to be published in 2004. However, the Law Commission bill was not ready for publication in 2004 (it was published in 2006) and the Government therefore decided to add to the Housing Bill, in the House of Lords, measures to tackle tenancy deposit protection.

Rationale for Government Intervention - Secondary Legislation

9. The consultation process with stakeholders and potential scheme providers throughout the implementation and negotiation process has elicited a number of issues that CLG has taken on board - issues which require amendments to Schedule 10 to the Act.

Claims for the return of the deposit without the agreement of both landlord or tenant, or court order.

10. As the Act stands, only following joint authorisation by a landlord and tenant can the scheme release a deposit from protection in the custodial scheme. Consultation with stakeholders has identified that there may be instances where the requirement for joint authorisation for the release of a deposit is problematic, in that joint authorisation may not always be possible where a landlord or tenant is not contactable (for example following abandonment) and/or where one party is not being co-operative. As the Act stands, one party would be forced to go to court to claim the deposit in this situation, even if it is very clear to whom the deposit should be returned. The amendment to Schedule 10 to the Act would enable one party to apply for the release of the deposit without the need for court intervention, thereby reducing the number of claims being made via the court.

Default ADR use

11. To reflect the amendment to the way in which the custodial scheme will operate, and to balance, as far as possible, the way in which the deposit release process works, the insurance-based scheme also needs to be changed to allow tenants easier access to the deposit, where a landlord is being un-cooperative. As the Act stands, if a landlord is being uncooperative at the end of the tenancy, and refusing to state whether he wishes to resolve a dispute through court or ADR, the tenant would also be forced to go to court to claim the deposit. An amendment to Schedule 10 to the Act would allow ADR to be used to claim the deposit in

[2] Tenancy Money: Probity and Protection: Consultation Paper, ODPM

situations where the landlord or tenant is refusing to co-operate in electing to use either ADR or the court to resolve a dispute. (If the landlord were entirely un-contactable the matter would still need to be referred by the tenant to a court.)

Transfer out of insurance scheme

12. In negotiations with potential scheme providers, it became apparent that Schedule 10 of the Act does not cater for situations where a landlord is ejected from an insurance-based scheme (e.g. for breaching scheme rules) or where a landlord simply wishes to move to another scheme. As the Act currently stands, if a landlord ceased to be a member of an insurance scheme, the scheme would need to provide ongoing insurance cover for an indefinite period for all of his deposits, even though it was receiving no membership fees from the landlord. This would be a highly undesirable situation for a commercial insurance organisation and therefore, the Act needs to be amended to allow a transfer to occur, setting out the procedures that need to be followed when this happens. This further change to Schedule 10 of the Act will also enable landlords to voluntarily move from protection of a deposit under one insurance scheme to another one (or to the custodial scheme if they considered that another scheme is more attractive (possibly due to better service or lower/no membership fees).

Consultation

Within Government

13. In drafting this Order, CLG has consulted the Department for Constitutional Affairs, the Information Commissioner's Office, Her Majesty's Courts Service, the Welsh Assembly Government and the Small Business Service.

Public Consultation

14. Landlord representatives were closely involved in the development of TDP policy - from a full public consultation in November 2002[3] through to a full and final Regulatory Impact Assessment published to accompany the Royal Assent, in November 2004, of the Housing Act 2004.

15. The development of secondary legislation formed part of a scoping study carried out by independent consultants and published in August 2005.[4] During this study, face-to-face meetings were held with the following representatives of landlords:

- Association of Letting and Managing Agents (ALMA)
- Association of Residential Letting Agents (ARLA)
- British Property Federation (BPF)
- Dorset Residential Landlord Association
- National Association of Estate Agents (NAEA)
- National Approved Letting Scheme (NALS)
- National Federation of Residential Landlords (NFRL)
- National Landlords Association (NLA)

[3] Tenancy Money: Probity & Protection: Consultation Paper, ODPM
[4] Tenancy Deposits Implementation, Scoping Study Report, August 2005, ODPM

- Residential Landlords Association (RLA)
- Royal Institute of Chartered Surveyors (RICS)
- UK Association of Letting Agents (UKALA)
- Universities UK
- Unipol

16. In April 2005, the first meeting was held of the TDP Advisory Group, which comprised representatives of the Association of Residential Letting Agents, the National Landlords Association (previously the Small Landlords Association), the Council of Mortgage Lenders, the British Property Federation, Unipol, Government departments, Citizens Advice and the National Union of Students. The meeting discussed an interim report of the scoping study, which it broadly endorsed.

