

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

PENSIONS ACT 2004

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Pensions Act which received Royal Assent on 18 November 2004. They have been prepared by the Department for Work and Pensions in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

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SUMMARY AND BACKGROUND

3. In Spring 2002 the then Secretary of State for Social Security asked Alan Pickering to look at how the administration of occupational pension schemes could be simplified. Ron Sandler was jointly commissioned by the Chancellor of the Exchequer and the Secretary of State to review retail savings in the same period. A Quinquennial review of the Occupational Pensions Regulatory Authority (Opra) and a National Audit Office (NAO) Value for Money study into how Opra worked took place during 2002. The outcomes of all these separate reviews showed that major themes for pension reform were emerging.

4. In December 2002 the Government published a Green Paper entitled *Simplicity Security and choice: Working and saving for retirement [Cm 5677]*, and its proposals for simplification of the tax treatment of occupational and personal pensions. In response to the ensuing consultation, in June 2003 the Secretary of State for Work and Pensions published *Working and saving for retirement: Action on occupational pensions [Cm 5835]*, which focussed on the need for member protection to rank alongside the other themes. It presaged primary legislation across the areas consulted, including a Pension Protection Fund to compensate members of defined benefit and hybrid schemes whose employers become insolvent leaving the pension scheme unable to meet its liabilities. The European Directive on the Activities and Supervision of Institutions for Occupational Retirement Provision (2003/41 EC) was adopted in September 2003 for implementation by September 2005. In February 2004 the Secretary of State for Work and Pensions carried forward broader policy on financial retirement planning in *Simplicity, security and choice: Informed choices for working and saving [Cm 6111]*.

5. These various strands of development have come together in this Pensions Act. Its main provisions are as follows.

6. Part 1 establishes a new Non-Departmental Public Body (NDPB), the Pensions Regulator, to replace Opra. This will take over Opra's responsibility for regulation of occupational pensions, and specific functions relating to personal pensions and stakeholder pensions. Like Opra, the Regulator will be funded by a levy on schemes. Through this Act the Regulator will assume a number of new functions. A new tribunal – the Pensions Regulator Tribunal- will be established to handle references from determinations made by the Regulator.

7. The Act also establishes in Part 2 a second new NDPB, the Board of the Pension Protection Fund; to provide compensation for members of defined benefit (normally final salary) and hybrid occupational pension schemes in the event of the scheme's sponsoring employer going insolvent and leaving the pension scheme with insufficient funds to pay its members at least the level of PPF compensation. The PPF will be funded by levies on relevant schemes, to be set by the Board of the Pension Protection Fund subject to parameters on the level and structure set by Parliament, and also by taking in any of the scheme's remaining assets, including any debt due by the employer, on insolvency. The external

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appeals body for the Board of the Pension Protection Fund's decisions will be the PPF Ombudsman. The Board of the Pension Protection Fund will subsume the functions of the Pensions Compensation Board.

8. Part 3 replaces the Minimum Funding Requirement for defined benefit occupational schemes with scheme-specific funding requirements allowing schemes greater flexibility in developing funding strategies appropriate to their circumstances.

9. Part 4 introduces a new, explicit function of the Secretary of State to promote and facilitate financial retirement planning. It provides for powers which may be exercised to require employers to provide their employees with access to pensions planning information and advice through the workplace and to be able to compel occupational or personal pension schemes to provide combined pension forecasts incorporating state pension data.

10. Part 5 deals with a number of matters relating to the administration of occupational and personal pension schemes. Amongst these it changes the rules on limited price indexation for occupational and personal pensions, reduces the cap from 5% to 2.5% for defined benefit schemes and removes the statutory requirements for limited price indexation for pensions derived from money purchase benefits. It introduces a minimum level of pension protection for employees involved in TUPE transfers where they had access to an occupational pension scheme pre-transfer. It introduces a requirement for trustees to have appropriate knowledge for the performance of their duties, in response to the recommendations from the Myrers Report on institutional investment.

11. Part 6 provides for financial assistance to be given to members of certain pension schemes.

12. Part 7 makes provision about cross-border activities within the European Union.

13. Part 8 alters the position of pensioners who defer taking their State Retirement Pension by bringing forward an increase in increments originally planned for 2010. This will provide a higher weekly income on retirement. Provision is made for a new option, a lump sum, as an alternative to increments.

14. There are a number of measures providing greater flexibility and simplification in pension scheme administration. Throughout Parts 5 and 8 there are a number of provisions clarifying existing pensions law.

THE ACT

15. The Act consists of nine parts, as follows:

- Part 1 – The Pensions Regulator;
- Part 2 – The Board of the Pension Protection Fund;
- Part 3 – Scheme Funding;
- Part 4 – Financial Planning for Retirement;
- Part 5 – Occupational and Personal Pension Schemes: Miscellaneous Provisions;
- Part 6 – Financial Assistance Scheme for members of certain pension schemes;

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- Part 7 – Cross-border activities within European Union;
- Part 8 – State Pensions;
- Part 9 – Miscellaneous and Supplementary.

TERRITORIAL EXTENT

16. The Act extends to England and Wales and to Scotland with the exception of *section 106 (legal assistance scheme)* which only extends to England and Wales. The following provisions of the Act also extend to Northern Ireland:

Part 1	
section 1	The Pensions Regulator
section 2 (other than (2)(b))	Membership of the Regulator
section 4	Regulator's functions (other than subsection (2)(b))
section 8	Non-executive functions
section 9	The Determinations Panel
section 11	Annual Reports to Secretary of State
section 59	Register of occupational and personal pension schemes
section 102	The Pensions Regulator Tribunal
section 106	Legal assistance scheme
Schedule 1	The Pensions Regulator, paragraphs 1 to 19, 20(1) to (3) and (7), 21 (other than sub-paragraph (b)) (delegation), 22 to 25 and 27 to 35 and section 3 (Further provision about the Regulator) so far as it relates to those provisions;
Schedule 4	The Pensions Regulator Tribunal
Part 2	
section 107	The Board of the Pension Protection Fund
section 108	Membership of the Board
section 109	Further provision about the Board
section 110(1)&(3)	Board's Functions
section 112	The non-executive functions
section 113	Investment of funds
section 114	Investment Principles
section 115	Borrowing
section 118	Fees
section 119	Annual reports to Secretary of State
section 161(2)(a), (3) and (5) to (8)	Effect of Board assuming responsibility for a scheme
section 173	Pension Protection Fund
section 188	Fraud Compensation Fund
section 209 (other than subsections (4)(b) to (4)(d), (4)(f) and (4)(g); subsection (6) so far as relating to any	The Ombudsman for the Board of the Pension Protection Fund

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of those sub-subsections; and subsections (7) and (8))	
section 210	Deputy PPF Ombudsmen
section 211 (3) and (4)	Status etc of the PPF Ombudsman and deputies
section 212	Annual reports to Secretary of State
section 220	Pension sharing
section 111	Supplementary powers, so far as that provision has effect in relation to functions of the Board conferred by any provision of, or made under, this Act which extends to Northern Ireland;
Schedule 5 (other than paragraph 18)	The Board of the Pension Protection Fund
Schedule 6 (other than paragraph 7)	Transfer of property, rights and liabilities to the Board
Part 4	
sections 234	Promoting and facilitating financial planning for retirement and so far as it relates to that paragraph.
section 235	Supply of information for purposes of section 234
section 236 (in so far as it relates to Schedule 10 paragraph 2); and Schedule 10 paragraph 2	Use and supply of information: private pensions policy and retirement planning
Part 5	
section 274	The Pensions Ombudsman and Deputy Pensions Ombudsmen
section 277(2)(b)	Amendments relating to the Pensions Compensation Board
Part 6	
section 286	Financial assistance scheme for members of certain pension schemes
Part 8	
section 299	Claims for certain benefits following termination of reciprocal agreement with Australia
Part 9	
sections 300 (1) and (2)	Dissolution of Opra
section 301	Transfer of employees from Opra to the Regulator
section 302 (1) and (2)	Dissolution of the Pensions Compensation Board
section 307	Modification of this Act in relation to certain categories of schemes
section 308	Modification of pensions legislation that refers to employers
section 310	Admissibility of statements
section 319(2)	Minor and consequential amendments
section 321	Pre-consolidation amendments
section 322	Commencement
section 323	Extent
section 324	Northern Ireland

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section 325	Short Title
<p>in so far as the following sections have effect for the purposes of provisions which themselves extend to Northern Ireland</p> <p>section 303 section 304 section 305</p> <p>section 306 section 309 section 313 section 315 section 316 section 318</p>	<p>Service of notifications and other documents</p> <p>Notification of documents in electronic form</p> <p>Timing and location of things done electronically</p> <p>Overriding requirements</p> <p>Offences by bodies corporate and partnerships</p> <p>Crown application</p> <p>Subordinate legislation (general provisions)</p> <p>Parliamentary control of subordinate legislation</p> <p>General interpretation</p>

COMMENTARY ON SECTIONS

PART 1 – THE PENSIONS REGULATOR

Summary

17. The Occupational Pensions Regulatory Authority (Opra) will be replaced by a new Non-Departmental Public Body (NDPB), the Pensions Regulator (referred to hereafter in the Act and these Notes as the Regulator).

18. Opra’s existing powers will be carried forward to the Regulator. In addition the new regulatory body will have statutory objectives and functions that provide a framework for its activity.

19. The Regulator will aim to operate a targeted and proportionate regulatory regime, applying greater regulatory scrutiny where it considers members benefits are most at risk. This approach will be supported by increased powers to gather, retain and share information. The information gathered will be subject to analysis to help identify those schemes where members’ benefits are more likely to be at risk.

20. The Act will introduce a range of new powers including:

- issuing improvement notices or third party notices to remedy breaches;
- the ability to freeze a scheme to protect members’ benefits or scheme assets whilst investigations by the Regulator take place;
- power to issue a contribution notice, or financial support directions and to make orders in respect of transactions at an undervalue;
- increased powers covering the prohibition, suspension and removal of trustees;
- increased whistleblowing responsibilities and duties to report certain events.

21. The Regulator will also be able to issue codes of practice. This will provide those involved in pensions, with practical guidance in relation to their duties and responsibilities

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under pensions legislation, thus assisting schemes in improving compliance and encouraging best practice. In certain areas the Regulator will be legally obliged to provide codes of practice, for example, on disclosure of information to scheme members.

22. The Act establishes a new tribunal – the Pensions Regulator Tribunal – to hear references from the Regulator’s determinations.

Establishment

Section 1: The Pensions Regulator

23. This section establishes the Pensions Regulator.

Sections 2 and 3: Membership of the Regulator; Further provision about the Regulator

24. *Section 2* deals with membership of the Regulator. The Regulator will consist of: a chairman (who will be appointed by the Secretary of State); a Chief Executive; and at least five other members appointed by the Secretary of State, after consulting the chairman (*subsection (1)(c)*). The chairman must not be appointed from the staff of the Regulator (as defined in *paragraph 7 of Schedule 1*) or be the chairman of the Board of the Pension Protection Fund. By virtue of *subsection (3)* at least two of the members of the Regulator appointed under *subsection (1)(c)* are to be appointed from the staff of the Regulator.

25. The inclusion of executive members on the Board implements a recommendation of Derek Higgs’ review for the Chancellor of the Exchequer and the Secretary of State for Trade and Industry of the role and effectiveness of non-executive directors (January 2003) which states:

“The Board should include a balance of executive and non executive directors (including independent non-executives) such that no individual or small group of individuals can dominate the board’s decision taking. (Annex A, item 3 – Board Balance and Independence).”

26. The executive members of the Regulator are to be the Chief Executive and the two or more members appointed from the staff of the Regulator under *subsection (1)(c)*. All other members of the Regulator will be non-executive members. *Subsection (4)* provides that in appointing members under *subsection (1)(c)* the Secretary of State must ensure that the majority of members of the Regulator are non-executive members. No member of the staff of the Board of the Pension Protection Fund is eligible for appointment as a member of the Regulator.

27. *Schedule 1* (which is introduced by *section 3*) contains further provision about the constitution of the Regulator

Schedule 1: The Pensions Regulator

28. *Paragraphs 1-3* set out the terms of appointment and tenure for members of the Regulator. These paragraphs set out that a person will cease to be a member of the Regulator if:

- in the case of the chairman of the Regulator, he ceases to hold this position or if he becomes a member of staff of the Regulator;
- in the case of any other non-executive member, he becomes a member of staff of the Regulator;

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- in the case of an executive member appointed as one of the five other members of the Regulator appointed by the Secretary of State after consulting the chairman (under *section 2(c)*), he ceases to be a member of staff of the Regulator;
 - in the case of the Chief Executive, he ceases to be employed as such.
29. *Paragraph 3* sets out that someone will not be prevented from being a member of the Regulator if they have previously been such a member.
30. *Paragraphs 4-6* set out provisions on remuneration which allow for the Secretary of State to determine the remuneration of the non-executive members of the Regulator, and allow for the Regulator to pay (as determined by the Secretary of State) allowances, gratuities or pensions to those who are or have been non-executive members of the Regulator. These paragraphs also provide for the payment of compensation (where it appears to the Secretary of State that such compensation is correct in the circumstances) to a non-executive member of the Regulator who ceases to hold such a position other than at the end of his term of office.
31. *Paragraphs 7 –10* provide that the staff of the Regulator consists of the Chief Executive as appointed under paragraph 8; the other employees of the Regulator as appointed under *paragraph 9*; and any additional staff made available by the Secretary of State under *paragraph 10*.
32. *Paragraph 11* sets out that in order to appoint a chairman of the Determinations Panel, the chairman of the Regulator must establish an appointments committee (consisting of a chairman (which is to be one of the non-executive members of the Regulator) and one or more people appointed by the chairman of the Regulator). The appointments committee will nominate a suitable person for the office of chairman of the Determinations Panel.
33. *Paragraph 12* provides that the Regulator is to determine the terms and conditions of appointment of members of the Determinations Panel, subject to the approval of the Secretary of State. A person is automatically removed from the Panel if, in the case of the Chairman of the Panel, he ceases to hold that office, or for any other member, he becomes a member of the Regulator or a member of staff of the Regulator. In conjunction with *section 9(5)*, this ensures that members of the Determinations Panel cannot simultaneously be members of either the Regulator or its staff. However, former members of the Panel, the Regulator, or the staff of the Regulator are eligible to sit on the Determinations Panel.
34. *Paragraphs 14-16* allow the Regulator to remunerate members of the Determinations Panel at a level determined by the Secretary of State. They also enable the Regulator to pay (at levels determined by the Secretary of State) allowances, gratuities or pensions to those who are or have been members of the Panel. These paragraphs also provide for the payment of compensation (where it appears to the Secretary of State that such compensation is correct in the circumstances) to a member of the Panel who ceases to hold such a position other than at the end of his term of office.
35. *Paragraph 17* enables the Regulator to establish committees for any purpose. Such committees may establish sub-committees. Provision is made as to the membership of such committees. “Committees of the Regulator” is also defined for the purposes of the Schedule.
36. *Paragraphs 18 and 19* enable the Regulator to determine its own procedures. Determination Panel procedures may be determined only by the Panel. The Secretary of State

has the power to make regulations prescribing the Regulator's procedures, which would include the Determination Panel's proceedings.

37. *Paragraph 20* allows the Regulator to authorise any executive member; any other member of staff; or, any of its committees (other than the appointments committee, the Determinations Panel and any of the Panel's subcommittees) to exercise on behalf of the Regulator, functions which the Regulator determines. However, this does not apply with regard to:

- the non-executive functions of the Regulator listed in *section 8(4)* (non-executive functions), which must be carried out by the committee established under *section 8*;
- the duty of the Regulator to appoint the chairman and other members of the Determinations Panel and to determine the terms and conditions of their appointments;
- the functions of the Regulator which are only exercisable by the Determinations Panel by virtue of *section 10(1)* (the power in certain circumstances to determine whether to exercise the functions listed in *Schedule 2* and to exercise them) or *section 99(10)* (compulsory review) or any corresponding provision in force in Northern Ireland.

38. The Regulator may authorise the Determinations Panel to exercise on the Regulator's behalf the power to determine whether to exercise, and to exercise, one or more of the regulatory functions listed in *sub-paragraph (5)*. There is also power to delegate further functions to the Panel under *sub-paragraph (6)*

39. *Paragraph 21* allows the Secretary of State to make regulations limiting the functions delegated by the committee established under *section 8* to any of its members or any of its sub-committees; limiting the functions delegated by the Determinations Panel to any of its members or any of its sub-committees; limiting the extent to which the functions of the Regulator may be delegated under *paragraph 20*, and permitting the Regulator in prescribed circumstances to delegate to prescribed persons any prescribed functions of the Regulator.

40. *Paragraphs 22 and 23* cover the application of the seal of the Regulator and its authentication by an approved person.

41. *Paragraphs 24 to 28* are concerned with matters relating to the funding and accounts of the Regulator, including the payment of the levy and the appointment of the Comptroller and Auditor General as auditor.

42. *Paragraphs 29 to 35* cover the status and liability etc of the Regulator as a corporate body and provide for exemption from liability in damages.

General provisions about functions

Section 4: Regulator's functions

43. The Regulator has both the functions which are transferred to it from Opra (also see *section 7* for detail on the transfer of Opra's powers) and other functions conferred on to it by the Act and any other enactments.

44. This section sets out further detail on how the Regulator will discharge its functions. The non-executive functions set out in *section 8(4)* must, by virtue of *section 8(2)* be

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discharged by the committee established under *section 8*. It also reserves the discharge of certain of the Regulator's regulatory functions to a special committee called the Determinations Panel established under *section 9*. The Regulator's general power to delegate certain functions is subject to the Secretary of State's power to make regulations limiting such delegation (see *paragraph 21 of Schedule 1*).

45. The Regulator will also be able to act, as Opra does now, as a prosecutor. No specific legislative provision is required to permit this.

Section 5: Regulator's objectives

46. The main objectives of the Regulator in discharging its functions are to protect the benefits of members (i.e. members of occupational pensions schemes or stakeholder pension schemes, and members of personal pension schemes who are employees in respect of whom direct payment arrangements exist and, in cases where the scheme is a stakeholder pension scheme, any other members) of work-based pensions (i.e. all occupational and certain personal pension schemes), to reduce the risk of situations arising which may lead to calls for compensation from the Pension Protection Fund, and, to promote the good administration of the schemes which it regulates.

Section 6: Supplementary powers

47. The Regulator may do anything (except borrow money) which is calculated to facilitate the exercise of its functions, or is incidental or conducive to their exercise. This power enables the Regulator to, for example, lease office space, print stationery, etc.

Section 7: Transfer of Opra's functions to the Regulator

48. The functions of Opra under the Pension Schemes Act 1993, the Pensions Act 1995, and the Welfare Reform and Pensions Act 1999 are transferred to the Regulator, with definitions amended accordingly.

Non-executive functions

Section 8: Non-executive functions

49. The Regulator must establish a committee to discharge the non-executive functions on its behalf. Only non-executive members of the Regulator may be members of that committee. The non-executive functions are: to keep under review whether the Regulator's internal financial controls secure the proper conduct of its financial affairs; and to determine the remuneration of the Chief Executive (with reference to *paragraph 8(4)(b) of Schedule 1*) which is subject to the approval of the Secretary of State.

50. The committee established under this section must prepare a report on the discharge of the non-executive functions for inclusion in the Regulator's annual report to the Secretary of State under *section 11* (annual reports to the Secretary of State). The report on the discharge of the non-executive functions must relate to the same period as that covered by the Regulator's annual report.

51. The committee established under *section 8* may establish sub-committees. The members of these sub-committees may include individuals who are not members of the committee or of the Regulator, but cannot include executive members or other staff of the Regulator.

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52. The committee may authorise any of the non-executive functions to be discharged by any of its members or by any of its sub-committees on behalf of the committee. The Regulator can in accordance with *paragraph 20(1) of Schedule 1* also authorise the committee or any of its sub-committees to carry out further functions of the Regulator.

Section 9: The Determinations Panel

53. This section provides for the Regulator to establish and maintain a committee known as the Determinations Panel which is to consist of a chairman and at least six other members. The Regulator must appoint as the chairman of the Determinations Panel the person nominated in accordance with *paragraph 11 of Schedule 1* (which requires the chairman of the Regulator to set up a committee to recommend a person for appointment as chairman of the Determinations Panel.)

54. The chairman of the Determinations Panel will decide the actual size of the Determinations Panel and nominate suitable people. The Regulator will then appoint these nominees as other members of the Determinations Panel. Any member of the Regulator, any member of staff of the Regulator, any member of the Board of the Pension Protection Fund and any member of the staff of that Board will not be eligible for appointment to the Determinations Panel.

55. The Panel may establish sub-committees consisting of members of the Panel.

Section 10: Functions exercisable by the Determinations Panel

56. This section provides that in certain circumstances the power to determine whether to exercise, and to exercise, certain functions of the Regulator is reserved to the Determinations Panel. The functions in question are listed in *Schedule 2* and are known as the “reserved regulatory functions”. The Regulator can also authorise the Panel to carry out more functions under *paragraph 20(4) or (6) of Schedule 1*. The Panel may also sub-delegate the exercise of functions to any of its members or sub-committees. This is all subject to any regulations made by the Secretary of State under *paragraph 21 of Schedule 1* (which concerns the power to limit or permit the delegation of functions).

Schedule 2: The reserved regulatory functions

57. This Schedule lists the reserved regulatory functions of the Regulator referred to in *section 10*. In certain circumstances the power to determine whether to exercise these functions and the power to exercise them is reserved to the Determination Panel (see *section 10(1) – (3)*).

Annual Report

Section 11: Annual reports to Secretary of State

58. *Subsection (1)* provides that the Regulator must produce a report for each financial year. The “financial year” is defined for these purposes as the date of the Regulator’s establishment to the following 31 March and then every 12 months thereafter (see *subsection (6)*).

59. *Subsections (2) and (3)* set out information which must be included in the report. Each report will have to cover the activities of the Regulator for the financial year. A report by the committee set up under *section 8* must also be included. It must give information about

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the strategic direction of the Regulator and how this is being kept under review; how the Chief Executive's performance is being monitored; and the steps taken to monitor the Regulator's performance against objectives and targets. *Subsection (4)* provides that the Regulator must send each report to the Secretary of State as soon as practicable after the end of the financial year. The Secretary of State will then lay a copy of every report received by him under this section before both Houses of Parliament (see *subsection (5)*).

Provision of information, education and assistance

Section 12: Provision of information, education and assistance

60. This section enables the Regulator to provide information, education and assistance to those involved in the administration of work-based pension schemes, employers in relation to such schemes or people advising the trustees, managers or employees in the operation of these schemes. The Regulator may also provide information, education and assistance to those who have duties under *section 238* of this Act. "Work-based pension scheme" has the same meaning as in *section 5* and "employers in relation to work-based pension schemes" means, in the case of stakeholder pension schemes, the persons upon whom duties are imposed under section 3 of the Welfare Reform and Pensions Act 1999 (duty of employers to facilitate access to stakeholder pension schemes).

New powers in respect of occupational and personal pension schemes

Section 13: Improvement Notices

61. This section provides that if the Regulator is of the opinion that someone has not complied with the "pensions legislation" (as defined in *subsection (7)*), it may issue an improvement notice directing the person to act to remedy or prevent a recurrence of the contravention. An improvement notice must specify the nature of the contravention and the evidence on which the Regulator has based its opinion that the contravention has occurred. For each step which the notice requires to be taken, the notice must specify the period within which the step must be taken (the time period must not be less than 21 days from the date of the notice).

62. *Subsection (3)* provides that an improvement notice may be framed by reference to a code of practice issued by the Regulator under *section 90* and may allow the person to whom the notice is made a choice of ways to remedy or prevent the recurrence of the contravention. *Subsection (4)* states that the requirement to comply with directions in an improvement notice can be dependent on compliance by a third party with a direction or directions contained in a notice under *section 14* (which concerns third party notices – see below). The improvement notice can direct the person to whom it was issued to inform the Regulator, within the period specified in the notice, of the measures taken following issue of the notice. *Subsections (8) and (9)* make provision for the imposition of civil penalties under section 10 of the Pensions Act 1995 (civil penalties) in cases where this section is contravened.

Section 14: Third party notices

63. This section deals with cases where a person (the third party) fails to do something and this causes another person to contravene the pensions legislation (within the meaning of *section 13(7)*). The third party can be given a third party notice by the Regulator requiring him to remedy his failure. For example if trustees are unable to comply with the requirements

to produce audited accounts because the scheme administrators had not supplied them with the required information, the Regulator could issue a third party notice to the scheme administrators requiring them to remedy the situation within a reasonable period of time.

64. The notice must specify the nature of the contravention of the pensions legislation and the alleged failure by the third party, and include the evidence on which the Regulator has based its opinion. Each step which the notice requires the third party to take must be taken within the deadline specified in the notice (and that deadline must be at least 21 days from the date of the notice). Directions in a third party notice may be framed so as to allow the third party a choice of ways to remedy or prevent the recurrence of the contravention. *Subsection (4)* provides that a notice may direct the third party to inform the Regulator of actions taken to comply with the notice.

65. *Subsection (6)* provides that section 10 of the Pensions Act 1995 (civil penalties) applies to a person who, without reasonable excuse, fails to comply with a third party notice issued to him.

66. *Subsection (7)* prevents compliance with a third party notice amounting to a breach of confidentiality.

Section 15: Injunctions and interdicts

67. This section provides that the Regulator can apply to the High Court for an injunction or, in Scotland, to the Court of Session for an interdict, which the court may grant where it is satisfied that:

- there is a reasonable likelihood that a person will do an act which constitutes a misuse or misappropriation of assets of an occupational or personal pension scheme; or
- a person has done any such act and that there is a reasonable likelihood that he will continue or repeat the act or do a similar act.

Section 16: Restitution

68. If the Regulator applies to the High Court or Court of Session and the court is satisfied that there has been a misuse or misappropriation of any of the assets of an occupational or personal pension scheme, then the court can direct any person knowingly concerned in the misuse or misappropriation of the assets to take specified steps to restore the parties to their original position.

Section 17: Power of the Regulator to recover unpaid contributions

69. This section enables the Regulator, on behalf of the trustees or managers of an occupational or personal pensions scheme, to use any power that the trustees or managers would have had to recover employer contributions (within the meaning of *subsection (3)*) due to a scheme. In the case of personal pension schemes, if the trustees or managers do not have powers under the scheme to recover unpaid employer contributions, *subsection (2)* ensures the Regulator may still recover those contributions as if they were owed on a debt to the trustees or managers.

Section 18: Pension liberation: interpretation

70. *Subsection (1)* provides definitions of terms used in *sections 18 to 21* relating to pension liberation. In addition to *section 18* itself, those sections are *section 19* (court's power to order restitution where pension liberation has occurred) and *sections 20 and 21* (Regulator's powers to make restraining orders, and repatriation orders, where pension liberation has occurred).

71. *Subsection (2)* defines what is meant by 'money liberated from a pension scheme'. It is money which represents accrued rights which has been transferred from a pension scheme on the basis that it would be used in an authorised way but, despite that, it has not been used in an authorised way and is not likely to be used in an authorised way. *Subsection (4)* describes the authorised ways. These are, broadly, the ways in which schemes are allowed to give effect to a transfer value as permitted by section 94 or 101AB or 101F of the Pension Schemes Act 1993 or the scheme rules.

Section 19: Pension liberation: court's power to order restitution

72. This section is concerned with the court's power to order restitution where pension liberation has occurred. It applies where there is recoverable property. *Subsection (2)* defines 'recoverable property' as being all or some of the money liberated from the pension scheme or as being property which directly or indirectly represents all or some of the money liberated from the pension scheme.

73. *Subsection (3)* sets out an exception so that recoverable property will not include property where the beneficial interest in the property has been acquired in good faith and for value. In addition it must have been acquired without notice as to the fact that it represents money liberated from a pension scheme. Property which subsequently represents excepted property will also not fall within the definition.

74. If the Regulator makes an application, under *subsection (4)*, the court can make any order that it thinks just and convenient for securing that recoverable property or money representing its value or proceeds of sale is transferred to a pension scheme, to an annuity or insurance policy or to the liberated member.

75. *Subsection (5)* provides that the court may also order a person who holds recoverable property or has control over it to take steps to ensure that the recoverable property is transferred as directed by the court e.g. he may be directed to sell the property.

76. *Subsection (6)* provides that when an order is made under *subsection (4)* to transfer the recoverable property to a pension scheme, the court may by order direct the trustees or managers of the scheme in question to take steps for that purpose and to apply the property or money transferred in the manner that the court directs for the purpose of providing benefits under that scheme for the liberated member.

77. *Subsection (7)* allows for regulations to be made to modify the provisions of the Pension Schemes Act 1993 as they would apply to cases where the court directs trustees or managers of a pension scheme in the manner laid out in *subsection (6)*.

Section 20: Pension liberation: restraining orders

78. This section gives the Regulator powers, where pension liberation has occurred, to make restraining orders on accounts with deposit takers.

79. *Subsection (1)* provides that the Regulator may make a restraining order in certain circumstances. Those circumstances exist if consideration is being given to the making of a repatriation order under *section 21* and the Regulator is satisfied that the account contains money that has been liberated from a pension scheme and is an account held by the liberator or someone who will act on the liberator's instructions.

80. *Subsection (2)* provides that during the period when the restraining order has effect no credit or debit may be made to the account.

81. *Subsection (3)* states that a restraining order must give the name of the deposit taker, identify the account in question and contain any other information which may be prescribed in regulations.

82. *Subsection (4)* provides that a restraining order will take effect when the deposit taker is notified of it by the Regulator and will cease after a period of six months from when it was made (but see *subsection (7)*). *Subsection (5)* states that the Regulator may extend or further extend the duration of a restraining order, (the Regulator does that by a further order – an “extension order”).

83. *Subsection (6)* states that the extension order takes effect when the deposit taker is informed of it by the Regulator provided that that happens before the expiry of the restraining order. *Subsection (7)* states that when an extension order takes effect, the restraining order continues for another six months after the initial six-month period but a further extension order cannot take effect until the end of the extension period.

84. *Subsection (8)* states that interest may be credited to an account whilst a restraining order is in effect.

85. *Subsection (9)* provides that if money is credited to an account in breach of the order then the deposit taker must return the money to the payer.

86. *Subsection (10)* allows payments to be made out of restrained accounts. An application must be made to the Regulator who will make a payment provided that the money will be used to help meet living expenses or carry on a trade, profession or occupation. In addition, the beneficial interest in the money paid out must belong to the person who applied for it (or else the person to whom the beneficial interest belongs must have consented to the application). The money paid out must not represent money liberated from a pension scheme.

87. *Subsection (11)* provides that section 10 of the Pensions Act 1995 (civil penalties) will apply to a deposit taker who without reasonable excuse fails to comply with any obligation imposed by a restraining order or this section.

Section 21: Pension liberation: repatriation orders

88. This section is concerned with the Regulator's power to make repatriation orders. A repatriation order can be made where a restraining order has effect and the Regulator is satisfied that the restrained account contains money liberated from a pension scheme where pension liberation has occurred.

89. *Subsection (2)* provides that the Regulator can order the deposit taker to pay a sum no greater than the liberated amount to a pension scheme, to an annuity or insurance policy or to the liberated member. Where the Regulator orders payment to a pension scheme it may also direct the trustees or managers of that scheme to apply the monies in the manner directed, so as to provide benefits under the scheme to or in respect of the liberated member.

90. *Subsection (3)* provides that where the Regulator makes a repatriating order under *subsection (2)* he may determine the sums to be paid out of the restrained account on the basis of what appears to be just and reasonable. This may be done where the Regulator has concluded that the restrained account contains money in relation to two or more liberated members. He will decide this by taking an overall view of transactions in the account before the restraining order was made.

91. *Subsection (4)* allows for regulations to be made to modify the provisions of the Pension Schemes Act 1993 where the Regulator directs trustees or managers of a pension scheme how to apply the repatriated amount (*subsection (2)(b)*).

92. Under *subsection (5)*, the Regulator may impose a civil penalty (under section 10 of the Pensions Act 1995) on a deposit taker who fails, without a reasonable excuse, to comply with a direction to pay the sum from the account in the manner specified in *subsection (2)*.

93. *Subsection (6)* states that the Regulator may impose a civil penalty (under section 10 of the Pensions Act 1995) on a trustee or manager who fails to take reasonable steps to comply with a direction to apply the sum from the account in the manner specified in *subsection (2)*.

Powers in relation to winding-up of occupational pension schemes

Section 22: Powers to wind up occupational pension schemes

94. This section amends section 11 of the Pensions Act 1995 (powers to wind up schemes) by allowing the Regulator to wind a scheme up during the assessment period in order to minimise the value of claims on the Pension Protection Fund (see Part 2 for claims on the Pension Protection Fund).

Section 23: Freezing orders

95. This section applies to occupational pensions schemes which are not money purchase schemes. *Subsection (2)* gives the Regulator the power to make a 'freezing order' where the Regulator is satisfied that it is necessary to protect the interests of the generality of members of the scheme and there is, or is likely to be if the order is not made, an immediate risk to the interests of members or the assets of the scheme.

96. The order will direct that, during the period it has effect, no benefits are to accrue to, or in respect of, members and that no winding up of the scheme may begin other than by an order of the Regulator (see *subsection (3)*).

97. An order may also contain other directions that have effect during the period of the order e.g. no new members, or specified class of member are to be admitted to the scheme; no further contributions or payments or specified contributions or payments are to be paid into the scheme by, or on behalf of, the employer, any members or any specified members; no

transfers, or no specified transfers of any member's rights under the scheme rules are to be made from the scheme.

98. A freezing order may not contain any direction which reduces the benefits payable to, or in respect of, a member during the period of the order to below the level to which the trustees or scheme managers would have the power to reduce them if winding up of the scheme had begun at the time the order took effect.

99. *Subsection (8)* provides that an order may require the trustees or managers to obtain an actuarial valuation.

Section 24: Consequences of freezing order

100. *Subsection (1)* deals with the consequences of a freezing order. Any action taken in contravention of the freezing order is void unless it is validated by an order under *section 26*.

101. *Subsection (2)* provides that a freezing order does not prevent an increase in benefits to accrue which would accrue apart from the order unless the order specifically so provides.

102. *Subsection (3)* provides that a freezing order does not prevent the scheme from being wound up by virtue of an order of the Regulator under section 11 of the Pensions Act 1995 (powers to wind up schemes).

103. *Subsection (4)* provides that if a freezing order states that no further contributions (or specified contributions) are to be paid during the period for which the order has effect then contributions which would have been due during that period do not have to be paid and any obligation to pay those contributions is treated as if it does not arise.

104. *Subsection (5)* provides that pension sharing orders and pension earmarking orders are not prevented from being complied with even if a freezing order is in place preventing transfers.

105. Regulations may modify any provisions of Chapter 4 (transfer values) and 5 (early leavers: transfer sums and contribution refunds) of Part 4 (protection for early leavers) of the Pension Schemes Act 1993 in their application to an occupational pension scheme in relation to which a freezing order is made containing a direction under *section 23(4)(f), (g) or (h)* (no transfers etc of member's rights from the scheme).

106. If a freezing order is not complied with then section 10 of the Pensions Act 1995 (civil penalties) will apply to a trustee or manager who fails to take all reasonable steps to comply with the order. If an employer is directed to repay certain contributions, and fails to do so without a reasonable excuse, a section 10 penalty will apply to the employer.

Section 25: Period of effect etc of freezing order

107. This section specifies that a freezing order has to state its duration, which cannot be longer than three months. However, the Regulator has the power to extend the order, but the total duration of the order cannot be more than six months. Under *section 101* (powers to revoke orders, notices or directions etc) an order can be amended or revoked by another order (which must state the date the amendment or revocation will take effect. It cannot have retrospective effect).

Section 26: Validation of action in contravention of freezing order

108. This section gives the Regulator power to validate by order an action which has been taken in contravention of a freezing order. It gives the trustees, managers of a scheme, or any other person directly affected by the action a statutory right to apply to the Regulator for a validation order.

Section 27: Effect of determination to wind up scheme on freezing order

109. This section sets out the period for which a freezing order has effect in cases where the Regulator has determined to wind up a scheme whilst the freezing order is in place. It ensures that when the Regulator, on notice to the affected parties, determines to wind-up a frozen scheme, the freezing period will extend to the conclusion of any reference to the Pensions Regulator Tribunal.

110. The Regulator retains the power to revoke the freezing order at any time.

Section 28: Effect of winding up order on freezing order

111. A freezing order ceases to have an effect when an order made under section 11 of the Pensions Act 1995 (power to wind up schemes) commences. The winding up is taken to begin at the time the freezing order came into effect. The Regulator may order a specified person to take specified steps within a specified period where the Regulator considers the steps are necessary as a result of the winding up of the scheme beginning at that time. Non-compliance with an order attracts a penalty under section 10 of the Pensions Act 1995 (civil penalties).

Section 29: Effect of assessment period under Part 2 on freezing order

112. A freezing order ceases to have an effect if an assessment period begins in relation to the scheme (see *section 132* (assessment periods)).

Section 30: Power to give a direction where freezing order ceases to have effect

113. This section gives the Regulator power to make directions when a freezing order ends and no winding up order (under section 11 of the Pensions Act 1995 (power to wind up schemes)) has been made. The Regulator may make an order that benefits stated in the order are to accrue under the scheme to, or in respect of, specified members of the scheme for the period when the freezing order was in effect or for part of that period. The Regulator may provide that specified conditions are to be met before benefits can accrue. These conditions can include: a requirement that specified benefits do not accrue to or in respect of specified members unless a contribution is made by or on behalf of the member; or that a specified amount of contributions be paid by or on behalf of the employer; or a requirement that such contributions are to be accepted for part or all of the period during which the freezing order was effective.

114. *Subsection (4)* specifies that where a freezing order contained a direction under *section 23(4)(d)* or *(e)* and any amount of any benefit under the scheme rules was not paid as a result of the direction, then the direction does not affect any entitlement to that benefit. Any benefit to which a member, or a person in respect of a member, remains entitled at the end of the freezing period, is an amount which falls due to the member, or person, at the end of the period.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

115. *Subsection (5)* provides that failure to comply with an order under this section will invoke a penalty under section 10 of the Pensions Act 1995 (civil penalties) on a trustee or manager of the scheme who has failed to take all reasonable steps to comply.

116. *Subsection (7)* provides that section 10 of the Pensions Act 1995 (civil penalties) will apply where an order has been made under this section which requires a contribution of a specified amount must be paid by, or on behalf of, the employer within a specified period. The civil penalty will apply if the employer has failed to comply and does not have a reasonable excuse. Where the amount remains unpaid at the end of a specified period, it will be treated as a debt due from the employer to the trustees or managers of the scheme. Notice of the failure to pay must be given to the Regulator by the trustees or managers, except in circumstances prescribed in regulations. Section 10 of the Pensions Act 1995 (civil penalties) will apply to any failure to give notice where the trustees or managers have not taken all reasonable steps.

Section 31: Notification of trustees, managers, employers and members

117. The Regulator must notify the trustees, managers and sponsoring employer of a scheme as soon as reasonably practicable after a freezing order or an order under *section 26, 28 or 30* has been made. The Regulator may order the trustees or managers of the scheme to inform all the scheme members, or members specified in the order, that the order has been made and of its effect. The period in which this notification must take place will be specified in the order.

118. Failure to comply with the directions contained in the order will invoke a penalty under section 10 of the Pensions Act 1995 (civil penalties).

Section 32: Sections 23 to 31: supplementary

119. This provision enables an order under *sections 23, 25, 26, 28, 30 and 31* to be made even if legislation, a legal rule or a rule of the scheme would have prevented this apart from this provision and without regard to any procedural requirements which such legislation, legal rule or scheme rule would otherwise impose.

120. *Subsection (2)* stipulates that the Regulator cannot make an order as mentioned in *subsection (1)* if, in doing so it would contravene section 6(1) of the Human Rights Act 1998 (unlawful for public authority to act in contravention of a Convention right).