17. The Advisory Group was reconstituted in November 2005, without the ARLA and NLA representatives, because they were involved in bids for an insurance-based scheme. The National Federation of Residential Landlords, the Law Society, Grainger Trust (a large landlord) and Shelter accepted invitations to join the group, which has met every two months or so since then. It has acted, and continues to act, as a sounding board for business and the consumer.

18. Also in November 2005, CLG published a consultation document on whether, and to what extent, the information requirements placed on tenants and landlords at the beginning and end of a tenancy, and inventories, should be enshrined in secondary legislation. The document was developed in consultation with the TDP Advisory Group.

19. The consultation period ended on 1 February 2006. 67 responses were received. The results of the consultation indicated that the majority of respondents agreed with CLG's prescribed information requirements. Of the 67 responses, 39% of respondents were letting agents, landlords and their representative organisations, 27% were local authorities, 9% were tenant representative organisations, 25% were 'others' which included other individuals, law organisations and housing organisations. A full analysis of the responses and CLG's response can be found on the CLG website at: http://www.communities.gov.uk/index.asp?id=1165540. A full discussion of the Order containing prescribed information that a landlord must give to a tenant is contained in a separate RIA.

20. The majority of consultation responses from landlord and letting agent representative organisations raised concerns about the requirement for joint authorisation for the release of the deposit at the end of a tenancy. This was raised in connection with scenarios where there were rent arrears and/or the tenancy had been abandoned.

21. Where a deposit is safeguarded in a custodial scheme and one party cannot contact the other to obtain agreement as to how to divide up the deposit, as the Act stands, the only recourse is for that party to go to court to release the deposit.

22. However, this would not put the party who is genuinely entitled to the deposit in any better position than it would under the existing system. In particular, where a tenant abandons the property, possibly leaving rent arrears or damage to the

property, a landlord could previously simply keep the deposit. Under the new deposit scheme arrangements a landlord would need to incur the expense, inconvenience and delay of obtaining a court order for the release of the deposit to him from the scheme. Similarly, a tenant who had paid his rent up to date would have to seek a court order before the scheme could release the deposit to him if he could not contact the landlord for its return.

23. CLG accepts that in certain circumstances the requirement for joint authorisation for the release of the deposit may complicate and protract the deposit release process, and therefore has considered an amendment to the legislation to address the problem in this RIA.

24. Stakeholders and consultees agree that the insurance-based scheme would need amending to reflect the changes in the custodial scheme. However, as the scheme works differently to the custodial scheme (with the landlord always holding the deposit until a dispute arises anyway), the most pragmatic solution is to make ADR the default way in which to resolve a dispute where a landlord is not co-operating with regard to choosing to resolve the matter via court or ADR.

Options

25. The Act sets out the framework for the operation of tenancy deposit schemes. The purpose of this RIA is to consider the impact of secondary legislation that amends the Act to allow a number of processes to take place. There are only two options for each amendment to the Act - the 'do nothing' option or the option to amend the legislation.

Custodial scheme

Claims by either landlord or tenant without the agreement of the other party

Option 1 – No amendment to the Act to allow a claim by a landlord or tenant without the agreement of the other party (i.e. 'do nothing')

26. As the Act stands, only joint authorisation by landlord and tenant can release a deposit from protection in the custodial scheme. Consultation with stakeholders identified the problem associated with the requirement for joint authorisation for the release of a deposit in the custodial scheme. Stakeholders identified that this may not always be possible where a landlord or tenant are not contactable and where one party is not being co-operative. One party would therefore be forced to go to court to claim the deposit, even in scenarios where it is clear that the deposit is rightfully due to one party.

Option 2 – Amend Schedule 10 of the Housing Act 2004 to enable the landlord or the tenant to claim all or part of the deposit without the agreement of the other party or court order.

27. This would enable one party to make a claim, thereby reducing the number of claims being made via the court, which is often a long and costly process. The scheme would receive a statutory declaration from the claiming party, in which he

would state the basis of his claim. If the scheme administrator received no response from the other party, the deposit would be paid out without the involvement of the ADR service or the court.