Trustees of occupational pension schemes

Section 33: Prohibition orders

121. This section substitutes a new section 3 of the Pensions Act 1995 (prohibition orders). The new section enables the Regulator to prevent a person from acting as a trustee, either in relation to a particular scheme or a particular description of trust schemes or trust schemes in general, wherever it considers that the person is not a “fit and proper” person to act as such. It is expected that the Regulator will have regard to certain considerations when deciding whether a trustee is fit and proper to act as such, including (but not limited to):

- the trustees’ probity, competence and soundness of judgement;
- the diligence with which he is fulfilling his responsibilities as trustee;

- whether the interests of members of the scheme or schemes in question are in the opinion of the Regulator being prejudiced by his acting as trustee;
- whether he has contravened any provision of the pensions legislation relating to the provision or management of pensions in a country or territory outside Great Britain.

122. The Regulator will issue guidance on how it will interpret the term “fit and proper”.

123. By virtue of subsection (2) of this substitute section, where a prohibition order is made under subsection (1) against a person in respect of one or more schemes of which he is a trustee, the order will have the effect of removing him as a trustee from all schemes to which the order relates.

Section 34: Suspension orders

124. This section amends section 4 of the Pensions Act 1995 (suspension orders) in relation to suspension orders. The current provision is extended so that a trustee can be suspended where consideration is being given to proceedings against a trustee, rather than just when proceedings have started.

Section 35: Appointments of trustees by the Regulator

125. *Subsection (1)* makes amendments to section 7 of the Pensions Act 1995 (appointment of trustees) omitting subsection (4) of that section which allowed regulations to prescribe additional circumstances when Opra (referred to as “the authority”) could appoint a trustee of a trust scheme. It also inserts a new subsection 5A in the Pensions Act 1995 which will allow applications to be made to the Regulator for the appointment of trustees to trust schemes, under the powers in section 7(3)(a) or (c) of that Act. Such an application can be made by the trustees, the employer, or any member of the scheme.

126. *Subsection 2* amends section 8 of the Pensions Act 1995 (consequences of appointment of trustees under section 7) so that the fees and expenses of any trustee appointed by the Regulator may be required to be paid by the employer or out of the scheme, or by both (at the discretion of the Regulator).

Section 36: Independent Trustees

127. *Subsection (2)* amends section 22 of the Pensions Act 1995 (circumstances in which provisions relating to independent trustees apply) so that section 23 of that Act (power to appoint independent trustees) will also apply where an interim receiver of the employer’s property is appointed at any time during an assessment period (within the meaning of *section 132* of this Act); and at any time when the scheme is authorised to continue as a closed scheme (see *section 153* of this Act).

128. New subsection (2B) and (2C) are intended to ensure that the Regulator, the Board of the Pension Protection Fund and the trustees or managers of the scheme are notified of certain events which are relevant to determining whether section 22 of the Pensions Act 1995 applies.

129. *Subsection (3)* substitutes sections 23 and 24 of the Pensions Act 1995, with a new section 23 (power to appoint independent trustees). Subsection (1) of new section 23 gives the Regulator power to appoint an independent trustee where section 22 of the Pensions Act 1995 applies and where that person has been registered in accordance with subsection (4). By

virtue of subsection (2) of new section 23 no more than one independent trustee may be appointed under section 23(1) at any one time. Subsection (3) of new section 23 sets out the criteria that must be met so that a person can be considered as an independent person in order to be appointed as an independent trustee under section 23. The Regulator must maintain a register of independent trustees and subsection (4) of new section 23 allows for regulations whereby the Regulator can compile and maintain the register of persons who satisfy the prescribed conditions for registration as an independent trustee. These regulations may provide for copies of the register, or extracts from it, to be provided to prescribed persons in prescribed circumstances. They may also provide for the inspection of the register by prescribed persons in prescribed circumstances. It will also be possible to charge a reasonable fee for providing copies or permitting inspection.

130. *Subsection (4)* amends section 25 of the Pensions Act 1995 (appointment and powers of independent trustees; further provisions). Where an independent trustee has been appointed and he ceases to be an independent person (see section 23(3) of the Pensions Act 1995 – as substituted by subsection (3) of this section) he must, as soon as reasonably practical, notify the Regulator in writing. Section 10 of the Pensions Act 1995 (civil penalties) will apply where there is a failure to give such notice.

131. An order appointing an independent trustee may provide for any fees or expenses of the trustees to be paid by the employer or out of the resources of the scheme, or by a combination of both. Where the fees of the appointed trustee are to be met from the resources of the scheme, the independent trustee's fee will take priority over all other claims to be met by the resources of the scheme.

Section 37: Disqualification

132. By virtue of this section, which amends section 30(1) of the Pensions Act 1995 (consequences of disqualification under section 29), disqualification will automatically remove a trustee. This aligns disqualification under section 29 of that Act with the effect of a prohibition order under section 3 of that Act.

Contribution notices where avoidance of employer debt

Section 38: Contribution notices where avoidance of employer debt

133. This section sets out the Regulator's power to issue a contribution notice where certain acts or deliberate failures to act have occurred.

134. *Subsection (1)* provides for this section to apply to an occupational pension scheme other than a money purchase scheme, a prescribed scheme or a scheme of a prescribed description.

135. *Subsection (2)* enables the Regulator to issue a contribution notice to a person stating that the person is under a liability to pay the sum specified in the notice. The sum is payable to the trustees or managers of the scheme or to the Board of the Pension Protection Fund if it has assumed responsibility for the scheme.

136. *Subsection (3)* sets out the conditions for the issuing of a contribution notice. The Regulator can only issue a contribution notice to a person if -

- the Regulator is of the opinion that the person was a party to an act or deliberate failure to act which falls within *subsection (5)*;
- at any time during “the relevant period” the person was the employer in relation to the scheme or connected with or an associate of that employer;
- the Regulator is of the opinion that, the person, in being a party to the act or failure, was not acting in accordance with his functions as an insolvency practitioner;
- and the Regulator is of the opinion that it is reasonable to require that person to pay the sum specified in the notice.

137. *Subsection (4)* provides that the Regulator cannot issue a contribution notice in prescribed circumstances to persons of a prescribed description.

138. *Subsection (5)* sets out what constitutes an act or failure to act in relation to this section. For an act or failure to fall within this subsection the Regulator must be of the opinion that the main purpose or one of the main purposes of the act or failure was to prevent a debt due or which might become due under section 75 of the Pensions Act 1995 (deficiencies in the assets) from being recovered, or otherwise than in good faith to prevent a section 75 debt from becoming due, to compromise or otherwise settle such a debt or to reduce the amount of such a debt which would otherwise become due. *Subsection (5)* also provides that the act or failure to act must have occurred on or after 27 April 2004 and includes other requirements as to when it must have occurred.

139. *Subsection (6)* provides that those who are party to an act or failure includes persons who knowingly assist in the act or failure and sets out the meaning of the term the “relevant period”.

140. *Subsection (7)* sets out that, in considering if it is reasonable to impose liability on someone to pay a contribution notice sum, the Regulator should bear in mind matters the Regulator thinks relevant, (including where relevant):

- the financial circumstances of that person;
- the degree of involvement of that person in the relevant act or failure to act;
- the relationship that person has or has had with the employer, (including where the employer is a company within the meaning of section 435 of the Insolvency Act 1986, whether the person has or has had control of the employer);
- any connection of the person with the scheme;
- whether the act or failure to act was a notifiable event under *section 69* of this Act (duty to notify the Regulator of certain events); and
- any prescribed matters.

141. *Subsection (8)* provides that for the purposes of *section 38*, references to a debt due under section 75 of the Pensions Act 1995 (deficiencies in the assets) include a contingent debt under that section. *Subsection (9)* provides for the reference in *subsection (5)(a)(ii)* to preventing a debt becoming due to be read, in the case of a contingent debt under section 75 of the Pensions Act 1995, as including a reference to preventing the occurrence of the events

upon which the debt is contingent. *Subsection (10)* sets out relevant definitions of connected or associated persons from other legislation that are applied to this section. *Subsection (11)* contains the definition of “insolvency practitioner”.

Section 39: The sum specified in a section 38 contribution notice

142. This section defines how the amount that a person is required to pay by way of a contribution notice under *section 38* is to be determined.

143. *Subsection (1)* provides that the amount specified by the Regulator in a contribution notice under *section 38* must not exceed the whole of the shortfall sum in relation to the scheme. The amount specified may be less than the whole of the shortfall sum. *Subsection (2)* sets out how the amount of the shortfall sum is to be calculated. Where at “the relevant time” a debt was due from the employer under section 75 of the Pensions Act 1995, then the shortfall sum is the amount that the Regulator estimates the section 75 debt to be at that time. If at “the relevant time” no such debt was due, the shortfall sum is the amount that the Regulator estimates would be the section 75 debt if *subsection (2)* of that section applies and “the relevant time” were the time designated for the purposes of that section.

144. *Subsection (3)* allows the Regulator in specified circumstances to increase the amount calculated under *subsection (2)(a) or (2)(b)* by way of a debt by any amount it considers appropriate. *Subsection (4)* sets out that “the relevant time” is the time of the act or, in the case of a failure to act, either the time when the failure occurred or if the failure continued for a period of time, the time which the Regulator determines during that period. *Subsection (5)* provides that any reference to a debt due under section 75 of the Pensions Act 1995 includes a contingent debt under that section.

Section 40: Content and effect of a section 38 contribution notice

145. This section makes provision in respect of the content and effect of contribution notices under *section 38*. It requires the contribution notice to contain a statement of the matters which it is asserted constitute the act or failure to act which falls within *section 38(5)*. The Regulator can decide to impose joint and several liabilities on recipients of contribution notices in certain circumstances where more than one contribution notice has been issued as a result of the same act or failure to act. The section also provides that the contribution is a debt due to the trustees or managers of the scheme. It also deals with the situation where the Board of the Pension Protection Fund has become involved with the scheme during an assessment period, in which case it will take over enforcement of the debt under the contribution notice from the trustees or managers and the Regulator.

146. *Subsection (2)* sets out what matters the contribution notice should contain. The notice must specify the act or failure to act, the amount of the debt, and a list of persons to whom the contribution notices have been issued as a result of the same act or failure to act.

147. *Subsection (3)* provides that, where the contribution notice states that the person is under a liability to pay the sum specified to the trustees or managers of the scheme, the sum is to be a debt due from the person to the trustees or managers. *Subsection (4)* allows the Regulator in such a case to exercise the same powers as the trustees or managers of the scheme in recovering this debt.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

148. *Subsection (5)* states that, during the assessment period (as defined in *section 132*), the Board of the Pension Protection Fund can exercise the rights and powers that the Regulator or the trustees or managers would normally have in respect of the recovery of the sum specified in the contribution notice. *Subsection (6)* provides for any debt paid in such a case to the Board during an assessment period, to be paid over to the trustees or managers of the scheme.

149. *Subsection (7)* provides that, where the contribution notice states that the person is under a liability to pay the sum specified to the Board, the sum is to be a debt due from the person to the Board.

150. *Subsection (8)* provides that a notice may state that the person issued with the contribution notice is jointly and severally liable for the debt with any other person specified in the notice as a person to whom a “corresponding contribution notice” is issued. *Subsection (9)* sets out the meaning of a “corresponding contribution notice”.

151. *Subsection (10)* states that a debt due under a contribution notice should not be taken into account when calculating the assets and liabilities of the scheme in relation to *section 75(2)* and (4) of the Pensions Act 1995 (deficiencies in the assets).

Section 41: Section 38 contribution notice: relationship with employer debt

152. This section deals with the situation where there is an outstanding debt due under *section 75* of the Pensions Act 1995 (deficiencies in the assets) from the employer in relation to the scheme at the same time as an outstanding debt due under a contribution notice. The Regulator will have power to direct the trustees or managers of the scheme from recovering the *section 75* debt pending recovery of the contribution notice debt.

153. *Subsection (1)* states that this section applies where a contribution notice is issued to a person under *section 38* and condition A or B is met as set out in *subsection (2) or (3)*. *Subsection (2)* sets out condition A. This is when there is a *section 75* debt due from the employer to the trustees or managers of the scheme or the Board of the Pension Protection Fund at the time that the contribution notice is issued. *Subsection (3)* sets out condition B. This is when a *section 75* debt becomes due from the employer after the contribution notice has been issued but before the debt under the contribution notice has been paid.

154. *Subsection (4)* states that the Regulator can direct the trustees or managers not to recover the debt due under *section 75* of the Pensions Act 1995 (deficiencies in the assets) pending the recovery of the contribution notice debt. *Subsection (5)* provides for a civil penalty under *section 10* of the Pensions Act 1995 (civil penalties) to apply where trustees or managers of a scheme fail to comply with a direction issued to them under *subsection (4)*.

155. *Subsection (6)* provides that any sums paid to the trustees or managers of the scheme or the Board of the Pension Protection Fund as a result of the contribution notice are to be treated as reducing the debt under *section 75* of the Pensions Act 1995 (deficiencies in the assets). *Subsection (7)* provides that where a payment is made in respect of the *section 75* debt then a recipient of a contribution notice may ask the Regulator to reduce the amount that has to be paid under the contribution notice.

156. *Subsection (8)* provides that an application under *subsection (7)* must be made as soon as reasonably practicable after a payment is made. *Subsection (9)* provides that the Regulator

may reduce the amount that has to be paid under the contribution notice and issue a revised contribution notice specifying the revised sum.

157. *Subsection (10)* provides that the Regulator must consider a number of factors when considering whether to reduce the amount payable under the contribution notice.

158. *Subsection (11)* states that where the person to whom the revised contribution notice is issued was originally jointly and severally liable for the debt with other persons, the Regulator must also issue a revised contribution notice to those other persons specifying the revised sum and their joint and several liability with the person for the sum of the debt.

159. *Subsection (12)* states that for the purposes of *section 41*, references to a debt or the amount of debt due under *section 75* of the Pensions Act 1995 (deficiencies in the assets) include a contingent debt under that section and the amount of any such debt.

Section 42: Section 38 contribution notices: clearance statements

160. An application may be made to the Regulator for the issue of a clearance statement. *Subsection (2)* specifies that a clearance statement is a statement made by the Regulator that in its opinion in the circumstances described in the application, the applicant would not be a party to an act or a deliberate failure to act falling within *section 38(5)(a)*; it would not be reasonable to impose any liability on the applicant under a contribution notice; or such requirements under *section 38* as may be prescribed would not be satisfied in relation to the applicant.

161. *Subsection (3)* provides that following an application for a clearance statement the Regulator may request further information from the applicant and may invite the applicant to amend the circumstances described in their application.

162. *Subsection (4)* requires the Regulator, as soon as reasonably practicable, to determine whether to issue the clearance statement, and, if it so determines, to issue the statement.

163. *Subsection (5)* specifies that a *section 40* clearance statement is binding on the Regulator in relation to exercising the *section 38* power to issue a contribution notice to the applicant unless the circumstances regarding the exercise of the *section 38* power are not the same as the circumstances described in the application for a *section 40* clearance statement and the differences in those circumstances is material to the exercise of the *section 38* power.

Financial support directions

Section 43: Financial support directions

164. This section gives the Regulator power to issue a direction requiring that the recipient put in place appropriate financial support for an occupational pension scheme. This power arises where a sponsoring employer of a scheme is a service company, or is insufficiently resourced.

165. *Subsection (1)* provides that *section 43* applies in relation to occupational pension schemes other than money purchase schemes, prescribed schemes or schemes of a prescribed description.

166. *Subsection (2)* provides that the Regulator may issue a financial support direction if it is of the opinion that the employer in relation to the pension scheme is a service company or

is insufficiently resourced (as defined in *section 44*) at “the relevant time”. The relevant time is the time within a prescribed period which ends with the determination by the Regulator to exercise the power to issue the financial support direction in question (see *subsection (9)*).

167. *Subsection (3)* sets out that a financial support direction requires the person or persons to whom it is issued to secure that financial support for the scheme is put in place within the timescale specified by the Regulator in the direction, that this financial support remains in place until the scheme ceases to exist and that notice is given to the Regulator of prescribed events.

168. *Subsection (4)* provides that the Regulator may issue a financial support direction to one or more persons.

169. *Subsections (5) and (6)* set out the persons to whom a financial support direction can be issued. They also provide that the Regulator can only issue a financial support direction if it is of the opinion that it is reasonable to impose the requirements of the direction on that person

170. *Subsection (7)* sets out the matters which the Regulator should consider before deciding whether to issue a financial support direction on a particular person.

171. *Subsection (8)* provides that a financial support direction must identify all the persons to whom the direction is issued.

172. *Subsection (10)* provides that, for the purposes of *subsection (3)*, a scheme is in existence until it is wound up. *Subsection (11)* provides that no duty to which a person is subject is to be regarded as contravened merely because of any information or opinion contained in a notice given by virtue of *subsection (3)(c)* (notice given to the Regulator of prescribed events). This is also subject to *section 311* (protected items).

Section 44: Meaning of “service company” and “insufficiently resourced”

173. This section defines the meaning of “service company” and “insufficiently resourced” for the purposes of *section 43*. *Subsection (2)* defines “service company” as a company whose turnover, as shown in the latest available company accounts, is solely or principally derived from amounts charged for the provision of the services of employees of the company to other companies in the same group.

174. *Subsection (3)* sets out that an employer is “insufficiently resourced” if the value of the resources of the employer is less than the amount which is a set percentage (to be prescribed in regulations) of the estimated debt which would become due from the employer under *section 75* of the Pensions Act 1995 (deficiencies in the assets) if the scheme were to wind up, and there is a person who is connected with or an associate of the employer the value of whose resources is not less than the amount which is the difference between the value of the resources of the employer and the amount which is the set percentage of the estimated *section 75* debt.

175. *Subsection (4)* provides that, for the purposes of *subsection (3)* what constitutes a person’s resources and their value are to be determined, calculated and verified in a prescribed manner. *Subsection (5)* provides that the “estimated *section 75* debt” is the amount which the Regulator estimates as the amount of debt which would become due from the employer if *section 75(2)* of the Pensions Act 1995 applied and “the relevant time” were the

time designated for the purposes of that subsection. *Subsection (6)* sets out that in estimating the section 75 debt in relation to the scheme in *subsection (5)* the amount of any debt actually due under that section is to be disregarded. *Subsection (7)* provides that “the relevant time” has the same meaning as in *section 43*.

Section 45: Meaning of “financial support”

176. This sets out the types of arrangement which may be put in place in order to comply with a direction to secure financial support for the scheme. *Subsection (1)* provides that such arrangements must be approved by the Regulator.

177. *Subsection (2)* sets out that a financial support arrangement can be:

- the application of joint and several liability for the whole part of the employer’s pension liabilities across the whole company group, so that the debt on the employer could be claimed against any member of the group; or
- an agreement by the holding company of the group, which meets prescribed requirements (the prescribed requirements will provide that the holding company of the group must be located in the EU) to meet the whole or part of the employer’s pension liabilities; or
- the provision of an arrangement which meets prescribed requirements and whereby additional financial resources are provided to the scheme (for example an appropriate bank guarantee or other arrangement); or
- such other arrangements as may be prescribed.

178. *Subsection (3)* provides that the Regulator cannot issue a notice under *subsection (1)* unless it is satisfied that the arrangement is or arrangements are reasonable in the circumstances. *Subsection (4)* defines the meaning of “employer’s pension liabilities”.

Section 46: Financial support directions: clearance statements

179. An application may be made to the Regulator for the issue of a clearance statement within *subsection (2)* in relation to circumstances described in the application and relating to an occupational pension scheme. *Subsection (2)* specifies that a clearance statement is a statement made by the Regulator, that in its opinion, in the circumstances described in the application the employer would not be a service company for the purposes of *section 43*; the employer in relation to the scheme would not be insufficiently resourced for the purposes of *section 43*; it would not be reasonable to impose the requirements of a financial support direction, in relation to the scheme, on the applicant.

180. *Subsection (3)* states the Regulator may request further information from the applicant and may invite the applicant to amend the application to modify the circumstances described.

181. *Subsection (4)* requires the Regulator, as soon as reasonably practicable, to determine whether to issue the clearance statement, and, if it so determines, to issue the statement.

182. *Subsection (5)* specifies that a clearance statement issued by the Regulator is binding in relation to the power to issue a financial support direction in relation to the scheme to the applicant unless the circumstances in relation to which the exercise of the power arises are

not the same as the circumstances described in the application, and the difference in those circumstances is material to the exercise of the power.

Section 47: Contribution notices where non-compliance with financial support direction

183. *Subsection (1)* provides that this section applies where there is non-compliance with a financial support direction under *section 43*. *Subsection (2)* provides for the Regulator to issue a notice requiring that a contribution be made to the scheme. The Regulator may issue a contribution notice to any one or more of the persons to whom the original direction under *section 43* was issued. However, *subsection (3)* provides that the Regulator can only do so if it is of the opinion that it is reasonable to impose liability on that person to pay the sum specified in the notice.

184. *Subsection (4)* sets out that, in considering whether it is reasonable to impose liability, the Regulator should have regard to all relevant matters including (where relevant):

- whether the person has taken reasonable steps to secure compliance with the financial support direction;
- the relationship which the person has or has had with the employer (including whether the person has or has had control of the employer).
- in the case of a person to whom the financial support direction was issued a person falling within *section 43(6)(b) or (c)*, the value of any benefits received directly or indirectly by that person from the employer;
- the relationship which the person has or has had with the parties to any arrangements put in place in accordance with the direction (this consideration would be particularly appropriate if non-compliance had arisen as a result of an arrangement lapsing);
- any connection or involvement which the person has or has had with the pension scheme;
- the financial circumstances of the person; and
- such other matters as may be prescribed.

185. *Subsection (5)* sets out that a contribution notice cannot be issued in respect of a scheme once the Board of the Pension Protection Fund has assumed responsibility for the scheme.

Section 48: The sum specified in a section 47 contribution notice

186. This section defines the maximum contribution that the Regulator can require by reference to the debt under *section 75* of the Pensions Act 1995 (deficiencies in the assets) which was due, or would have been due, at the time of non-compliance with the financial support direction.

187. *Subsection (1)* states that the Regulator can specify in the contribution notice the whole or part of the shortfall sum in relation to a scheme. *Subsection (2)* sets out how the amount of the shortfall sum should be calculated. Where, at the “time of non-compliance”, a debt was due from the employer under *section 75* of the Pensions Act 1995, the shortfall sum is the amount which the Regulator estimates the debt to be at that time, or, if no such debt was due, the shortfall sum is the amount of the debt that the Regulator estimates would

become due if subsection (2) of section 75 of the Pensions Act 1995 applied and the “time of non-compliance” were the time designated for the purposes of that subsection.

188. *Subsection (3)* sets out that the “time of non-compliance” is where-

- financial support for the scheme is not put in place within the period specified in the Regulator’s direction, the time immediately after the expiry of that period;
- a financial support arrangement lapses, the time when the financial support ceased to be in place;
- there is a failure to notify the Regulator of a prescribed event in respect of the financial support, the time when the prescribed event occurred; and
- more than one type of non-compliance applies, whichever of those times the Regulator determines.

Section 49: Content and effect of a section 47 contribution notice

189. *Subsection (2)* provides that the contribution notice must contain a statement of the matters which constitute the non-compliance with the direction and specify the sum which the person identified in the notice is under a liability to pay. *Subsection (3)* provides that the sum specified in the contribution notice is to be treated as a debt due to the trustees or managers of the scheme.

190. *Subsection (4)* allows for the Regulator to enforce the payment of any sum due under a contribution notice on behalf of the trustees or managers. *Subsection (5)* deals with the situation where the Board of the Pension Protection Fund has become involved with the scheme during an assessment period, in which case it will take over enforcement from the trustees or managers or the Regulator, and – as provided for in *subsection (6)* – any debt paid to the Board in respect of a debt due by virtue of a contribution notice during this time must be passed on by the Board to the trustees or managers of the scheme.

191. *Subsection (7)* provides that the contribution notice must identify any other person to whom contribution notices have been issued in respect of the same non-compliance and the sums specified in each of those notices. *Subsection (8)* provides that a contribution notice may state that the person issued with the contribution notice is jointly and severally liable for the debt with any other person specified in the notice as a person to whom a “corresponding contribution notice” is issued. *Subsection (9)* sets out the meaning of a “corresponding contribution notice” *Subsection (10)* states that a debt due under a contribution notice should not be taken into account when calculating the assets and liabilities of the scheme in relation to section 75(2) and (4) of the Pensions Act 1995 (deficiencies in the assets).

Section 50: Section 47 contribution notice: relationship with employer debt

192. This section deals with the situation where there is an outstanding debt due under section 75 of the Pensions Act 1995 (deficiencies in the assets) from the employer in relation to the scheme at the same time as an outstanding debt due to the scheme under a *section 47* contribution notice. The Regulator will have power to direct the trustees or managers of the scheme from recovering the section 75 debt pending recovery of the debt due by virtue of the contribution notice where it would not be sensible for both to happen at once.

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193. *Subsection (1)* states that this section applies where a contribution notice is issued to a person under *section 41* and condition A or B is met as set out in *subsection (2) or (3)*. *Subsection (2)* sets out condition A. This is when there is a section 75 debt due from the employer in relation to the scheme to the trustees or managers of the scheme or the Board of the Pension Protection Fund at the time the contribution notice is issued. *Subsection (3)* sets out condition B. This is when a section 75 debt becomes due from the employer in relation to the scheme after the contribution notice has been issued and before the debt under the contribution notice has been paid.

194. *Subsection (4)* states that the Regulator can direct the trustees or managers not to recover the debt due under section 75 of the Pensions Act 1995 (deficiencies in the assets) pending the recovery of the contribution notice debt. *Subsection (5)* provides for section 10 of the Pensions Act 1995 (civil penalties) to apply where trustees or managers of a scheme fail to comply with a direction issued to them under *subsection (4)*.

195. *Subsection (6)* provides that any sums paid to the trustees or managers of the scheme or the board of the Pension Protection Fund as a result of the contribution notice are to be treated as reducing the debt under section 75 of the Pensions Act 1995. *Subsection (7)* provides that where a payment is made in respect of a section 75 debt then the person to whom a contribution notice is issued may ask the Regulator to reduce the amount that has to be paid under the contribution notice.

196. *Subsection (8)* provides that an application under *subsection (7)* must be made as soon as reasonably practicable after a payment is made. *Subsection (9)* provides that the Regulator may reduce the amount that has to be paid under the contribution notice and issue a revised contribution notice specifying the revised sum.

197. *Subsection (10)* provides that the Regulator must consider a number of factors when considering whether to reduce the amount payable under the contribution notice.

198. *Subsection (11)* states that where the person to whom the revised contribution notice is issued was originally jointly and severally liable for the debt with other persons the Regulator must also issue a revised contribution notice to those other persons specifying the revised sum and their joint and several liability with the person for the sum of the debt.

Section 51: Sections 43 to 50: interpretation

199. *Subsection (1)* defines “group of companies” as a holding company and its subsidiaries. “Holding company” and “subsidiaries” have the meaning given by section 736(1) of the Companies Act 1985. *Subsection (2)* provides that any reference to a debt due under section 75 of the Pensions Act 1995 (deficiencies in assets) includes a contingent debt under that section. *Subsection (3)* provides that section 249 (connected persons) and section 435 (associated persons) of the Insolvency Act 1986 apply for the purposes of *sections 43 to 50* as they do for the purposes of that Act. It also provides that section 74 of the Bankruptcy (Scotland) Act 1985 (associated persons) applies as it applies for the purposes of that Act.

Transactions at an undervalue

Section 52: Restoration orders where transactions at an undervalue

200. The purpose of this section is to ensure that, when an employer has been subject to a “relevant event”, if the assets of the scheme have been reduced by virtue of a transaction at an

undervalue involving assets of the scheme, the Regulator may make a restoration order to put the position back to what it would have been had the transaction not occurred.

201. *Subsection (1)* provides that the provision only applies in relation to an occupational pension scheme which is not a money purchase scheme or a prescribed scheme or a scheme of a prescribed description. *Subsection (2)* provides that the Regulator may only make an order in certain circumstances where a “relevant event” has occurred and where the transaction was entered into on or after 27th April 2004 and not more than 2 years before the occurrence of the “relevant event”.

202. *Subsection (3)* describes the purpose of a restoration order – to restore the position to what it would have been had the transaction not been entered into. *Subsection (4)* defines a “relevant event” as an insolvency event in relation to the employer, or an application to or notification from the Board of the Pension Protection Fund under *section 129*, which occurs on or after the “appointed day”.

203. *Subsection (5)* defines the meaning of “appointed day” and provides that the meaning of insolvency event under *section 121* applies when deciding if and when such an event has occurred in relation to the employer.

204. *Subsection (6)* defines a ‘transaction at an undervalue’ as a transaction which is entered into by the trustees or managers or an appropriate person with a person where no consideration is to be provided towards the scheme or where the consideration is significantly less than the value of the consideration provided by or on behalf of the trustees or managers. An ‘appropriate person’ is defined in *subsection (7)* as a person of a prescribed description who is entitled to exercise powers in relation to the scheme. *Subsection (8)* provides that references to “assets” in this section and *section 53* include future assets and that references to “transaction” include a gift, agreement or arrangement. *Subsection (9)* provides that this section does not prejudice the use of any other remedy in respect of the action (e.g. a claim for breach of trust).

Section 53: Restoration orders: supplementary

205. This section provides that a restoration order may require any assets or property which were transferred or received as part of the transaction to be transferred back to the scheme (or the Board of the Pension Protection Fund where it has assumed responsibility for the scheme); or may require any person to pay a sum as specified by the Regulator to the scheme or the Board of the Pension Protection Fund (*Subsection (2)*). *Subsection (3)* ensures that a restoration order has no effect to the extent that it prejudices any interest in property which is acquired in good faith and for value. However, *subsection (5)* adds that, where certain people have acquired an interest in a property or received a benefit as a result of the transaction then, unless the contrary is shown, it is presumed that the interest was not acquired or the benefit was not received in good faith. *Subsection (5)* lists these people as:

- one of the trustees, managers or “appropriate persons” (as defined) who entered into the transaction and persons who are connected or associated with such persons at the time of the acquisition or receipt;
- any person who has notice of the fact that the transaction was at an undervalue at the time of the acquisition or receipt; or

- any person who, at the time of the acquisition or receipt, is a trustee or manager, or the employer in relation to the scheme, or is connected or associated with such persons.

206. *Subsection (6)* provides that sections 249 (connected persons) and 435 (associated persons) of the Insolvency Act 1986 apply for the purposes of this section as they do for the purposes of that Act. Section 74 of the Bankruptcy (Scotland) Act 1985 (associated persons) also applies as it does for that Act. *Subsection (7)* provides that references in the section to “property” cover a broad definition which includes money, goods, things in action, land and every description of property wherever situated, obligations and every description of interest.

207. *Subsection (8)* provides that references in this section to where the Board has assumed responsibility for a scheme are to where the Board has assumed responsibility under Chapter 3 of Part 2 of the Act (pension protection).

Section 54: Content and effect of a restoration order

208. *Subsection (2)* provides that a restoration order issued by the Regulator under section 52 must specify the period within which any obligation imposed must be complied with. *Subsection (3)* provides that, where the order imposes an obligation on a person (A) to transfer or pay a sum of money to a person (B), the sum is to be treated as a debt due from A to B. *Subsection (4)* provides that if the debt is due to the trustees or managers of the scheme, the Regulator can enforce the debt on their behalf. *Subsection (5)* deals with the situation where the Board of the Pension Protection Fund has become involved with the scheme during an assessment period, in which case the Board will take over enforcement of the debt. *Subsection (6)* provides that, where any amount is transferred or paid to the Board in respect of a debt due under a restoration order during an assessment period, the Board must pay that amount to the trustees or managers of the scheme.

Section 55: Contribution notice where failure to comply with restoration order

209. Whereas *section 54* provides for enforcement of the restoration order where it imposes an obligation to transfer or pay a sum of money, this section gives the Regulator power to issue a contribution notice where there is a failure to comply with a restoration order which has imposed an obligation to transfer assets other than money, such as property or land for example. *Subsection (2)* sets out that a contribution notice issued under this section imposes a duty on the person to whom it is issued to pay a specified sum to the trustees or managers of the scheme, or the Board of the Pension Protection Fund where it has assumed responsibility for the scheme. *Subsection (3)* provides that the contribution due may be either the whole or a specified part of the shortfall sum in relation to the scheme. *Subsection (4)* defines the “shortfall sum” as the Regulator’s estimate of the amount of the decrease in the value of the assets of the scheme as a result of the transaction at an undervalue.

Section 56: Content and effect of a section 55 contribution notice

210. *Subsection (2)* sets out that a contribution notice must contain a statement of the matters which constitute the failure to comply with the restoration order and specify the sum which the person is under a liability to pay. *Subsection (3)* provides that where the liability set out in a contribution notice is a liability to pay the trustees or managers of the scheme, the sum is a debt due from the person specified in the notice to the trustees or managers. *Subsection (4)* provides that the Regulator can enforce the debt on behalf of the trustees or

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managers of the scheme. *Subsection (5)* deals with the situation where the Board of the Pension Protection Fund has become involved with the scheme during an assessment period, in which case it will take over enforcement of the debt. *Subsection (6)* provides that, where any amount is paid to the Board in respect of a debt due under a contribution notice during an assessment period, the Board must pay that amount to the trustees or managers of the scheme. *Subsection (7)* provides that, where the contribution notice states that the liability is to pay the Board, the sum is treated as a debt due to the Board.

Sections 38 to 56: partnerships and limited liability partnerships

Section 57: Sections 38 to 56: partnerships and limited liability partnerships

211. *Subsection (1)* provides that for the purposes of *sections 38 to 56*, regulations may modify any of the definitions mentioned in *subsection (2)* in relation to a partnership or a partner in a partnership or a limited liability partnership or a member of such a partnership. *Subsection (3)* states that regulations may also provide that any provision of *sections 38 to 51* applies with such modifications as may be prescribed in relation to any case where a partnership is or was the employer in relation to an occupational pension scheme or connected with or an associate of the employer. Similarly regulations may also provide that any provision of *sections 38 to 51* applies with such modifications as may be prescribed in relation to any case where a limited liability partnership is the employer in relation to an occupational pension scheme or connected with or an associate of the employer.

212. *Subsection (4)* specifies that regulations may also provide that any provision of *sections 52 to 56* applies with such modifications as may be prescribed in relation to a partnership or a limited liability partnership. *Subsections (5) and (6)* define “partner”, “partnership”, and “limited liability partnership” and “member” of such a partnership. *Subsection (7)* stipulates that this section will not prejudice *section 307* (power to modify this Act in relation to certain categories of scheme) and *section 318(4)* (power to extend the meaning of “employer”).

Applications under the Insolvency Act 1986

Section 58: Regulator’s right to apply under section 423 of Insolvency Act 1986

213. This section allows the Regulator to apply for an order under Section 423 of the Insolvency Act 1986 (transactions defrauding creditors) if the pension scheme is owed money by the employer and either:

- the Board of the Pension Protection Fund has obtained an actuarial valuation of the fund, which outlines both the assets and the protected liabilities of the scheme (the cost of benefits for members to the same level which would be paid by the Board of the Pension Protection Fund, non member liabilities of the scheme and the estimated cost of wind-up) and the value of the assets are not sufficient to meet these liabilities at the time of the qualifying insolvency event; or
- the trustees or managers of the scheme have obtained an actuarial valuation which indicates that the funding objective (see *section 222* (the statutory funding objective)) is not being met.

214. If the debtor is declared bankrupt, a corporate body which is being wound-up or is in administration, or a partnership which is being wound up or is in administration, then the Regulator must get the court's permission to make an application under section 423 of the Insolvency Act 1986.

215. An application made under this section is treated as being made on behalf of the victims of the transaction (trustees, members of the scheme or the Board of the Pension Protection Fund).

Register of schemes

Section 59: Register of occupational and personal pension schemes

216. This section compels the Regulator to set up and keep a register of pension schemes. The Regulator must record in the register the most up to date "registrable information" that it has been provided with by schemes. The Regulator will record any notice received by the Regulator that a scheme has been wound up or has ceased to be registrable. The Regulator will also record on the register information relating to the involvement of the Board of the Pension Protection Fund with a scheme. If and when a transfer notice under *section 160* (transfer notice) is issued by the Board of the Pension Protection Fund and copied to the Regulator, the Regulator must record that fact.

217. The Regulator may record the information collected in whatever manner it considers appropriate. The register will be used by the Regulator for its functions and it will also be used to enable members to trace their pension. Information contained in the register or held by the Regulator may be used for any purposes connected with or incidental to the exercise of its functions.

Section 60: Registrable information

218. This section defines, for the purposes of *sections 59 to 65* what will constitute "registrable information", in relation to occupational and personal pension schemes. Registrable information includes:

- the name of the scheme;
- the address of the scheme;
- the names and addresses of each of the trustees or managers of the scheme;
- the status of the scheme (i.e. whether open or closed to new members, whether any contributions for future accrual can be made and whether there are any active members);
- the categories of benefits provided by the scheme;
- in the case of an occupational pension scheme, the previous name of every employer in relation to the scheme since 5th April 1975;
- in the case of an occupational pension scheme, information about the number of members of the scheme; and
- any other information prescribed under regulations.

219. Regulations may make further provision with respect to interpretation of the above information.

Section 61: The register: inspection, provision of information and reports etc.

220. *Subsection (1)* of this section provides the power for regulations to be made in relation to the provision of information recorded in the register, extracts from the register, or copies of the register to specified persons in specified circumstances. Regulations can also provide for the inspection of the register, extracts from the register, or copies of the register by prescribed persons in prescribed circumstances.

221. *Subsection (2)* states that the regulations may confer functions on the Secretary of State, or other authorised person. In particular, this regulation-making power will enable the Secretary of State to provide a Pensions Tracing Service following the dissolution of Opra. This service will provide persons with a free service for tracing unclaimed or “lost” occupational and personal pensions. The regulations may also provide for disclosure of the information obtained by virtue of the regulations and may provide that the disclosure of restricted information under them may not be an offence.

222. Under the provisions in *subsections (4), (5) and (6)* the Secretary of State may direct the Regulator to produce reports, in a set format and within a set time, concerning the information held in the register, including the operation of the Regulator’s functions in relation to the register. These reports may be published.

Section 62: The register: duties of trustees or managers

223. *Subsections (1), (2) and (3)* impose a duty on trustees and managers to notify the Regulator, during the “initial notification period”, of all the registrable information required on registrable schemes. The initial notification period is a period of three months beginning from the date the scheme is established, or, if later, beginning from the date it becomes a registrable scheme.

224. *Subsection (3)* enables any regulations which contain any provisions made under *subsection (2)(b)* to modify the provisions of *section 82* (restricted information).

225. *Subsection (4)* provides that trustees or managers have to notify the Regulator of changes to registrable information as soon as practicable. *Subsection (5)* provides that trustees or managers must notify the Regulator as soon as practicable, where the scheme ceases to be registrable, or is wound up (otherwise than where the Board of the Pension Protection Fund assumes responsibility for it). Section 10 of the Pensions Act 1995 (civil penalties) will apply to a trustee or manager who fails to comply with *subsections (2), (4) or (5)*.

Section 63: Duty of Regulator to issue scheme return notices

226. This section requires the Regulator to issue scheme return notices (a request for information) to each registrable scheme. The first request for a scheme return must be made within three years of the Regulator becoming aware that the scheme has become a registrable scheme. Existing schemes will become registrable schemes when this section comes into force, but transitional provision will be made under *section 322(5)* in relation to such schemes when the provisions about the register come into force. The Regulator must issue subsequent scheme return notices to schemes every one to three years from the date of the schemes last return notice depending on the scheme.

Section 64: Duty of trustees or managers to provide scheme return

227. *Subsection (1)* provides that the trustees or managers of a registrable scheme must provide a completed scheme return, on or before the return date, when required to do so by the Regulator. Section 10 of the Pensions Act 1995 (civil penalties) will apply to a trustee or manager who fails to comply with *subsection (1)*.