28. An amendment to Schedule 10 of the Housing Act 2004 will permit an application for the deposit to be made by a landlord or tenant in the following circumstances:

    - where the landlord, agent or tenant is not contactable by the other party

    - where the landlord, agent or tenant are contactable but one party refuses to co-operate in order to release the deposit.

29. Guidance on the application process will be provided to landlords/agents and tenants in the prescribed information that scheme administrators will pass on to landlords/agents at the beginning of a tenancy once a deposit is safeguarded in their scheme.

The 'No Contact' Claim

Claims by Landlords/Agents

30. A claim on the deposit can be made 14 days after the end of the tenancy (i.e. the contractual end of the tenancy or where notice has been given and has expired) where the landlord/agent makes an application, accompanied by a statutory declaration in which he states that:

    (a) the tenant cannot be contacted; **and**
    (b) there are rent arrears on the tenancy **and/or**
    (c) there is damage to the property or the landlord's belongings; **and**
    (d) he is willing to resolve the issue via ADR or court, if the tenant is in fact contactable.

31. A claim submitted for 'damage' can include circumstances where:

    a. there is clear damage to the property or damage to or destruction of items in the property owned by the landlord; and

    b. where the property is left in a condition which is beyond normal wear and tear.

32. Guidance on the claim form will indicate what evidence should be provided to support a claim with examples given. Such evidence could include:

    - proof that the tenancy had terminated (e.g. tenancy agreement/written notice expired);
    - where there are rent arrears - bank statements or a letter from the bank;
    - where there is damage,- photographic evidence or receipts/quotes for cleaning/repairs to goods.

33. The scheme administrator is not expected to assess the merit of the evidence provided.

34. The scheme administrator must then send the application and the statutory declaration to the tenant at his last known address asking whether he agrees to the claim. The tenant will be given 14 days to respond. The scheme administrator must enclose a form on which the tenant must authorise the claim, or contest it, **and** where the claim is contested, an indication of whether the tenant wishes to resolve the dispute through ADR or court.

35. If there is no response after 14 days, the deposit is released in accordance with the claim to the landlord/agent.

36. If there is a response from the tenant within the 14 days, the response would indicate:

(a) the tenant agrees to the claim by the landlord/agent; **or**
(b) the tenant disagrees with the claim; **and**
(c) the tenant's wish to resolve the dispute – and whether he opts for it to be resolved through ADR or court.

37. If (a) applies the scheme pays out the deposit to the landlord/agent within 10 days of receiving agreement from the tenant. If (b) and (c) apply, the scheme contacts the landlord/agent and the dispute goes on to be resolved as indicated by the parties. Where the tenant disputes the claim but has not indicated whether he wants the dispute to be resolved through ADR or court, he will be treated as though he has agreed to ADR (the default position).

Claims by Tenants

38. A claim on a deposit can be made by a tenant 14 days after the end of the tenancy (i.e. the contractual end of the tenancy or where notice has been given and has expired) where the tenant makes a statutory declaration in which he states that:

    i. the landlord/agent cannot be contacted and that he considers he is entitled to the return of all or part of the deposit; **and**
    ii. he is willing to resolve the issue via ADR or court, if the landlord/agent is in fact contactable.

39. The scheme must then send the application and the statutory declaration to the landlord/agent at his last known address asking whether he agrees to the claim. The landlord/agent will have 14 days to respond. The scheme administrator must enclose a form on which the landlord must authorise the claim or contest it, **and** where the claim is contested, the landlord must indicate whether he wishes to resolve the dispute through ADR or court.

40. If there is a response from the landlord/agent within the 14 days, the response would indicate:

(a) the landlord/agent agrees to the claim by the tenant; **or**

(b) the landlord/agent disagrees with the claim; **and**
(c) the landlord/agent's wish to resolve the dispute through ADR or court.

41. If (a) applies the scheme pays out the deposit to the tenant within 10 days of receiving agreement from the landlord/agent. If (b) and (c) apply, the scheme contacts the landlord/agent and the dispute goes on to be resolved as indicated by the parties. Where the landlord disputes the claim but has not indicated that he wants the dispute to be resolved through ADR or court, he will be treated as though he has agreed to ADR (the default position).