Section 65: Scheme returns: supplementary

228. This section has effect for the purposes of *sections 63 and 64* and specifies the meaning of “return date” and “scheme return”. *Subsection (3)* states that a scheme return notice, which must be in writing, must specify details of the information required, which must include details of all registrable information, as well as any other information that may be required by the Regulator to enable it to fulfil its functions. For example, information may be collected to assist in:

- the calculation of the Pension Protection Fund levy (*section 181*);
- the exercise of functions by the Board of the Pension Protection Fund (*section 110*);
- the exercise of functions delegated by the Board of the Pension Protection Fund to the Regulator
- the assessment of risk for each scheme (*section 179*).

229. The scheme return notice must also specify the return date (which must be at least 28 days after the date the notice was issued).

Register of prohibited trustees

Section 66: Register of prohibited trustees

230. This section provides that the Regulator must keep a register of all people who are prohibited under section 3 of the Pensions Act 1995 (prohibition orders) from acting as a trustee. By virtue of *subsection (2)*, the Regulator must ensure that, with the exception of the duties contained in *section 67*, contents of the register are not disclosed or otherwise made available to the public.

Section 67: Accessibility of register of prohibited trustees

231. *Subsection (1)* provides that the Regulator must ensure that the prohibition register is open during its normal working hours for people to inspect it without notice. *Subsection (2)* provides that where a request is made to the Regulator as to whether a particular person appears in the prohibition register as prohibited in respect of a specific scheme, a particular description of trust scheme, or in respect of all trust schemes, then the Regulator must comply with that request promptly in such manner as it considers reasonable.

232. *Subsection (3)* provides that the Regulator can publish a summary of the prohibition register if the summary contains:

- the full names and titles (where the Regulator has such record) of all the people appearing as prohibited in the register;
- the dates of birth of those people (where the Regulator has such record);

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- for each person included in the published summary, whether they appear in the register as prohibited in respect of only one scheme, or in respect of two or more schemes, or as prohibited in respect of all trust schemes (as specified at *subsection (4)(c)*). For each of the three subcategories specified in *subsection (4)(c)*, the Regulator must publish a separate register.

233. The published summary of the prohibition register must not identify any of the schemes in respect of which people who are named in the summary are prohibited and also must not disclose any other information contained in the register (*subsections (3)(c) and (d)* refer).

234. *Subsections (6) to (8)* deal with the information to be included in a published summary where the inclusion of a person in the register, or a particular part of it, may be, or is, subject to a review, or an appeal or other legal proceedings.

235. *Subsection (9)* defines ‘a determination which might still become the subject of a review, appeal or proceedings’ as one where:

- the time for the making of an application for a review or for the bringing of an appeal or other proceedings has not expired; and
- there is a reasonable likelihood that such an application might yet be made, or that such an appeal or such proceedings might yet be brought.

Collecting information relevant to the Board of the Pension Protection Fund

Section 68: Information relevant to the Board

236. This section allows the Regulator to collect any information which appears to it to be relevant to the exercise of the functions of the Board of the Pension Protection Fund.

Section 69: Duty to notify the Regulator of certain events

237. This section provides that the trustees or managers of an occupational pension scheme, which is an eligible scheme for the purposes of Part 2 of this Act (see *section 126* (eligible schemes)) must report any prescribed event in relation to the scheme to the Regulator (unless the Regulator has directed otherwise).

238. *Subsection (4)* specifies that the report must be made in writing and given as soon as is reasonably practicable after the person reporting has become aware of the notifiable event.

239. It is intended that the information so collected by the Regulator will assist it in its function of limiting calls on the Board of the Pension Protection Fund (see *section 5(1)(c)* (Regulator’s objectives)).

240. *Subsection (6)* provides that anyone who makes a report under this section is protected in the event that making such a report would otherwise contravene any other duty imposed on that person – for example, a confidentiality section in an employment contract. *Section 311* (protected items) deals with the issue of legal professional privilege.

241. *Subsections (7) and (8)* apply section 10 of the Pensions Act 1995 (civil penalties) to failures to comply with obligations imposed by this section.

Reporting breaches of the law

Section 70: Duty to report breaches of the law

242. This section requires certain breaches of the law in relation to occupational and personal pension schemes to be reported to the Regulator and imposes a duty to do so on specific categories of persons:

- a trustee or manager;
- a person who is involved in scheme administration;
- the employer (in relation to an occupational pension scheme);
- a professional adviser (within the meaning of Part 1 of the Pensions Act 1995); and
- any other people otherwise involved in advising the trustees or managers of such schemes in relation to the scheme.

243. The people listed above must immediately report in writing to the Regulator any breach of law which is relevant to the administration of the scheme in question and is likely to be materially significant to the exercise of any of the Regulator's functions. The Regulator must issue a code of practice to assist persons to identify what is likely to be of material significance for these purposes.

244. *Subsection (3)* provides that anyone who makes a report under this section is protected in the event that making such a report would otherwise contravene any other duty imposed on that person – for example, a confidentiality section in an employment contract. *Section 310* (admissibility of statements) deals with admissibility of statements under this section and *section 311* (protected items) with legal professional privilege.

245. *Subsection (4)* provides for section 10 of the Pensions Act 1995 (civil penalties) to apply to any person who without reasonable excuse fails to comply with this section.

Reports by skilled persons

Section 71: Reports by skilled persons

246. This section enables the Regulator to require those listed in *subsection (1)(a) to (c)* to provide it with a report on a matter relevant to the exercise of its functions.

247. The report has to be provided to the Regulator by the date and in the form specified by the notice. The person to whom the notice is issued has to meet the costs of providing the report unless the notice states the costs should be met by someone else. Failure by a person to comply with a notice issued to him can result in him being subject to a civil penalty under section 10 of the Pensions Act 1995 (civil penalties).

Gathering information

Section 72: Provision of information

248. This section allows the Regulator to issue a notice requiring trustees, scheme managers, professional advisers, employers or any other person who appears to the Regulator to hold, or to be likely to hold, relevant information to produce a document or provide

specified information to the Regulator. The information or document requested must be relevant to the exercise of the Regulator's functions.

249. The information requested in the notice must be provided in such manner and by the time stated by the Regulator in the notice. Failure to do so is an offence under *section 77*.

Section 73: Inspection of premises

250. This section provides that an inspector (a person appointed by the Regulator) may enter premises which are liable to inspection, to investigate whether specified provisions (see *subsection (2)*) are being complied with. Premises are liable to inspection if the inspector has reasonable grounds to suspect that members of the scheme are employed there, documents relevant to the administration of the scheme are being kept there, or the administration of the scheme, or work connected with the administration of the scheme, is being carried out there.

Section 74: Inspection of premises in respect of employers' obligations

251. This section provides that an inspector may enter premises liable to inspection, at any reasonable time, for the purpose of investigating whether an employer is complying with specified requirements (see *subsection (1)*). Premises can be inspected if the inspector believes employees are employed there; documents relevant to the administration of the employer's business, the direct payment arrangements, or the scheme to which those payments relate are being kept there; or, either of the following is being carried out on the premises:

- the administration of the employer's business, the arrangements or the scheme;
- work connected with administration of the employer's business, the arrangement or the scheme.

Section 75: Inspection of premises: powers of inspectors

252. This section outlines the powers of the inspectors when inspecting premises. When an inspector enters premises which are liable to inspection he may:

- make such examination and inquiry as may be necessary;
- take possession of any document appearing to be relevant to the matter to which the inspection relates, or take any steps which appear necessary for preserving the document or preventing interference with it;
- take copies of any such document;
- require any person on the premises to produce, or secure the production of, any relevant document for inspection; and
- examine, or require to be examined, either alone or in the presence of another person, any person on the premises whom he has reasonable cause to believe to be able to give information relevant to that matter.

Section 76: Inspection of premises: supplementary

253. This section provides additional provisions in respect of *sections 73, 74 and 75*. *Subsection (1)* provides that premises which are a private dwelling-house not used by, or by permission of, the occupier for the purposes of a trade or business are not liable to inspection.

An inspector applying for admission to any premises for the purposes of this section must produce his certificate of appointment if required to do so. An inspector may when conducting inspections be accompanied by such persons as he considers appropriate. *Subsections (6) and (7)* provide that any document taken can be retained if it is going to be used in proceedings against an individual until the end of the proceedings, or for a period of 12 months. This 12 month period can be extended by another 12 months if the Regulator feels it necessary.

Section 77: Penalties relating to sections 72 to 75

254. This section outlines the penalties where an individual fails to comply with the powers contained in these sections.

255. When an individual without a reasonable excuse:

- does not comply with a request to provide information when required under *section 72* they will be guilty of an offence which can lead to a fine of up to level 5 on the standard scale (*subsection (2)*);
- intentionally delays or obstructs an inspector; neglects or refuses to produce a document or answer a question under *sections 73 to 75* they will be guilty of an offence which can lead to a fine of up to level 5 on the standard scale. (*subsection (3)*).

256. *Subsection (4)* provides that where an individual has been convicted for refusing to provide information or a document or failing to answer a question but has still failed to provide the information or document or answer the question he can be charged again.

257. *Subsection (5)* provides that if an individual intentionally alters, suppresses, conceals or destroys a document that they have been asked to produce then they are guilty of an offence which can lead, on summary conviction to a fine not exceeding the statutory maximum, and, on conviction on indictment, to imprisonment, a fine or both (*subsection (6)*).

Section 78: Warrants

258. This section sets out the conditions in which a justice of the peace (sheriff in Scotland) can issue a warrant. A justice of the peace can issue a warrant if satisfied by information given on oath by, or on behalf of, the Regulator that there are reasonable grounds for believing:

- there are documents which have been requested under *section 72* or *section 75*, which have not been provided or if the documents were requested, they would either not be produced, would be removed from the premises, hidden, tampered with or destroyed; or
- that a person has committed an offence or misused the assets of an occupational pension scheme or is liable to civil penalties under section 10 of the Pensions Act 1995 (civil penalties) or to be prohibited from being a trustee of an occupational scheme and that there are documents relating to that matter whose production could be required under *section 72 or 75*.

259. An inspector with a warrant can take or copy these documents or require named individuals to state where these documents can be found. When executing a warrant a named

inspector can be accompanied by anyone he feels necessary. A warrant has a time span of one month from when it was issued.

260. *Subsections (8) and (9)* provide that any document taken can be retained if it is going to be used in proceedings against an individual until the end of the proceedings, or for a period of 12 months. This 12 month period can be extended by another 12 months if the Regulator feels it necessary.

Section 79: Sections 72 to 78: interpretation

261. This section defines for *sections 72 to 78* “document” and “inspector”.

Provision of false or misleading information

Section 80: Offences of providing false or misleading information

262. This section provides that it is an offence to knowingly or recklessly give the Regulator false or misleading information when the information:

- is provided in purported compliance with a requirement under *section 62* (the register: duties of trustees and managers); *section 64* (duty of trustees or managers to provide scheme return); *section 72* (provision of information); or *section 75* (inspection of premises: powers of inspectors) or,
- is provided for other circumstances but the person providing the information intends, or could reasonably be expected to know, that it would be used by the Regulator for the purpose of discharging its functions.

263. A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding the statutory maximum and on conviction on indictment, two years’ imprisonment, a fine or both.

Use of information

Section 81: Use of information

264. This section allows the Regulator to use occupational or personal pension scheme information it holds, and, information contained in the occupational and personal pension schemes register, for any purpose connected with or incidental to the exercise of its functions.

Disclosure of information

Section 82: Restricted information

265. This section prevents the Regulator, or any person to whom the Regulator gives restricted information from disclosing it unless the Regulator has the consent of the individual who provided the information and anyone whom it relates to, except in circumstances prescribed in *sections 71(9), 83 to 88 and 235*.

266. Regulations which contain any provision made by virtue of *section 61(2)(b)* (the register: inspection, provision of information and reports etc) may, in particular, modify this section.

267. Unauthorised disclosure of information will represent an offence, except where so permitted.

268. “Restricted information “means any information the Regulator has obtained in carrying out its regulatory functions with the exception of information which is already in the public domain or information presented in a way in which the identity of an individual could not be determined.

Section 83: Information supplied to the Regulator by corresponding overseas authorities

269. For the purpose of *section 82* “restricted information” includes information given to the Regulator by any corresponding overseas authority. *Sections 84 to 87* do not apply to information given to the Regulator by any corresponding overseas authority. The Regulator can only disclose this information if it enables or assists the Regulator in the discharge of its functions, or for the purpose of criminal proceedings.

Section 84: Disclosure for facilitating exercise of functions by the Regulator

270. This section allows the Regulator to disclose information to a qualified individual where the Regulator needs to seek advice on a technical matter (for example on a matter of law or accountancy practice) if the Regulator believes that it needs that advice to properly exercise its functions. For example, the Regulator may need to disclose information to a skilled person to enable a report under *section 71* (report by skilled persons) to be prepared.

Section 85: Disclosure for facilitating exercise of functions by the Board

271. This section allows the Regulator and anyone receiving the information from the Regulator to disclose restricted information for the purpose of aiding the Board of the Pension Protection Fund to carry out its functions.

Section 86: Disclosure for facilitating exercise of functions by other supervisory authorities

272. This section allows the Regulator to disclose restricted information to any individual specified in the first column of *Schedule 3* if the Regulator considers that it would enable or assist that person in exercising their functions listed in column two of *Schedule 3*. *Schedule 3* may be amended by the Secretary of State, by Order, after consultation with the Regulator.

Schedule 3: Restricted information held by the Regulator: certain permitted disclosures to facilitate exercise of functions

273. This Schedule provides a list of persons to whom the Regulator can disclose restricted information, if the Regulator considers that the disclosure would enable or assist the person to exercise the functions specified in relation to him in the second column of the Schedule.

Section 87: Other permitted disclosures

274. This section sets out other circumstances where the Regulator can disclose restricted information. These include disclosure:

- to the Secretary of State, the Inland Revenue or the Department for Social Development in Northern Ireland if the Regulator believes it is in the interest of scheme members or in the public interest (*subsection (1)*);

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

- for the purpose of any criminal proceedings arising from the specified provisions, in disciplinary proceedings relating to carrying out professional duties by a solicitor, an actuary, an accountant or an insolvency practitioner;
- in relation to disciplinary proceedings against a public servant;
- in assisting an authority in a country outside the United Kingdom to carry out functions in this Act and the Pensions Act 1995; or
- in the pursuance of a Community obligation.

275. The Regulator is not prevented from disclosing restricted information to the Director of Public Prosecutions; the Director of Public Prosecutions for Northern Ireland; the Lord Advocate; a procurator fiscal; or a constable.

276. Subsection (4) provides that the Regulator is not prevented from disclosing restricted information where disclosure is required by law, or to a trustee which the Regulator has appointed if the disclosure is for the purpose of enabling or assisting him to carry out his work.

277. Any person mentioned in *subsection (1) or (4)* to whom the Regulator gives information is able to disclose it with the permission of the Regulator. Also any person listed in *Schedule 3* can disclose information to other supervising authorities with the consent of the Regulator for the purpose of carrying out functions listed in the second column of *Schedule 3*. Before the Regulator gives consent to a party to disclose information the Regulator must take into account representations made by that party in respect of the need for the disclosure.

Section 88: Tax Information

278. *Subsections (1) and (2)* relate to disclosure of information by the Inland Revenue. It applies to information held by any person in the exercise of tax functions about any matter which is relevant, for the purposes of those functions to tax or duty in the case of an identifiable person. *Subsection (2)* provides that the Inland Revenue will not be bound by the restrictions imposed by section 182 of the Finance Act 1989 (disclosure of information) so long as the information is disclosed for the purposes of enabling or assisting the Regulator to discharge its functions. *Subsections (3) to (5)* apply where the Inland Revenue discloses information to the Regulator and provide that the Regulator should treat it as “restricted information”. The usual provisions about disclosure do not apply and the Regulator must not disclose this information unless the Commissioners of the Inland Revenue or Customs and Excise have given permission or in connection with criminal proceedings being brought under this Act, the Pensions Act 1995 or the Pension Schemes Act 1993.

Reports

Section 89: Publishing reports etc

279. This section enables the Regulator to publish reports in any form, on its investigation and the results of those investigations into the consideration of taking action. Examples of such reports may be the publication of a decision to exercise a function (for example, a decision to appoint a trustee) or of a report of a particularly good practice discovered by the Regulator.

Codes of practice

Section 90: Codes of practice

280. This section gives the Regulator a new power to issue codes of practice for the purpose of providing practical guidance on what how to be done to comply with the pensions legislation. In the case of the matters listed in *subsection (2)* of this section the Regulator must issue codes of practice.

281. By virtue of *subsections (3) and (4)*, the Regulator is given a power to revise from time to time the whole or any part of a code of practice issued by it, subject to the same procedure as applies for issuing a code of practice (see notes on *section 91*). The Regulator also has power to revoke a code of practice, again subject to statutory procedures (see notes on *section 92*).

282. Breach of a code of practice will not, of itself, result in legal proceedings. However, a code of practice is admissible in evidence in any legal proceedings.

283. The Regulator may frame any direction under *section 13* (improvement notices) by reference to a code of practice and breach of such a direction is subject to civil penalties.

284. A court or tribunal should take into account the provisions of a code of practice. This means that, should the Regulator allege that a person has breached the pensions legislation, that person's failure to follow the relevant code of practice may be taken as admissible evidence in proceedings regarding the legislative breach.

Section 91: Procedure for issue and publication of codes of practice

285. Before a code of practice (including a revised code of practice) can be issued by the Regulator, a draft of the code must be published by the Regulator and consulted upon. If a code of practice only consolidates existing codes or, if the Secretary of State, for reasons of urgency, considers it inappropriate for consultation to occur, then no draft of the code of practice will be issued for consultation.

286. Before a draft code of practice may be issued, the Regulator must send it to the Secretary of State who will either lay it before Parliament (if he approves of it) or will publish details of his reasons for withholding consent (if he does not approve of it). If a draft code of practice is laid before Parliament (for the time period as set out in *subsection (7)*) and no resolution is passed by either House, then the draft code of practice can be issued by the Regulator. However, if either House so resolves, no further action can be taken on the draft code of practice (although this will not prevent a new draft code on the same subject being laid before Parliament).

287. *Subsection (10)* provides for the Regulator to arrange for any code of practice issued under *section 90* to be published in the manner it considers appropriate. *Subsection (11)* provides that the Regulator may charge a reasonable fee for giving people a copy of a code of practice.

Section 92: Revocation of codes of practice

288. This section provides for the Secretary of State to revoke, by order, a code of practice (issued under *section 90*). A code can only be revoked with the agreement of the Regulator.

Exercise of regulatory functions

Section 93: The Regulator's procedure in relation to its regulatory functions

289. *Subsection (1)* requires the Regulator to determine the procedure that it will follow in discharging its "regulatory functions". The "regulatory functions" are listed in *subsection (2)*. They include the "reserved regulatory functions" listed in *Schedule 2* and there is power under *subsection (2)(q)* for further functions to be added as "regulatory functions".

290. *Subsection (3)* requires the Determinations Panel to determine its own procedure in relation to any exercise by it of the power to determine whether to, and the power to exercise, a regulatory function.

291. Procedures determined under *subsection (1) or (3)* must provide for those under *section 96* (standard procedure) and *section 98* (special procedure).

Section 94: Publication of procedure in relation to regulatory functions

292. By virtue of this section, the Regulator must issue a statement of the procedure determined under *section 93*. This will include the "standard procedure" under *section 96* and the "special procedure" under *section 98* and any other procedures that the Regulator feels are necessary to define in respect of *section 93*. This must be published in a way that appears to the Regulator to be appropriate and the Regulator can make a reasonable charge to anyone requesting a copy. These publications must be kept up to date with any material changes made in procedure.

Section 95: Application of standard and special procedure

293. Where the Regulator considers that the exercise of one or more of its regulatory functions may be appropriate or, where an application is made under any of the provisions listed in *section 10(6)* (functions exercisable by the Determinations Panel) or under any provision prescribed under *subsection (1)(b)(ii)*, the requirements of the procedures set out in *section 96* (standard procedure) and *section 98* (special procedure) will apply.

294. Neither *section 96* nor *section 98* will apply in relation to a determination whether to exercise a regulatory function when a review is conducted under *section 99* (compulsory review of regulatory action).