The 'Contact' Claim

Claims by Landlords, Agents and Tenants

42. A party will be able to claim if the other party is contactable but is refusing to co-operate with the other over the release of the deposit. For example, the landlord is contactable, but consistently refuses to communicate with the tenant, or to either agree to the release of the deposit or to agree to the dispute being settled either through ADR or through the courts.

43. A claim on the deposit can be made 14 days after the end of the tenancy (i.e. the contractual end of the tenancy or where notice has been received) where the claiming party states (again in a statutory declaration) that:

- the other party has been contacted but is refusing to co-operate in order to release the deposit (giving reasons if known); **and**
- he is willing to resolve any dispute via ADR or court.

44. The refusal to co-operate is a refusal to:

- agree the release of full or part of the deposit; **and**
- resolve the dispute through ADR or court.

45. The scheme administrator must then send the application and statutory declaration to the other party at his last known address, asking whether he agrees to the claim. The other party has 14 days to respond. The scheme administrator must enclose a form on which the other party must authorise the claim, or contest it **and** where the claim is contested, indicate whether he wishes to resolve the dispute through ADR or court.

46. If there is no response after 14 days, the deposit is released in accordance with the claim by the claimant.

47. If there is a response from the other party within the 14 days, the response would indicate:

(a) the party agrees to the claim by the claimant; **or**
(b) the party disagrees with the claim; **and**
(c) the party's wish to resolve the dispute through ADR or court.

48. If (a) applies the scheme pays out the deposit to the claimant within 10 days of receiving agreement from the other party. If (b) and (c) apply, the dispute goes on to be resolved as indicated by the parties. Where a party has not indicated he wishes to resolve the dispute through ADR or court, he will be treated as though he has agreed to ADR (the default position).

Reimbursement

49. Payment of the claim by the scheme does not preclude the landlord/agent/tenant later disputing the disbursement of the deposit. Where a landlord/agent/tenant provides evidence that the claim was false (i.e. no rent arrears, no damages, tenancy not ended/abandoned) or, contactable (in the no contact claim)), he can make a claim on the deposit. In this situation, the party who has made a false claim may be subject to criminal investigation and possible prosecution under the Perjury Act 1911. This dispute would be dealt with outside of the scope of the scheme – with the individuals going to court.

Statutory declaration

50. The contents of the statutory declaration that will be supplied in the event of an application under the proposed new procedures will be prescribed in legislation. It will capture the following information depending on whether it is a landlord/agent or tenant making the claim:

51. Where it is the landlord/agent making the claim:

- Landlord's/agent's name, address, rented property address, contact telephone number, e-mail address (if available);
- Tenant's name, forwarding/alternative address (if available), contact telephone number, e-mail address (if available).
- Amount of deposit being claimed;
- Reasons why the amount is being claimed, providing details of rent arrears or damage;
- The form must be signed with a statutory declaration that the information on the form is true and if found out to be false, the claimant could be subject to prosecution under the Perjury Act 1911.

52. Where the landlord/agent has an alternative/forwarding address for the tenant, he must provide this information when making a claim.

53. Where it is the tenant making the claim:

- Tenant's name, current address, rented property address, contact telephone number, e-mail address (if available);
- Landlord's/agent's name, address, contact telephone number, e-mail address (if available)
- Amount of deposit being claimed
- Reasons why the amount is being claimed
- The form must be signed with a statutory declaration that the information on the form is true and if found out to be false, the claimant could be subject to prosecution under the Perjury Act 1911.

Default ADR in the insurance-based scheme

*Option 1 - No amendment to the Act to allow ADR to be used as a default position (i.e. 'do nothing'***)**

54. As the Act stands, a tenant would be forced to go to court to claim a deposit where a landlord is not co-operating with the tenant by either not returning all the deposit or, where there is a dispute, not electing to resolve it via the court or through mutual co-operation or ADR.

Option 2 – Amend the Act to allow ADR to be used as a default position where a landlord is contactable

55. An amendment will be made to the insurance-based scheme for the particular circumstance where the landlord is contactable by the scheme but is refusing to cooperate with the scheme in terms of indicating whether he chooses ADR or the courts to resolve a dispute. In this scenario, Schedule 10 will be amended to make it mandatory for the case to be referred to the scheme for resolution through its ADR service, if the tenant also wishes to use ADR. This would be clearly explained in the scheme membership rules, to ensure that the landlord was aware of this situation.

56. The process would take place as follows:

- When a tenant informs the scheme administrator that he is unable, to reach agreement with the landlord about the return of the deposit (i.e. because the landlord is out of contact or has not returned any or part of the deposit due to the tenant), he must also indicate whether he wishes to resolve the dispute through ADR or court. The scheme will provide the tenant with a form for this purpose, if necessary.

- The scheme administrator will then direct the landlord to transfer the disputed amount to the scheme and will also require the landlord to indicate within 14 days whether he wishes to resolve the dispute through ADR or court.

- Following a response from the landlord, if both agree to ADR and abide by the scheme's rules relating to the ADR, then ADR will be used. If one party disagrees to the use of ADR, the dispute would go to court (because the use of ADR cannot be compulsory).

- If the landlord is contactable by the scheme, but does not indicate within 14 days of being contacted whether he wishes to use ADR or the courts, then the landlord will be treated as if he consents to the use of ADR and the case must be referred to the scheme for resolution through its ADR service.

Transfer out of an insurance-based scheme

Option 1 - No amendment to the Act to enable a landlord to transfer out of an insurance-based scheme (i.e. 'Do nothing')

57. Schedule 10 of the Act does not cater for situations where a landlord has his membership cancelled and where he is ejected from an insurance-based (IB) scheme (e.g. for breaking scheme rules) or where a landlord simply wishes to move to another scheme. If the Act is not amended, where a scheme administrator wishes to eject a landlord from his scheme, he would still need to provide insurance cover to protect the deposit (and possible multiple deposits), indefinitely. The Act, as it stands, does not enable protection for the deposit to stop because the landlord cannot transfer protection out of a scheme. Without a change, the service providers are unlikely to be able to provide insurance cover from a commercial perspective to this level.

Option 2 - Amend the Act to enable landlords to transfer out of an insurance-based scheme

58. Transfer from an IB scheme to another scheme will be allowed in the following circumstances (examples of these scenarios are set out in more detail at the end of this note):

    a) A landlord no longer wishes to protect his tenant(s') deposit(s) through the IB scheme and wishes instead to protect one or all of them under the custodial or another IB scheme (for example, if he finds another scheme more attractive for cost reasons and/or is unhappy with the service of the IB scheme provider).

    b) The scheme administrator is unwilling or unable to continue to protect one or more deposit held by a landlord under its scheme.

    c) The scheme administrator wishes to terminate a landlord's membership of the IB scheme.

59. Where the landlord chooses to transfer protection of a tenant's deposit out of the scheme, he must give notice to the scheme administrator to that effect. The scheme administrator must then determine the date on which it will terminate protection of the deposit under its scheme. He must then send a notice to both the landlord and tenant, in which he will identify the tenancy deposit in question, inform the recipients of the date he has determined that the deposit will cease to be held under its scheme, and give general explanation of the continuing effect of sections 213 to 215 of the Act in relation to the deposit. (i.e. that the landlord must provide the tenant with the prescribed information about the security of the deposit as if he had received the deposit afresh, and the remedies and sanctions available to the tenant in section 214 to 215 will apply). The date the administrator gives for termination of the holding of the deposit under its scheme must not be less than 3 months from the date that the landlord gives his notice; and the administrator's notice to the tenant and the landlord must be given at least 2 months before the date he has determined the deposit will cease, to be held under the scheme.

60. During the three month period referred to above, the deposit remains fully protected by the scheme. The scheme administrator must continue to provide

ADR and other scheme services and insurance cover as per usual for the deposit(s) protected by the landlord under the scheme. If ADR is initiated by either party at any point during this ongoing cover period, then the ADR service must continue to be accessible until completion of the ADR process, even if consent for ADR is received from the second party only after the cover period begins. If a dispute is initiated during the cover period, cover must be provided even if the ADR or court process runs on beyond the cover period, and requires a payout beyond the cover period.

61. Where the scheme administrator proposes that a deposit should no longer be held under its scheme, he must give notice to the landlord of that proposal. The scheme administrator must then determine whether he does in fact wish to proceed in the way proposed. If he does not, then he must give notice to that effect to the landlord. If he does decide that the deposit should no longer be held under his scheme, then not earlier than 2 weeks from the date he gave notice of his proposal he must send a notice to both the landlord and tenant, in which he must state what he has decided to do – i.e. that he has determined that the deposit will no longer be held under his scheme. He must give the date on which it will no longer be so held. He must also give a general explanation of the continuing effect of sections 213 to 215 of the Act in relation to the deposit. The date the administrator gives for termination of the holding of the deposit under his scheme must not be within 3 months from the date that he gives his proposal notice to the landlord, and must be given at least 2 months before the date he has determined the deposit will cease to be held under the scheme.