Section 96: Standard procedure

295. This section specifies what needs to be included in the statement of procedure in normal circumstances where notice is given, i.e. that the persons directly affected by the regulatory action under consideration are informed (a "warning notice") and that they are given a chance to make representations. The Regulator has to take consideration of this evidence and notify the persons directly affected of its determination whether or not to take the proposed action (a "determination notice"). The determination notice must contain reference to the right of referral to the Pensions Regulator Tribunal. The procedure must also provide for the form and content of warning notices and determination notices; the manner in which they are to be given, and any time limits which apply throughout this process.

296. *Subsection (3)* states that the determination may be referred to the Tribunal either by anyone to whom the determination notice is given or anyone who appears to the Tribunal to be directly affected by the determination.

297. *Subsection (4)* specifies that *subsection (3)* does not apply where the determination which is the subject of the determination notice is a determination to issue a clearance statement under *section 42* (*section 38* contribution notices: clearance statements) or *section 46* (financial support directions: clearance statements).

298. *Subsection (5)* provides that the regulatory function in question may not be exercised in the period during which persons have the right to have the determination referred to the Tribunal or, if it is referred, while the Tribunal process (including any appeal) is ongoing. However, *subsection (5)* does not apply to the list of regulatory functions in *subsection (6)*.

Section 97: Special procedure: applicable cases

299. The special procedure outlined in *section 98* (special procedure), as opposed to the standard procedure outlined in *section 96* (standard procedure), applies in the three cases set out in *subsections (2), (3) and (4)*. They each involve cases where the Regulator determines to exercise a regulatory function immediately on the basis that it is necessary to do so because there is or is likely to be an immediate risk to the interests of members under a scheme or the assets of a scheme.

300. *Subsection (5)* lists the regulatory functions to which the special procedure may apply.

Section 98: Special procedure

301. This section specifies what needs to be included in the statement of special procedure published by the Regulator. In the special procedure there is no provision for the issuing of a warning notice or an opportunity to make representations before the Regulator issues a determination notice. The determination notice must be given to all the persons who appear to be directly affected by the determination. It must also contain details of the Regulator's requirement to review the determination under *section 99* and of the right of referral to the Tribunal under *section 99(7)*. Those to whom the determination on notice is given have the right to make representations before the Regulator reviews the determination.

302. The representations will be considered by the Regulator before the review and the "final notice" (the notice given after the review) is given in accordance with *section 99(4)*. The procedure must provide for the final notice to contain information about the right of referral to the Tribunal. It must also provide for the form and further content of determination notices and final notices, the way they are given and any time limits that are applied at any stage of the procedure.

Section 99: Compulsory review

303. This section applies to a determination made under the special procedure. *Subsections (1) and (2)* provide that the Regulator must review its determination to take regulatory action as soon as reasonably practicable. *Subsection (3)* provides that as part of the review the Regulator may confirm, change or revoke a determination, direction, notice or order made; may substitute a different determination, direction, notice or order and can deal with matters arising on the review in the same way as if the matters had arisen on the original determination and make savings and transitional provision.

304. *Subsection (4)* provides that when the Regulator has completed the review of the determination, a "final notice" (the outcome of the review) must be sent to all the persons who appear to be directly affected by it.

305. *Subsection (5)* provides that if the final notice gives a determination to exercise a different regulatory function than that set out in the original determination, then before the final notice is given, all the persons that appear to the Regulator to be directly affected by the new proposed action must have the opportunity to make representations in relation to the proposed action. The Regulator must consider these representations before making its determination. However, *subsection (6)* provides that this right to make representations on a determination (to exercise a different regulatory function) does not apply if the function is a function listed in *section 97(5)* and the Regulator decides to take such regulatory action immediately on the grounds it is necessary, because there is an immediate risk, or the Regulator considers there is likely to be a risk if the function is not exercised, to the scheme assets or the interests of members.

306. *Subsection (7)* provides that the determination contained in the final notice may be referred to the Pensions Regulator Tribunal by any person who has been given a final notice and any other person who appears to the Tribunal to be directly affected by the determination.

307. *Subsection (8)* provides that where that determination is to exercise a different regulatory function different to the function in the determination notice, the Regulator cannot exercise the function in the period during which a reference can be made to the Tribunal and until the reference and any appeal is disposed of. *Subsection (9)* provides that *subsection (8)* will not apply if the regulatory function is a function listed in *section 96(6) or 97(5)* which may be exercised immediately by the Regulator and it is determined to exercise the function immediately because there is a risk to the interests of members or the scheme's assets. *Subsection (10)* provides that the Regulator's functions are exercisable on its behalf by the Determinations Panel. *Subsection (11)* provides that the panel must decide the procedure it will follow in exercising those functions. *Subsection (12)* provides that *section 94* (publication of Regulator's procedure) applies in relation to the procedure determined under *subsection (11)*.

Section 100: duty to have regard to the interests of members etc

308. This section requires the Regulator when determining whether to exercise a regulatory function and when exercising the function, to take into account the interests of the generality of the members of the scheme to which the exercise of the function relates and the interests of other persons who the Regulator considers will be directly affected.

Section 101: Powers to vary or revoke orders, notices or directions etc

309. Subject to specified exceptions the Regulator has the power to vary or revoke any determination, notice, direction or order issued in exercising its regulatory functions. *Subsection (3)* provides that any variation or revocation of an order, notice or direction must be made by a subsequent order, notice or direction as the case may be. *Subsection (4)* provides that a variation or revocation cannot take effect before the date on which the revocation or variation is made. *Subsection (5)* provides that the *section 101* power is not to be treated, for the purposes of *subsection (1)*, as a regulatory function, and is in addition to any such legislative power conferred on the Regulator.

The Pensions Regulator Tribunal

Section 102: The Pensions Regulator Tribunal

310. This section establishes the new Pensions Regulator Tribunal – referred to in the Act as “the Tribunal”. *Schedule 4* sets out detailed provisions in relation to the Tribunal. The Lord Chancellor may make procedural rules in relation to the conduct of the Tribunal’s proceedings.

Schedule 4: The Pensions Regulator Tribunal

311. *Paragraph 1* sets out that the Lord Chancellor must appoint a panel of individuals who will chair the Tribunal (the panel of Chairmen) and the qualifications individuals need for this post. The Lord Chancellor must also appoint a panel (the lay panel) of individuals who appear to be qualified by experience or otherwise to deal with matters which will come before the Tribunal.

312. *Paragraph 2* sets out that the Lord Chancellor must appoint from the panel of chairmen a President and a Deputy President to preside over the exercise of the Tribunal’s functions and the qualification that these individuals should hold. The President can assign functions on to the Deputy President as he sees fit. If the President is absent, his functions can be exercised by the Deputy President or another member of the panel of chairmen who is appointed by the Lord Chancellor.

313. *Paragraph 3* states that each member of each panel (chairmen and lay panel) may hold, vacate, resign or be removed from office in accordance with the terms and conditions of their appointment. A member can be re-appointed if he ceases to hold office.

314. *Paragraphs 4, 5 and 6* set out that the Lord Chancellor can determine the pay of any member of the Tribunal and of an expert appointed under *paragraph 7(4)* and he can appoint staff for the Tribunal and set their remuneration, and which expenses of the Tribunal are to be borne by the Lord Chancellor.

315. *Paragraph 7* sets out the constitution of the Tribunal. It specifies that the President must set out how members of a Tribunal are chosen from the panels (‘the standing arrangements’). These arrangements must provide for at least one member to be selected from the panel of chairmen. The paragraph also provides for the procedures if a member of a Tribunal is unable to sit on the Tribunal. The Tribunal may appoint one or more experts if it feels it needs their technical expertise on a factual matter which may arise.

316. *Paragraph 8* states that the Lord Chancellor may state the times when and the place where the Tribunal must sit.

317. *Paragraph 9* lists provisions that the Lord Chancellor may include in the rules made under *section 102*.

318. *Paragraph 10* specifies that the President may give directions as to the practice and procedure to be followed by the Tribunal in relation to references to it.

319. *Paragraph 11* states that the Tribunal may by summons require persons to attend or produce evidence which the Tribunal considers it necessary to examine. A person who without reasonable excuse fails to attend, or give evidence, is guilty of an offence and can receive a fine not exceeding level 5 on the standard scale. A person who without reasonable

excuse refuses to produce a document, or alters, conceals or destroys a document which he is required to produce can, on summary conviction, be subject to a fine not exceeding the statutory maximum and on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.

320. *Paragraph 12* lists rules and procedure surrounding the decisions of the Tribunal. These are:

- a decision of the Tribunal may be taken by a majority;
- the decision must state whether it was unanimous or taken by a majority;
- the decision must be recorded in a document which, contains a statement of the reasons for the decision, and is signed and dated by the member of the panel of chairmen dealing with the reference;
- the Tribunal must inform each party to the reference of its decision;
- the Tribunal must as soon as reasonably practicable send a copy of the document which the decision was recorded in, to each of the parties to the reference, and to such other persons as appear to the Tribunal to be directly affected by the decision;
- the Tribunal must send the Secretary of State and the Department for Social Development in Northern Ireland a copy of its decision.

321. *Paragraph 13* provides that if the Tribunal considers that a party acted vexatiously, frivolously or unreasonably, it can order the party to pay some or all of the costs or expenses that were incurred by another party to the proceedings. Also, if the Tribunal considers the determination of the Regulator was unreasonable it can order the Regulator to pay some or all of the costs of the other party incurred in the proceedings.

322. *Paragraph 14 to 21* lists amendments to other enactments to ensure that correct reference is made to the provisions contained in this schedule.

Section 103: References to the Tribunal

323. *Subsection (1)* provides for the time limits for making references to the Tribunal. The Tribunal may allow a case to be referred after these periods have elapsed.

324. The Tribunal will hear any reference afresh, and accordingly will be able to consider any evidence relating to a reference whether or not it was available to the Regulator. Its purpose is to determine what action, if any, the Regulator must take in relation to the reference.

325. The Tribunal may give the Regulator such directions as it considers appropriate for giving effect to its determination. The Tribunal may also on determining a reference make a recommendation to change the Regulator's procedures. An order of the Tribunal can be enforced as if it were an order of a county court or in Scotland an order of the Court of Session.

Section 104: Appeal on a point of law

326. There is a right of appeal, with permission of the Tribunal, the Court of Appeal, or in Scotland the Court of Session, on a point of law only, from decisions of the Tribunal to the

Court of Appeal or in Scotland, the Court of Session. There is then a further right of appeal to the House of Lords.

327. If on appeal the court finds the decision of the Tribunal was wrong in law then the court may either send the case back to the Tribunal for a rehearing and redetermination or make a determination itself.

Section 105: Redetermination etc by the Tribunal

328. This section applies when an application for permission to appeal a decision of the Tribunal is made. If the chairman or person who constitutes in law the Tribunal for this application considers that the decision of the Tribunal was wrong the decision may be set aside and either reheard and redetermined by the same Tribunal or one made up of different members.

Section 106: Legal assistance scheme

329. This section enables the Lord Chancellor to establish, by regulations, a scheme providing legal assistance for cases which go to the Tribunal. This provision does not extend to Scotland (see *section 323(3)* (extent)).

330. The legal assistance scheme may make provision for-

- the kinds of legal assistance that may be provided;
- the persons by whom legal assistance may be provided;
- the manner in which applications for legal assistance are to be made;
- the criteria on which eligibility for legal assistance is to be determined;
- the persons or bodies by whom applications are to be determined;
- appeals against refusals of applications; the revocation or variation of decisions; and
- its administration and the enforcement of its provisions.

331. The conditions placed on the legal assistance provided may require the recipient of the aid to make a contribution.

PART 2 – THE BOARD OF THE PENSION PROTECTION FUND

Summary

332. This part establishes a new non-departmental public body, called the Board of the Pension Protection Fund (and referred to in the Act and in these notes as “the Board”).

333. The Board has two main functions:

- it will administer the Pension Protection Fund from which compensation will be paid to members of defined benefit and hybrid occupational pension schemes which are underfunded and no longer have a solvent employer, and where the scheme has insufficient assets to pay benefits at a level equal to the amount of compensation the Pension Protection Fund would provide;

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which received Royal Assent on 18 November 2004*

- it will administer the Fraud Compensation Fund from which compensation will be paid to defined benefit and money purchase occupational pension schemes in cases of fraud and misappropriation of scheme assets. Similar functions were previously exercised by the Pensions Compensation Board, which is abolished under Part 9 of this Act.

334. Part 2 also makes provision for charging four types of levy in respect of occupational pension schemes:

- pension protection levy (which will include both a scheme based and risk based levy) (see *sections 174 to 181*);
- administration levy (to cover the set-up and ongoing administration costs of the Board of the Pension Protection Fund (see *section 117*);
- fraud compensation levy (to be paid by both defined-benefit and money purchase schemes) (see *section 189*);
- levy to fund the expenditure of the Ombudsman for the Board of the Pension Protection Fund (see *section 209*).

335. The Board of the Pension Protection Fund will have a procedure for dealing with disputes and complaints of maladministration. This will include an internal dispute resolution procedure, followed if still disputed by referral to the Ombudsman for the Board of the Pension Protection Fund (the “PPF Ombudsman). There is a separate right of appeal (on points of law only) to the High Court if the dispute is still unresolved following the PPF Ombudsman’s determination.

Chapter 1 – The Board

Establishment

Sections 107, 108 and 109: The Board of the Pension Protection Fund; Membership of the Board, Further provision about the Board

336. A body corporate known as the Board of the Pension Protection Fund is established by *section 107*.

337. The Board is to consist of a chairman appointed by the Secretary of State; a Chief Executive appointed by the Board with the approval of the Secretary of State (although the first Chief Executive will be appointed by the Secretary of State); and at least five ordinary members appointed by the Board, at least two of which must be appointed from the staff of the Board. A maximum number of ordinary Board members may be prescribed by secondary legislation.

338. The executive members of the Board are the Chief Executive and the two or more members appointed from the staff of the Board. All other members of the Board, including the chairman, will be “non-executive members” and a majority of the Board must be non-executive members.

339. Further provision about the Board is set out in *Schedule 5*.

Schedule 5: The Board of the Pension Protection Fund

340. Part 1 of *Schedule 5* deals with the membership of the Board.

341. The ordinary Board members who are non-executive members are the members who are not also members of the Board's staff. The ordinary members who are executive members are members who are also members of the Board's staff (see *section 108(7)* (membership of the Board))

342. *Paragraph 1* provides that the chairman of the Board is to be appointed by the Secretary of State. *Paragraph 2* provides that the first five appointments of ordinary members (all members other than the Chairman and the Chief Executive) will also be made by the Secretary of State, while subsequent appointments will be made by the Board in accordance with any procedure that may be set out in regulations. There must always be at least five ordinary members and should there be less at any time the Secretary of State must appoint the additional members required.

343. *Paragraph 3* provides that the terms and conditions of appointment of the Chairman and the ordinary members will be decided by the Secretary of State where he has appointed him. The terms and conditions of a Chairman appointed by the Board will be decided by it. *Paragraph 3* further states that the terms and conditions of non-executive Board members will be set by the Chairman with the approval of the Secretary of State, while the Chief Executive will set the terms and conditions of the executive members of the Board.

344. The terms and conditions of ordinary members who are non-executive members will be decided by the Chairman with the approval of the Secretary of State. The Chief Executive will decide the terms and conditions of the ordinary members who are executive members of the Board.

345. The terms and conditions of appointment under *Paragraphs 4, 5 and 6* will govern how long members stay in office, their leave, how they resign etc. However a person will cease to be a member of the Board if:

- in the case of the chairman he ceases to hold this position or if he becomes a member of staff of the Board;
- in the case of any other non-executive member he becomes a member of the staff of the Board;
- in the case of an ordinary executive member he ceases to be a member of the staff of the Board;
- in the case of the Chief Executive he ceases to be employed as such.

346. *Paragraphs 7-9* deal with remuneration. The Secretary of State determines the remuneration of the non-executive members of the Board. The Board can pay (as determined by the Secretary of State) this remuneration and can make provision for its payment. This includes allowances, gratuities or pensions.

347. The table below summarises the appointment procedures for the Board and its staff.

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	Initial appointment by	Subsequent appointments by	Terms and conditions set by	Remuneration set by
Chairman	Secretary of State	Secretary of State	Secretary of State	Secretary of State
Chief Executive	Secretary of State	Board, with the approval of the Secretary of State	Secretary of State	Secretary of State for the first appointment; Subsequent appointments - the Board, through the committee responsible for the non-executive functions and with the approval of the Secretary of State
Non-executive Board members (other than Chairman)	Secretary of State	Board	Secretary of State for first appointment; Subsequent appointments - Chairman with the approval of the Secretary of State	Secretary of State
Executive Board members (other than Chief Executive and other employees)	Secretary of State	Board	Secretary of State for first appointment; Chief Executive	Board, with the approval of the Secretary of State
Other staff of the Board	Board with Secretary of State approval as to numbers	Board with Secretary of State approval as to numbers	Chief Executive	Chief Executive

348. Part 2 of this Schedule sets out the detailed provisions on the staff of the Board.

349. *Paragraph 11* sets out that the staff of the Board consists of the Chief Executive, the other employees of the Board and any additional staff made available by the Secretary of State. Additional staff could include, for example, those on secondment from the Department for Work and Pensions.

350. The first Chief Executive will be appointed by the Secretary of State, who will also set the terms and conditions and remuneration. Subsequent appointments of the Chief Executive will be made by the Board who will also set the terms and conditions of these appointments. The Secretary of State must approve them. However, a committee established to exercise the non-executive functions under *section 112* (non-executive functions) will make recommendations on remuneration for the Chief Executive.

351. Other employees will be appointed by the Board with the Secretary of State's approval. The Chief Executive will determine the terms and conditions although in the case of an employee who is also to be an executive member or prescribed descriptions of

employees the terms and conditions relating to remuneration will be determined on the Board's behalf by the committee established to exercise the non-executive functions (and with the Secretary of State's approval in the case of executive members).

352. Any additional staff made available to the Board will be on such terms as to payment as the Secretary of State may determine.

353. Part 3 of *Schedule 5* covers proceedings and delegation.

354. *Paragraph 15* enables the Board to establish a committee for any purpose. Any committee established by the Board may further establish sub-committees. The members of such committees or sub-committees (other than the committee or sub-committee mentioned in *section 112*) can include people who are not members of the Board or members of the committee.

355. The Board will be responsible for setting procedures (and quorum) for itself, its committees and sub-committees.

356. *Paragraph 17* enables the Board to delegate any of its functions other than the non-executive functions described in *section 112*.

357. *Paragraph 18* gives the Board the power to outsource some of its functions. These are listed in *sub-paragraph (2)*.

358. Part 4 of the Schedule covers the accounting requirements and authorises the Board to pay certain expenses.

359. *Paragraph 22* requires the Board to keep accounts and accounting records following any accounting directions given by the Secretary of State (with approval of Treasury). The Board must prepare an annual statement of accounts, which will include an actuarial valuation of the assets and liabilities of the Pension Compensation Fund. This actuarial valuation must be prepared by a person appointed by the Board who meets the requirements specified in *sub-paragraph (4)(a)*. A copy of the annual accounts must be sent to the Secretary of State and the Comptroller and Auditor General. In turn, the Comptroller and Auditor General must examine, certify and report on the accounts, and lay both the accounts and his report before both Houses of Parliament.

360. *Paragraph 23* enables the Board to pay certain expenses, such as travel allowances. This includes the power to pay fees to persons providing professional advice.

361. Part 5 deals with the status and liability of the Board.

362. By virtue of *paragraph 24* the Board is to be regarded as independent from the Crown. Therefore, the property of the Board is not property of the Crown (and the Crown will not be liable to meet any of the liabilities of the Board).

363. *Paragraph 25* provides that Board vacancies, or any problems arising out of appointments of members of the Board, committees, sub-committees or the Chief Executive will not affect the validity of any proceedings of the Board.

364. *Paragraphs 26 and 27* amend the appropriate legislation to disqualify members of the Board from membership of the House of Commons or Northern Ireland Assembly.

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365. *Paragraph 28* amends the Superannuation Act 1972 so that the Chairman and the staff of the Board will be eligible for a government-backed pension for which the Board must pay the Minister for the Civil Service such sums as he may direct. This is a common provision for public bodies – for example the Regulator also has a similar provision, as did its predecessor Opra.