62. Where the scheme administrator proposes that a landlord's membership of a scheme should be terminated, he must give notice to the landlord of that proposal. The scheme administrator must then determine whether he does in fact wish to terminate the membership. If he decides not to do so, he must give notice to that effect to the landlord. If he decides to terminate his membership then not earlier than 2 weeks from the date he gave notice of his proposal he must send a notice to both the landlord and all his tenants whose deposits are held under his scheme and who will be affected by the termination. The notice must state what he has decided to do – i.e. terminate the landlord's membership. He must give the date on which membership will be terminated. He must also give a general explanation of the effect that termination will have on any deposits retained by the landlord under the scheme and the continuing effect of sections 213 to 215 of the Act in relation to the deposit. The date the administrator gives for termination of membership under its scheme must not be within 3 months from the date that he gives his proposal notice, and must be given at least 2 months before the date he has determined the membership will cease.

Chosen options

63. For each amendment to the Act, the chosen option is Option 2. The amendments to the Act aim to reduce the administrative burden on the end-users of the scheme. The amendments enable essential processes to take place: making tenancy deposit schemes more streamlined, allowing speedier access to deposits for genuine

claimants without the need to go to court and enabling a more reasonable level of commercial risk from the perspective of insurers in the insurance-based schemes.

Costs and Benefits

Sectors and Groups Affected

Race Equality Assessment

64. There is a high degree of geographical concentration of the ethnic minority groups within parts of urban England, with an apparent tendency for the growing minority ethnic population to be increasingly concentrated in groups, by race.

65. 50% of ethnic minority households live in London, which also has the highest proportion of privately rented homes. 17% of accommodation in London is in the private rented sector and 23% of England's entire private rented stock is in London. Across the whole of England, 24% of ethnic minority households live in the private rented sector compared to 11% of white households. In London, 22% of ethnic minority households live in the PRS compared to 18% of white households.

66. The data suggests that tenancy deposit legislation will affect a high proportion of ethnic minorities for a number of reasons, the principal being economic and linguistic; ethnic minorities tend to be in lower income groups and not so able to communicate in English.

67. Although the legislation will have a high impact on ethnic minorities, its impact will be positive with the current problems concerning the return of deposits being addressed.

68. Overall, it is considered that tenancy deposit schemes are unlikely to hinder equality of opportunity and will not damage race relations.

Environmental Impact assessment

69. There will be no environmental impacts from the safeguarding of tenancy deposits.

Health Impact assessment

70. There will be no health impacts from the safeguarding of tenancy deposits.

Rural Impact assessment

71. There will be no rural impacts from the safeguarding of tenancy deposits.

Social Impact assessment

72. There are positive social impacts to be achieved through the safeguarding of tenancy deposits. The timely return of deposits to tenants prevents them from being short of funds for a significant period of time. Increased labour mobility is in line with government policy, which aims to achieve sustainability and flexibility in the housing market.

73. Breakdown of costs and benefits

Claims by landlord or tenant

Option 1 -

Economic		Environmental		Social	
Benefit	**Cost**	**Benefit**	**Cost**	**Benefit**	**Cost**
No benefit as parties would need to go to court to secure return of deposit.	Potentially a large number of cases being taken to court when the landlord and/or tenants are un-cooperative or not contactable. (Stakeholders have indicated this will occur frequently at the end of tenancies.) The cost of making a claim is dependent on amount being claimed. Based on the average deposit in England of £700 the court fees alone at present would be £80. Legal fees would add to the cost.	N/A	N/A	No benefit.	Could impact on the most vulnerable tenants, the poorest and those from an ethnic minority where English was not the first language. In both circumstances pursuing a claim in court could be a significant problem.

Option 2 -

Economic	Environmental	Social

Benefit	Cost	Benefit	Cost	Benefit	Cost
Release of deposit to genuine claimant can be expedited. There would be no need for either landlord or tenant to incur any court charges.	The cost of producing the prescribed information necessary for landlords to facilitate their claim would remain the same at £30. Schemes would incur more administration costs through creation and processing of claim forms.	N/A	N/A	Vulnerable tenants would be spared the ordeal of going to court to recover what was rightfully theirs.	