366. *Paragraph 29* sets out that no member of any Board, committee, sub-committee or staff is to be liable for damages for anything done or omitted in the discharge of the functions of the Board. Members of the committee which exercises the non-executive functions (*section 112*) will also not be liable for damages when exercising their functions. This does not apply if the action or omission was in bad faith and does not prevent the Board being required to pay compensation on a direction of the PPF Ombudsman or in respect of an act or omission on the grounds that it was unlawful as a result of the Human Rights Act 1998.

General provision about functions

Section 110: Board's functions

367. The functions of the Board are to hold and manage the Pension Protection Fund and the Fraud Compensation Fund; to levy contributions to those funds, and to carry out other functions as set out in this Act or other enactments.

Section 111: Supplementary powers

368. The Board may do anything which is designed to help it carry out its functions, or which is incidental to those functions. This power enables the Board to carry out all the minor and incidental administrative functions that are necessary for any public body, such as leasing office space and printing stationery.

Non-Executive functions

Section 112: Non-Executive functions

369. This section sets out the non-executive functions. These are reviewing the adequacy of the internal financial controls; determining the remuneration of the Chief Executive and other executive members of the Board (subject to the approval of the Secretary of State); and making recommendations on the remuneration of certain senior staff, identified in secondary legislation.

370. Under this section, the Board is required to establish a committee to discharge the non-executive functions. An executive member of the Board cannot be a member of that committee.

371. The committee must produce a report on the manner in which it has fulfilled its role, which will be included in the Board's annual report (*section 119*) (annual reports to the Secretary of State).

372. Any sub-committee to which the committee delegates its functions can include persons who are not members of the committee but cannot include executive members or other staff of the Board. Such sub-committees can discharge any of the committee's non-executive functions or its duty to prepare the report for inclusion in the Board's annual report

Financial matters

Section 113: Investment of funds

373. The Board is permitted to invest its funds for the purposes of the prudent management of its financial affairs. When making investment decisions in relation to the Pension Protection Fund, the Board must have regard to both the interests of current and potential beneficiaries of compensation from the Pension Protection Fund, the effect of its decisions on the rate for the levy and the interests of persons affected by the rate (such as the employers). When making decisions in relation to the Fraud Compensation Fund, the Board must have regard to the interests of members of occupational pension schemes and to the effect of its decisions on the rate of the levy and the interests of persons affected by the rate.

374. For the purposes of ensuring the prudent management of the Pension Protection Fund, the Board must appoint at least two fund managers to manage its investments. It must be satisfied that a fund manager has the appropriate knowledge and experience for managing the Pension Protection Fund, or if a firm is appointed has the necessary arrangements in place to ensure that any individual acting on its behalf has appropriate knowledge or experience.

Section 114: Investment principles

375. The Board must produce a written statement of its investment principles that is maintained and reviewed at prescribed intervals. The statement is to set out the investment principles governing decisions about investments made by and on behalf of the Board.

Section 115: Borrowing

376. This section enables the Board to borrow money subject to a prescribed limit (“the borrowing limit”) which will be specified by the Secretary of State by order. The Board is permitted to borrow money from a “deposit-taker” (the meaning of which is set out in *subsections (3) and (4)*). This section also enables the Board to provide security for any money it borrows.

Section 116: Grants

377. This provision allows the Secretary of State to pay the Board grants towards its administrative expenses. Such money can be used solely for this purpose and cannot be used for the payment of compensation from either the Pension Protection Fund (*section 173*) or the Fraud Compensation Fund (*section 188*).

Section 117: Administration levy

378. This section enables regulations to provide for a levy to reimburse the secretary of State’s expenditure under *section 116* and his expenditure on the Board’s set-up costs. This levy is in respect of schemes whose members are eligible for pension compensation (as defined under *section 162*). It is known as the “administration levy”. Regulations will set out how much must be paid and how often it will be paid. This levy will be payable by or on behalf of the trustees or managers of an eligible scheme or any other person as detailed in regulations. The administration levy is payable to the Secretary of State and is recoverable by him or by the Regulator on his behalf. *Subsection (4)* states that the Secretary of State must consult the Board before determining the rate of the administration levy. The details of how this levy is to be calculated, collected and recovered will be set out in secondary legislation.

Section 118: Fees

379. This section enables regulations to authorise the Board to charge fees specified by regulations or fees sufficient to meet costs specified in regulations.

Annual reports

Section 119: Annual reports to Secretary of State

380. The Board must produce an annual report (for each “financial year” as defined in *subsection (6)*) dealing with its activities during the reporting period. This includes the report prepared by the committee which exercises the non-executive functions (see *section 112(5)*). This report must be sent by the Board to the Secretary of State as soon as practicable after the end of the reporting period. The Secretary of State must then lay a copy of each report received by him before both Houses of Parliament.

Chapter 2 – Information Relating to Employer’s Insolvency etc

Insolvency events

Sections 120: Duty to notify insolvency events in respect of employers

381. This section applies where an insolvency event (see *section 121*) occurs in relation to the employer in relation to an occupational pension schemes. The insolvency practitioner appointed to act in relation to the employer must notify the Board and the Regulator and the trustees or managers of the pension scheme of the occurrence of the event within a specified period.

382. *Subsection (3)* defines the “notification period” in which the notification must be provided. This will be the period set out in regulations beginning with the insolvency date (see *section 121*) or, if later, the date on which the insolvency practitioner becomes aware that a scheme exists in relation to the insolvent employer. *Subsection (4)* allows regulations under this section to prescribe the form and content of the notice.

Section 121: Insolvency event, insolvency date and insolvency practitioner

383. This section defines an insolvency event and sets out when an insolvency event occurs in relation to an individual, a company and a partnership. These events trigger the involvement of the Board with an occupational pension scheme.

384. *Subsection (5)* enables regulations to be made prescribing additional events that are to be treated as insolvency events. These regulations may, for example, apply to insolvency proceedings occurring in respect of organisations (such as Banks, building societies and limited liability partnerships) that are not included as insolvency events (as defined).

385. *Subsection (7)* gives the Secretary of State a regulation making power to make amendments to *subsection (4)(e)* to deal with insolvent partnerships if the new administration regime introduced by the Enterprise Act 2002 is, in future, applied to partnerships under section 240 of the Insolvency Act 1986.

386. *Subsection (8)* defines the meaning of ‘insolvency date’ as the date on which the insolvency event occurs.

387. *Subsection (9)* defines “insolvency practitioner” to include those persons within section 388 of the Insolvency Act 1986 (meaning of “act as an insolvency practitioner”). It also enables regulations to provide that specific individuals may also be regarded as an insolvency practitioner in specific circumstances. This could for example be used in respect of deeds of arrangement or schemes of arrangement under the Companies Act 1985, if these were ever prescribed as an insolvency event. This is because these schemes or deeds may not involve an “insolvency practitioner” within the meaning of section 388 of the Insolvency Act 1986:

- deeds of arrangement are very rare and it is unlikely the Board will encounter schemes whose employers are subject to these arrangements.
- schemes of arrangements are more common in terms of numbers. These are not dealt with under the Insolvency Act 1986. They are dealt with under the Companies Act 1985 and an “insolvency practitioner” within the meaning of section 388 of that Act is not involved in these cases.

Status of scheme

Section 122: Insolvency practitioner’s duty to issue notices confirming status of scheme

388. This section makes provision for an insolvency practitioner to confirm the status of an occupational pension scheme after the occurrence of an insolvency event in relation to the employer.

389. *Subsection (1)* provides that the section applies where an insolvency event has occurred in relation to the employer in relation to an occupational pension scheme. *Subsection (2)* states that, if an insolvency practitioner is able to confirm that a scheme rescue is not possible, he must issue a “scheme failure notice”. If he can confirm that a scheme rescue has occurred, he must issue a “withdrawal notice”.

390. *Subsections (3) and (4)* provide that the insolvency practitioner must issue a notice where he has not been able to confirm that a scheme rescue has occurred or is not possible. This applies in prescribed circumstances where insolvency proceedings are stayed or come to an end, or where a prescribed event occurs. *Subsection (5)* provides that a person is able to confirm that a scheme rescue has occurred or is not possible only if he is able to confirm such matters as are prescribed in regulations.

Section 123: Approval of notices issued under section 122

391. This section provides that where a “*section 122* notice” (“scheme failure notice” or “withdrawal notice” or notice under *section 122(4)*) is issued the Board must determine whether or not to approve it. Conditions for approval are provided in the section.

392. *Subsection (1)* sets out that this section applies where the Board receives a section 122 notice. *Subsection (2)* states that the Board must determine whether to approve the section 122 notice. Where the conditions in *subsection (3)* are satisfied the Board must approve the section 122 notice. These conditions are that the Board is satisfied that the insolvency practitioner was required to issue the notice and the notice complied with any requirements set out in regulations made under *section 122(8)*. *Subsection (4)* provides that when the Board has come to a decision about whether or not to approve the section 122 notice it must

inform certain parties (which are listed under this subsection) by issuing a “determination notice”. *Subsection (5)* provides that the form and content of the determination notice will be prescribed by regulations.

Board’s duties

Section 124: Board’s duty where there is a failure to comply with section 122

393. *Subsection (1)* states that this section applies where the Board has determined not to approve the section 122 notice or the Board is satisfied that an insolvency practitioner, or former insolvency practitioner, has failed to issue the notice required under *section 122*. The Board can issue a section 122 notice instead of the insolvency practitioner and the notice will be treated as if it had been given by the insolvency practitioner or former insolvency practitioner.

394. *Subsection (4)* states that where a notice is issued by the Board, it must give a copy to the Regulator, the trustees or managers of the scheme, the insolvency practitioner (or former insolvency practitioner) who issued or failed to issue the notice in question, any other insolvency practitioner in relation to the employer and, if there is no insolvency practitioner in relation to the employer, the employer.

395. A notice issued by virtue of this section can specify that it has effect from an earlier date than its issue date, if the Board is satisfied it ought to have been issued under *section 122* at an earlier date.

Section 125: Binding notices confirming status of scheme

396. This section sets out when a notice under *section 122* (confirming a scheme’s status) becomes binding.

397. *Subsection (1)* states that a notice issued under *section 122* is not binding until the Board issues a determination notice under *section 123* approving the notice. In addition the notice is not binding until the period within which the issue of the notice may be reviewed has expired, and the review, any reconsideration, any reference to the PPF Ombudsman and any subsequent appeal to the court against his determination has been disposed of and the notice has not been revoked, varied or substituted.

398. If a notice becomes binding the Board must give a notice to that effect together with a copy of the binding notice, to the parties listed in *subsection (3)*.

399. *Subsection (4)* provides for regulations to prescribe the format of the notice given under *subsection (3)* and the information it must contain. Where a withdrawal notice under *section 122 (2)(b)* becomes binding, the *subsection (3)* notice must also state the time from which the Board ceases to be involved with the scheme (see *section 149*) (circumstances in which Board ceases to be involved with an eligible scheme).

Chapter 3 – Pension Protection

Eligible schemes

Section 126: Eligible schemes

400. This section defines those occupational pension schemes which are eligible to be taken over by the Board of the Pension Protection Fund. Eligible schemes are occupational

pension schemes other than money purchase schemes and schemes specified, or of a description specified, in regulations. The section also clarifies that a scheme is not eligible if it is already being wound up immediately before the day appointed by the Secretary of State under *subsection (3)*. Regulations may also provide that a scheme which would cease to be an eligible scheme during the assessment period begins will be treated as remaining as an eligible scheme in such circumstances as may be prescribed. Regulations may also exclude schemes which would otherwise qualify as eligible schemes under this section.

Circumstances in which Board assumes responsibility for eligible schemes

Section 127: Duty to assume responsibility for schemes following insolvency event

401. For members of occupational pension schemes to be entitled to compensation under Chapter 3 of Part 2 the Board must assume responsibility for the scheme. There are a number of circumstances in which the Board will assume responsibility for a scheme. These are set out in this section, and in *sections 128*, (duty to assume responsibility for a scheme) *152* (duty to assume responsibility following reconsideration) and *158* (duty to assume responsibility for closed schemes). These are the only circumstances in which the Board will assume responsibility for a scheme.

402. This section applies where a qualifying insolvency event (see *subsection (3)*) has occurred in relation to the employer in relation to an eligible scheme.

403. *Subsection (2)* states that the Board must assume responsibility for the scheme if:

- the assets of the scheme immediately before the insolvency date (see *section 121(8)*) were not sufficient to meet the scheme's protected liabilities (see *section 131*). (For this purpose assets relating to money purchase schemes are disregarded);
- a scheme failure notice becomes binding; and
- there has not been and there cannot be a withdrawal event resulting from a withdrawal notice issued before the schemes failure notice was issued.

404. By virtue of *subsection (3)(a)* an insolvency event which occurs before the day appointed under *section 126(2)* (eligible schemes) by order is not a qualifying "insolvency event" for these purposes. The insolvency event must also be the first insolvency event to occur in relation to the employer on or after that day, and must not occur during an assessment period (see *section 132* (assessment periods)) in relation to the scheme which began before the occurrence of the insolvency event in question. For example an employer in relation to a scheme could be subject to administration which then turns into liquidation. The commencement of the liquidation is an insolvency event. However, as the administration will already have been triggered the Board's involvement and started an assessment period, there is no need for the subsequent insolvency event to start the process again.

Section 128: Duty to assume responsibility for schemes following application or notification

405. See notes for *section 127* for information regarding the effect of the Board assuming responsibility for a scheme.

406. This section provides for the Board to assume responsibility for schemes whose sponsoring employers cease to be going concerns but cannot be subject to insolvency events

as defined in *section 121* – for example public sector schemes without a crown guarantee and schemes with employers based overseas and subject to foreign insolvency proceedings.

407. *Subsection (1)* provides that this section applies where the trustees or managers of such schemes make an application to the Board under *section 129(1)* or receive a notice from the Board under *section 129(5)(a)*. *Subsection (2)* provides for the Board to assume responsibility for such a scheme if:

- the value of the assets of the scheme is less than the amount of the protected liabilities (*section 131*) (for this purpose assets relating to money purchase benefits are disregarded);
- a scheme failure notice becomes binding; and
- there has not been and cannot be a withdrawal event resulting from a withdrawal notice issued before the scheme failure notice was issued.

408. *Subsection (4)* provides that where such a scheme is already subject to an assessment period (see *section 132*), any further applications or notifications under *section 129* made during that period will be disregarded.

Section 129: Applications and notifications for the purposes of section 128

409. This section is directly linked to *section 128* and lays out the application and notification process for schemes whose employers cannot be subject to insolvency events as defined in *section 121*. It mirrors the regime for schemes whose employers are subject to insolvency events as defined in *section 121*.

410. *Subsection (1)* provides for the trustees or managers of an eligible scheme to make an application to the Board for it to assume responsibility for the scheme if they become aware that the employer in relation to the scheme is unlikely to continue as a going concern and requirements prescribed in regulations under *subsection (1)(b)* are met. This provision is intended to apply in cases where the employer cannot be subject to an insolvency event (as defined in *section 121*) are met. The Board must give a copy of the application under *subsection (1)* to the Regulator and the employer.

411. *Subsection (4)* also provides that the Regulator must issue a notice to the Board in circumstances where it becomes aware that an employer in relation to an eligible scheme is unlikely to continue as a going concern and the requirements prescribed in regulations under *subsection (1)(b)* are met. The Board must give a copy of this notice to the trustees or managers of the scheme and the employer.

412. *Subsections (6)* and *(7)* are intended to prevent both an application under *subsection (1)* and a notification under *subsection (4)* in relation to the same set of facts

413. Regulations will prescribe the form and content of notices under this section.

Section 130: Board's duty where application or notification received under section 129

414. This section relates to cases where an application is made under *section 129(1)* or a notification is given under *section 129(4)*. As there is no insolvency event or insolvency practitioner in these cases the Board takes responsibility for issuing notices confirming the status of the scheme.

415. If the Board is able to confirm a scheme rescue is not possible, *subsection (2)* provides for it to issue, as soon as reasonably practicable, a “scheme failure notice” confirming this. If the Board is able to confirm a scheme rescue has occurred *subsection (3)* provides for it to issue, as soon as reasonably practicable, a “withdrawal notice”. The Board must give a copy of any notice to the Regulator, the trustees or managers of the scheme and the employer. This notice is not binding until the period for review has expired and any review, reconsideration, reference to the PPF Ombudsman or appeal against the determination has been disposed of and the notice has not been revoked, varied or substituted.

416. *Subsection (5)* sets out that the Board can only confirm that a scheme rescue has occurred or is not possible when specific conditions (to be prescribed in regulations) are met.

417. Regulations will set out the format and contents of notices made under this section.

418. *Subsection (7)* states that where a notice issued under *subsection (2) or (3)* becomes binding, the Board must give a notice to that effect, along with a copy of the binding notice to the Regulator, the trustees or managers of the scheme and the employer. A notice in relation to a scheme rescue must also state when the Board ceases involvement with the scheme.

Section 131: Protected liabilities

419. This section explains how the “protected liabilities” of a scheme at any time are to be determined. The basic rule is that the Board will not assume responsibility for a scheme unless the assets of the scheme are insufficient to meet the protected liabilities at least equal to the value of compensation offered by the Pension Protection Fund.

420. Protected liabilities are:

- the cost of providing benefits equivalent to the compensation which would be payable by the Board in respect of the scheme, out of the Pension Compensation Fund, if it assumed responsibility for the scheme;
- any non-pension liabilities of the scheme;
- the estimated cost of winding up the scheme.

Restrictions on schemes during the assessment period

Section 132: Assessment periods

421. This section defines “assessment period”. The assessment period is the period of the Board’s involvement with a scheme, and during this period various restrictions are imposed on the scheme by *sections 133 to 138*.

422. *Subsection (1)* provides for references to an assessment period in Part 2 to be construed by reference to this section.

423. *Subsection (2)* provides for an assessment period to begin with the occurrence of a qualifying insolvency event in relation to the employer in relation to the scheme and to end once any of the following events occur:

- the Board ceasing to be involved with the scheme (and issuing a withdrawal notice – see *section 149* (circumstances in which Board ceases to be involved with an eligible scheme));

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- the trustees or managers of the scheme receiving a transfer notice from the Board; or
- the conditions in *section 154(2)* (requirement to wind up schemes with sufficient assets to meet protected liabilities) being satisfied and the scheme being required to wind up.

424. A qualifying insolvency event is defined in *section 127(3)*. *Subsection (3)* provides for circumstances where more than one insolvency event occurs.

425. *Subsection (4)* provides that an assessment period also commences where an application is made under *section 129(1)* or a notification is received under *section 129(5)(a)*. In that case the assessment period ends once any of the following events occur:

- the Board ceasing to be involved with the scheme (and issuing a withdrawal notice – see *section 149* (circumstances in which Board ceases to be involved with an eligible scheme)),
- the trustees or managers of the scheme receiving a transfer notice from the Board, or
- the conditions in *section 154(2)* (no scheme rescue but sufficient assets to meet protected liabilities) being satisfied and the scheme being required to wind up.

426. *Subsection (5)* provides that, where an assessment period has already begun in relation to the scheme, any further application or notification received during that period will be disregarded. This avoids overlapping assessment periods.

Section 133: Admission of new members, payments of contributions etc

427. This section applies to schemes that have entered an assessment period. The effect of an assessment period on schemes is similar to a freezing of a scheme under *section 23* (freezing orders) of this Act.

428. *Subsection (2)* provides that no new members may be admitted to the scheme during an assessment period. *Subsection (3)* states that no further contributions can be paid into the scheme during an assessment period, except in circumstances and subject to conditions set out in regulations. For instance where contributions were due before the assessment period began or where a debt is owed to the scheme from the employer under *section 75* of the Pensions Act 1995 (deficiencies in assets), these can still be paid to the scheme.

429. No benefits may accrue during the assessment period. This does not prevent any increase to a benefit which would otherwise accrue. Money purchase benefits can still continue to accrue. It is also possible for a trustee or manager of a scheme to discharge liabilities in respect of a pension sharing order granted over a member's shareable rights by conferring rights under the schemes on the former spouse entitled to the pension credit.

430. *Subsection (10)* provides that any action taken in contravention of this section is void. *Subsection (11)* provides for *section 10* of the Pensions Act 1995 (civil penalties) to apply to trustees or managers who fail to take all reasonable steps to comply with this section.