Default ADR

Option 1 -

Economic		Environmental		Social	
Benefit	**Cost**	**Benefit**	**Cost**	**Benefit**	**Cost**
No benefit as parties would need to go to court in all circumstances to secure return of deposit, i.e whether the landlord was contactable or not.	There would be a larger number of cases being taken to court. Where landlords and / or tenants are un-cooperative by not indicating a preference for ADR or court. The cost of making a claim is dependent on amount being claimed. Based on the average deposit in England of £700 the court fees would be at present £80. Legal fees would add to the costs.	N/A	N/A	No benefit.	Could impact on the most vulnerable tenants, the poorest and those from an ethnic minority where English was not the first language. In both circumstances pursuing a claim could be a significant problem.

Option 2

Economic		Environmental		Social	
Benefit	**Cost**	**Benefit**	**Cost**	**Benefit**	**Cost**
ADR would be used more frequently, i.e. where both parties agree to use it and where a landlord is being un-cooperative. Also, as ADR is free to use, there would be lower court costs for the tenant.	The tenant will need to complete a form indicating their wish to use ADR or court. Another form would need to be completed by the landlord indicating his wish to use ADR or court. These additional forms will mean increased admin costs for schemes. The ADR service will be used in more circumstances, therefore adding an additional financial and administration burden on the service.	N/A	N/A	Vulnerable tenants would be spared the ordeal of going to court to recover what was rightfully theirs. Landlords would also benefit from this means of dispute resolution.	There would be a cost to the scheme in providing this service which may be exacerbated by frivolous claims or claims which revolve on a matter of principle rather than a more substantial sum of money.

Transferring protection to another scheme

Option 1

Economic		Environmental		Social	
Benefit	**Cost**	**Benefit**	**Cost**	**Benefit**	**Cost**
No benefit to landlord or scheme as a landlord could not change	Removing protection of a tenant's deposit is not allowed as	N/A	N/A	N/A	

scheme by choice. Whilst the scheme would be able to eject the landlord from the scheme, it would not be able to unprotect the deposit.	the Act stands. The insurance scheme provider would have to ensure continuity of cover indefinitely and The insurer may not be able to cover this level of risk on commercial grounds.				

Option 2

Economic		**Environmental**		**Social**	
Benefit	**Cost**	**Benefit**	**Cost**	**Benefit**	**Cost**
Would provide the landlord with a degree of flexibility in how he was able to comply with the legislative requirements. He would be free to choose to move to another insurance based scheme that suits him better. Insurance-based scheme providers would also be able eject members from their scheme without continuing to protect the deposits indefinitely, enabling a more reasonable level of risk from the perspective of the insurers.	There would be a requirement on landlords transferring protection of deposits from one scheme to another to provide their tenants with the prescribed information again. There are time/admin costs in doing so. The changes to the Act would impose some extra administrative duties on the Insurance-based scheme providers. They would need to contact landlords and tenants when a transfer is due to take place, indicating the legislative requirements the landlord will	N/A	N/A	N/A	N/A

	have to comply with when re-protecting a deposit.				

74. There are positive social impacts to be achieved through the safeguarding of tenancy deposits. The timely return of deposits to tenants prevents them from being short of funds for a significant period of time. Increased labour mobility is in line with government policy, which aims to achieve sustainability and flexibility in the housing market.

Small Firms Impact Test

75. The majority of landlords and agents affected by these proposals would be regarded as small businesses. While initial soundings did not identify any significant negative impact the Government recognises that TDP will have a regulatory effect, in that it adds a new administrative and cost burden to business, which does not apply now. Therefore, Government has sought to ensure that the schemes' impact on business - in accordance with the Hampton principles of better regulation - are kept to the minimum consistent with effective 'regulation'.

76. CLG has consulted extensively with business (and others) and sought to keep impact on small businesses to a minimum. To that end, we used extensive negotiations with potential suppliers to help them to design schemes which, whilst complying with the legislation, will be, as far as is possible, business-friendly. This RIA was referred to the Small Business Service, who acknowledged our approach and findings.

Competition Assessment

77. The Department has completed the Office of Fair Trading's Competition filter. This requires that policy makers consider the market that will be affected, i.e. the firms that compete against one another to sell the same or similar products or services.

78. The main markets affected are landlords and residential letting agents, none of whom have more than 10% of the market share. The costs of the proposed regulations should not affect some firms substantially more than others, with the proviso that a small increase in administrative costs would be more easily subsumed by bigger firms. The proposed regulations would not result in higher set-up or running costs for new firms that existing firms do not have to meet and the market is not characterised by rapid technological change.

79. There is an outside chance that the proposed regulations might affect the number of operators in the market, as smaller (part time) landlords in particular might decide the imposition outweighs the advantages. It is also possible that firms operating in areas of low demand for private rented property would be unable to increase prices to compensate for the increased administrative costs of the proposed regulation.

80. There is therefore unlikely to be a negative competitive impact from the new regulation and no detailed assessment is required.

Enforcement, Sanctions and Monitoring

<u>Enforcement</u>

81. The Housing Act 2004 does not make it a requirement that all landlords take a deposit, only that, where they do, they protect those deposits in accordance with the legislation.

Enforcement will be tenant-led, in that they will need to ask their landlord at the beginning of the tenancy how the landlord intends to protect their deposit, and ensuring after they have paid their deposit that it has been safeguarded by a tenancy deposit scheme. Similarly, when a landlord transfers protection of a deposit to another scheme, the tenant will need to ensure he enquires about the re-protection of the deposits and ensures he receives the prescribed information again from the landlord.

Sanctions

82. There are no criminal penalties associated with tenancy deposit protection, but there are a number of civil sanctions against landlords set out in the Act. Where a landlord takes a deposit and fails to either safeguard it with an authorised tenancy deposit scheme or provide the tenant with the prescribed information he will be unable to use the notice only procedure for possession under section 21 of the Housing Act 1988, until he has rectified the situation.

83. Where a tenant becomes aware that his deposit has not been safeguarded with an authorised scheme, or where the landlord has not provided the tenant with the prescribed information, the tenant can seek a court order requiring the landlord to comply with the Act. If a landlord has not complied with the Act by the time of a court hearing, the court can order him to pay to the tenant an amount equivalent to three times the deposit.

Implementation and Delivery Plan

84. There are two issues here, which are inextricably linked: the implementation and delivery of the single custodial scheme and of one or more insurance-based schemes; and the implementation of the SI, which is the subject of this RIA.

85. For the schemes as a whole, implementation plans, drawn up by bidders have been set out in schedules to the contracts applying to the custodial and insurance-based schemes. These will include a claim form. It is intended that the operation of the schemes commence on 6th April 2007.

Monitoring and Post Implementation Review

86. The contracts have been entered into with Service Providers on the basis of 3+2 years (i.e. 3 years in the first instance, with an additional two years provided the SPs fulfil minimum performance requirements specified in the contract). Contract governance manuals, for both types of scheme, are being developed. These will specify what should be monitored against the contracts and when - for example, through key performance indicators.

Summary and Recommendation

87. This RIA addresses the OrderI which will change Schedule 10 of Housing Act 20 04 in three ways. The first was called for by landlords and letting agents - in their responses to the November 2005 consultation paper, through the TDP Advisory Group, and through landlord and other forums. The second change was introduced in recognition of difficulties a tenant may have in securing the release of his/her deposit from an un-cooperative landlord in the insurance-based scheme. The ADR default position would spare the tenant the cost of making a small claim for money that was rightfully theirs. Finally, the third change has been introduced to ensure that a tenant's deposit remains

protected irrespective of whether a landlord chooses or is compelled to transfer protection of a deposit from the insurance scheme to another scheme.

Option	Total cost per annum, economic, environmental, social	Total benefit per annum, economic, environmental, social
1 Make no changes	**Costs are unquantifiable but would involve taking legal action in court to recover a deposit unjustifiably withheld.**	
2 Make the changes	**Increased administrative costs on schemes and landlord. Increased numbers of disputes being referred to ADR means a greater cost for the ADR service provider.**	**Deposits could be released more expeditiously to the party entitled to it. Costs of taking legal action in court would be saved. Security of tenants' deposits would be maintained by allowing greater flexibility for landlords. Tenants would have less need to go to court to recover money to which they had a justifiable claim.**

Declaration and Publication

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed……..

Date

Minister's name, title, department

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