431. Where the Board ceases to be involved with a scheme, *section 150* (consequences of Board ceasing to be involved with a scheme) makes provision about contributions which, but for *section 133*, would have been due during the assessment period.

Section 134: Directions

432. This section enables the Board to give directions to “a relevant person” during the assessment period.

433. *Subsection (2)* provides for the Board to give directions to a relevant person during the assessment period on matters relating to the investment of the scheme’s assets; any expenditure; the instigation or conduct of legal proceedings; and any other prescribed matters. This enables the Board to ensure that protected liabilities do not exceed assets or, if they do exceed the assets, that excess is kept to a minimum. Assets for this purpose will not include assets relating to money purchase benefits. *Subsection (3)* defines the relevant person in relation to a scheme as the trustees, managers, sponsoring employer or such other persons as may be prescribed.

434. *Subsection (4)* enables the Board to revoke or vary any direction it makes under this section. *Subsection (5)* provides for section 10 of the Pensions Act 1995 (civil penalties) to apply to any trustee or manager of a scheme who fails to take all reasonable steps to secure compliance with any direction issued to the trustees or managers by the Board. *Subsection (6)* provides for civil penalties to also apply to any other person who fails to comply with a direction given to him by the Board and does not have a reasonable excuse for such a failure.

Section 135: Restrictions on winding up, discharge of liabilities etc

435. This section restricts the winding up of a scheme during an assessment period. It effectively takes away all the power that the trustees or managers or the employer might have under scheme rules to wind up a scheme.

436. *Subsection (2)* prevents the winding up of the scheme during the assessment period. It does not prevent the Regulator directing the winding up of a scheme under section 11(3A) of the Pensions Act 1995 (as inserted by *section 22* (power to wind up occupational pension schemes) of this Act) in order to ensure the protected liabilities do not exceed assets or to keep any excess to a minimum.

437. *Subsections (4) and (5)* provide that no transfers are to be made from the scheme during the assessment period. In addition no steps can be taken to discharge the scheme’s liabilities for pensions or other benefits or other liabilities prescribed in regulations. These prohibitions apply whether or not the scheme is being wound up. But these restrictions are subject to *section 138* which sets out how benefits are to be paid, to or in respect of members, during an assessment period.

438. *Subsection (7)* applies where a member has a right to a cash transfer sum or a contribution refund (Chapter 5, Part 4 of the Pension Schemes Act 1993) and this right arises on the commencement of the assessment date, during the assessment period the right cannot be exercised and the powers and duties under Chapter 5, Part 4 of the Pension Schemes Act 1993 do not apply.

439. *Subsection (8)* provides that the restrictions in *subsection (4)* do not prevent trustees or managers from complying with a pension sharing order and discharging their liability to provide a pension credit to the member’s former spouse.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

440. *Subsection (9)* provides that any action taken in contravention of this section is void, other than in cases where the Board validates it (see *section 136* (power to validate contraventions of *section 135*)).

441. *Subsection (10)* provides for *section 10* of the Pensions Act 1995 (civil penalties) to apply to any trustee or manager of a scheme who fails to take all reasonable steps to secure compliance with the restriction.

442. *Subsection (11)* prevents the Regulator from making a freezing order (see *section 23*) in relation to a scheme during the assessment period.

Section 136: Power to validate contraventions of section 135

443. This section gives the Board power to validate contraventions of *section 135* (which places certain restrictions on schemes during the assessment period). *Subsection (1)* provides for the Board to validate a breach of *section 135* only if to do so would be consistent with the objective of ensuring that the scheme's protected liabilities do not exceed its assets or, if they do, that any excess is kept to a minimum. Assets for this purpose do not include assets relating to money purchase benefits.

444. *Subsection (2)* provides that when the Board makes a determination as to whether or not to validate a breach of *section 135*, it must give notice of its decision. The notice must contain the reasons for the determination. It must be given to the Regulator, the trustees or managers of the scheme, any insolvency practitioner in relation to the employer (or if there is none, the employer), and any other person who the Board considers affected by the decision.

445. *Subsection (4)* provides that a validation of a breach may only take effect once a notice of the Board's decision has been given and the period for review of the notice has expired. If there is a review the validation takes effect once the review, any reconsideration, any reference to the PPF Ombudsman and any appeal against the determination has been disposed of.

Section 137: Board to act as creditor of the employer

446. This section provides that during an assessment period the Board is the creditor of any debt owed by the employer to the trustees or managers of a scheme and for the Board to have all the rights and powers of a creditor during this period. So, for example, the Board will represent the scheme at any meeting involving creditors of the employer.

447. *Subsection (3)* provides that the Board must pay any amounts received in respect of the debt owed by the employer to the trustees or managers of the scheme.

Section 138: Payment of scheme benefits

448. This section restricts the scheme benefits paid to members of a scheme during an assessment period.

449. *Subsection (2)* provides that the amount of the benefits payable to scheme members during the assessment period must be reduced, if necessary, so that they do not exceed the level of compensation that would be payable if the scheme had been taken over by the Board from the beginning of the assessment period. *Subsections (3)* and *(4)* provide that during the assessment period no benefits are payable in respect of Chapter 5, Part 4 of the Pension

Schemes Act 1993 (early leavers; cash transfer sum and contribution refund). This restriction does not apply to money purchase benefits.

450. *Subsection (5)* provides that benefits can be paid during an assessment period in relation to pension credits (where there has been a pension sharing order).

451. Where a pension scheme is being wound up, the effect of sections 73 to 73B of the Pensions Act 1995 (as inserted by *section 270* (winding up) of this Act) is that the benefits payable may be reduced. *Subsection (6)* provides that where a scheme is being wound up during the assessment period the benefits payable are those that would have been payable by the scheme had it not been winding up. This is subject to any reduction required under *subsections (2) and (3)* so that the benefits are paid at the same level as that available under the pension compensation provisions.

452. If the Board does not assume responsibility for the scheme, adjustments may need to be made in the future to make up amounts not paid by virtue of this section or to recover amounts overpaid by virtue of *section 138(6)* (see *sections 150(1) to (3)* (consequences of the Board ceasing to be involved with a scheme) and *154(13)* (requirement to wind up schemes with sufficient assets to meet protected liabilities)).

453. *Subsection (8)* provides that for the purposes of ensuring that benefits are paid during an assessment period in accordance with *subsections (2) and (3)* the trustees or managers of the scheme may take such steps as they consider appropriate (including steps adjusting future payments under the scheme rules) to recover any overpayment or pay any shortfall. *Subsection (9)* provides for civil penalties under section 10 of the Pensions Act 1995 (civil penalties) to apply to the trustees or managers of a scheme who fail to take all reasonable steps to secure compliance with *subsections (2) and (3)*.

454. *Subsection (10)* provides that regulations may provide that in certain circumstances benefits payable during an assessment period are not to be reduced to the level of pension compensation payable from the Pension Protection Fund. Regulations may also allow, in certain circumstances, for a member who has attained normal pension age and continues in employment to postpone taking benefits from the scheme. This can be postponed for the whole or part of the assessment period and can be on such terms and conditions as may be prescribed. This prevents a person becoming a person in receipt of a pension where, had there not been an assessment period, he would have postponed payment of his pension.

455. *Subsection (11)* defines “normal pension age” as the age specified in the scheme rules as the earliest age at which the pension or other benefit becomes payable without actuarial adjustment (excluding early payment on the grounds of ill health). Provision is made for cases where different ages are specified in relation to different parts of a benefit.

456. *Subsection (12)* provides that regulations may set out that in prescribed circumstances a benefit will be treated (for the purpose of *subsection (2)*) as having become payable before the assessment period commenced. This may, for example, be used where a member dies before the assessment period commences and as a person becomes entitled to a benefit not immediately on the death but later during the assessment period.

Section 139: Loans to pay scheme benefits

457. This section allows the Board to lend money to the trustees or managers of a scheme during the assessment period where it considers it appropriate for the purpose of enabling payment of benefits to scheme members in accordance with *section 138*.

458. The trustees or managers will have to make an application. The Board will lend what it considers to be appropriate and on such terms as it thinks fit. Loans cannot be made to enable payment of money purchase benefits payable from the scheme.

459. *Subsection (3)* provides for any amount lent to the trustees or managers of a scheme and interest to become due for repayment at the time that the Board ceases to be involved with the scheme, or when the Regulator makes an order under section 11(3A) of the Pensions Act 1995 (power to wind up occupational pension schemes) to wind up the scheme or at the time when the requirement to wind up schemes with sufficient assets to meet the protected liabilities applies (*section 154* (requirement to wind up schemes with sufficient assets to meet protected liabilities)) whichever first occurs.

460. *Subsection (4)* provides that the Board may not make any loans once a scheme has been ordered to wind up under section 11(3A) of the Pensions Act 1995.

Ill health pensions

Section 140: Reviewable ill health pensions

461. This section provides that during an assessment period the Board may review entitlement to ill health pensions paid under the scheme. A person under normal pension age who is entitled to an ill health pension will generally be entitled to a higher level of compensation than a person whose pension is not in payment at the beginning of the assessment period. This section enables the Board to ensure that any ill health pension has been correctly awarded.

462. *Subsection (2)* provides that the Board may review an ill health pension where:

- the member would be entitled to pension compensation under *paragraph 3 of Schedule 7* in respect of that pension;
- the member is under normal pension age at the assessment date; and
- the pension is attributable to the member's pensionable service under the scheme or another scheme i.e. it is not a survivor's or dependent's pension.

463. *Subsection (3)* provides that the Board can only review an ill health pension under *subsection (2)* if the original decision made by the trustees or managers to award the ill health pension was made in the three years before the assessment date, or where the member had applied for ill health retirement before the assessment date, and the decision is made after that date.

464. *Subsection (4)* provides that where, at the assessment date, the trustees or managers have failed to decide applications for ill health retirement then the trustees or managers must decide these applications within a prescribed time. If the trustees or managers fail to do this then they may be subject to a civil penalty under section 10 of the Pensions Act 1995 (civil penalties).

465. *Subsection (5)* deals with rates where an application for an ill health pension is made on or after the assessment date or is made before that date but not decided in the period mentioned in *subsection (3)(b)*. If, in the absence of this section, the award would be backdated to before the assessment date, this subsection provides that for the purposes of determining any pension compensation the award is treated as taking effect after the decision is made. As a result the person will be treated as an active or deferred member rather than a person in receipt of a pension for the purposes of *Schedule 7* (pension compensation).

466. *Subsection (6)* provides for regulations to prescribe the procedure to be followed in relation to the review of an ill health award under this section. This procedure may, for example, require the Board to notify the scheme member in writing and give reasons for its decision

467. The definitions in *section 142* are relevant to this section.

Section 141: Effect of a review

468. Where the Board decides that the conditions in *section 141(3)* are met, it may then determine that the compensation in respect of the pension is to be determined under the regulations rather than in accordance with *Schedule 7* to the Act. It may only make such a determination within a reasonable period after the assessment period began (or the date the decision was made to pay the benefit) and before it approves a scheme valuation.

469. The conditions in *section 141(3)* are that:

- the compensation which would be payable at the assessment date would exceed the rate of the compensation which would be payable if it was calculated under the regulations under *section 141(2)*;
- the Board is satisfied that:
 - the award was made in ignorance of, or based on a mistake as to, a material fact relevant to the decision;
 - at the time of the decision to make the award, the member knew, or could have been expected to know, that fact and that it was relevant to the decision;
 - had the trustees or managers known, or not been mistaken as to that fact, they could not reasonably have decided to make the award;
- the Board is satisfied that the person would not have satisfied the conditions for ill health retirement after the date of the trustees' or managers' decision and before the assessment date. For example, if a person's health had deteriorated significantly since the original award this provision enables the Board to consider new evidence to determine if the award could properly have been made at a later time.

470. Where the Board determines that compensation in respect of the ill health pension is to be determined in accordance with regulations under this section, compensation is payable only from the time when the scheme valuation under *section 143* becomes binding (see *section 145*).

471. The definitions in *section 142* are relevant to this section.

Valuation of assets and liabilities

Section 143: Board's obligation to obtain valuation of assets and protected liabilities

472. This section requires the Board to obtain an actuarial valuation of the assets and liabilities of the scheme in order to determine whether the assets of the scheme are less than the protected liabilities. It must make this determination so that it can decide whether it is required to assume responsibility for the scheme.

473. *Subsection (2)* states that the Board must, as soon as is reasonably practicable, obtain an actuarial valuation of the scheme as at the relevant time. This is the time before the qualifying insolvency event mentioned in *section 127* (duty to assume responsibility for schemes following an insolvency event), or, as the case may be, before the application or notification under *section 129* (applications and notifications for the purposes of *section 128*) was made or received.

474. *Subsection (3)* provides that if the requirements set out in regulations are met, regulations provide that the following are to be assets or protected liabilities for the purposes of this valuation:

- a debt due to trustees or managers by virtue of a contribution notice under *section 38, 47 or 55*;
- an obligation arising under a financial support direction (see *section 45*);
- an obligation imposed by a restoration order (see *section 52*).

475. *Subsection (4)* provides that regulations may prescribe how the assets and the protected liabilities of eligible schemes and their amount or value are to be determined, calculated and verified. Regulations may provide for the valuation to take account of events occurring during the period beginning with the relevant time and ending with the time the valuation is approved under *section 144*, when valuing certain assets and liabilities. Those assets/liabilities are

- a *section 75* debt;
- a debt due by virtue of a contribution notice issued under *section 38, 47 or 55*;
- an obligation arising under financial support for the scheme;
- an obligation imposed by a restoration order made under *section 46* in respect of a transaction involving assets of the scheme. This is in order that the Board need not assume responsibility for a scheme which could be wound up to the benefit of members.

476. *Subsection (6)* states that subject to any provision made in regulations under *subsection (4)*, a valuation must accord with any guidance issued by the Board.

477. *Subsection (7)* states that when calculating the amount of any liabilities, a provision of the scheme rules which limits the amount of the scheme's liabilities by reference to the value of its assets is to be disregarded. Such a rule places an artificial restriction on the value of a scheme's liabilities.

478. *Subsection (8)* provides that when the Board ceases to be involved with a scheme it no longer has a duty to obtain an actuarial valuation under *subsection (2)*. It is, for example, possible that the employer and associated pension scheme could be rescued before the valuation is completed, and in such circumstances it would not be necessary to complete the valuation.

479. *Subsection (9)* provides that the Board need not undertake an actuarial valuation of a scheme when it considers that an event (such as a repayment of a debt or other event as listed in this subsection) may occur. Such an event could affect the value of the assets or the amount of the protected liabilities of the scheme for the purposes of the valuation.

480. In addition, under *subsection (10)* provision has been made to take account of the Board having power to review ill health awards. This means that the Board cannot be required to obtain the valuation whilst it may review ill health pensions under section 140. This is because such a review may affect the valuation.

481. *Subsection (11)* defines “actuarial valuation” as a valuation of assets and protected liabilities of the scheme that is prepared and signed by a person with the appropriate qualifications or experience or a person approved by the Secretary of State. The necessary qualifications on experience will be detailed in regulations. The form of the valuation and the information to be contained within the valuation will be set out in regulations.

Section 144: Approval of valuation

482. The purpose of this section is to require the Board to determine whether to approve a scheme valuation and where it approves a valuation, to provide a copy of it to specified persons.

483. *Subsection (1)* provides that this section applies where the Board obtains a valuation in respect of a scheme under *section 143* (Board’s obligation to obtain valuation of assets and protected liabilities).

484. *Subsection (2)* states that if the Board is satisfied that the valuation has been prepared in accordance with *section 143* it must approve the valuation, and give a copy of it to the Regulator, the scheme trustees or managers and the insolvency practitioner of the employer or the employer. *Subsection (3)* states that if the Board is not satisfied that the valuation is in accordance with *section 143* then it must obtain a further valuation under that section.

Section 145: Binding valuations

485. This section provides for when a valuation becomes “binding” for the purposes of Chapter 3 of Part 2. By virtue of *section 160* (transfer notice), the Board cannot assume responsibility for a scheme until the valuation is binding.

486. *Subsection (1)* provides that the valuation only becomes binding once it is approved under *section 144* and the period to review the approval of the valuation has expired, and any review, reconsideration or reference to the PPF Ombudsman of the approval of the valuation and any appeal against his decision has been completed.

487. *Subsection (2)* states that once a valuation has become binding it is conclusive for the purposes of establishing whether scheme assets are less than the protected liabilities for the purpose of *section 127* or under *section 128*. *Subsection (2)* ensures that even where a

binding valuation is obtained account can be taken of subsequent fraud compensation payments (see *section 172*) (relationship with fraud compensation regime).

488. *Subsection (3)* provides that the Board must notify the trustees or managers, the insolvency practitioner (or, if none, the employer) and the Regulator once the valuation becomes binding. *Subsection (4)* states that a notice under *subsection (3)* must be in the prescribed form, and contain the prescribed information, as set out in regulations.

Refusal to assume responsibility

Section 146: Schemes which become eligible schemes

489. This section enables regulations to be made requiring the Board to refuse to assume responsibility for a scheme if it was not an eligible scheme throughout such period as may be prescribed. Assuming that regulations under *section 126* (eligible schemes) require an “eligible scheme” to have at least three members, an example could include a scheme with only two members which increases the number of scheme members solely with the aim of becoming an eligible scheme to obtain assistance from the Pension Protection Fund.

490. Where the Board refuses to assume responsibility for a scheme under this section it must issue a withdrawal notice and give a copy of the notice to the Regulator; the trustees and managers of the scheme; and any insolvency practitioner in relation to the employer or if there is no insolvency practitioner, the employer. A withdrawal notice means a notice in the prescribed form which states the time from which the Board ceases to be involved with the scheme and contains such other information as may be prescribed in regulations. A withdrawal notice is binding once the period for review has expired and any review, reconsideration or reference to the PPF Ombudsman or appeal against his determination of the notice has been completed and the notice has not been revoked, varied or substituted.

Section 147: New schemes created to replace existing schemes

491. The Board must refuse to assume responsibility for a scheme where it is satisfied that the conclusions in *subsection (1)* are satisfied. This section prevents abuse in cases where schemes which are not required to pay the levy transfer their members to a new scheme which is an eligible scheme, when insolvency of the employer seems likely, in order to benefit from the compensation scheme.

492. Where the Board refuses to assume responsibility for a scheme it must issue a withdrawal notice and give a copy of the notice to the Regulator, the trustees or managers of the scheme and any insolvency practitioner in relation to the employer or if there is no insolvency practitioner, the employer. A withdrawal notice means a notice in the prescribed form which states the time from which the Board ceases to be involved with the scheme and contains such other information as may be prescribed in regulations. A withdrawal notice becomes binding once the period for review of the notice has expired and any review, reconsideration or reference to the PPF Ombudsman and any appeal against his determination has been concluded and the notice has not been revoked, varied or substituted.

Section 148: Withdrawal following issue of section 122(4) notice

493. A section 122(4) notice is a notice issued by an insolvency practitioner in respect of a scheme stating that he cannot determine whether the scheme is one in respect of which a scheme rescue is not possible or a scheme rescue has occurred.

494. The section stipulates that a withdrawal notice under *subsection (3)* must be issued where:

- there is a binding section 122(4) notice;
- a withdrawal event has not occurred in respect of a withdrawal notice that has been issued between the last insolvency event and the section 122(4) notice becoming binding;
- the occurrence of such a withdrawal notice in respect of such a notice is no longer possible (see *section 149*);
- an insolvency event has not occurred since the issue of the section 122(4) notice and an insolvency event is unlikely to occur within six months from when the section applies;
- where a withdrawal notice becomes binding, the Board's involvement with the scheme ceases (see *section 149*).

495. *Subsection (4)* states that where no withdrawal notice is issued under *subsection (3)* and no further insolvency event occurs during that six month period the Board must issue a withdrawal notice.

496. *Subsection (5)* states that the Board must send a copy of any withdrawal notice to the Regulator, the trustees or managers of the scheme and the employer.

497. *Subsection (6)* specifies that a withdrawal notice issued under this section does not become binding until the period for review has expired and any review, reconsideration or reference to the PPF Ombudsman and any appeal against his determination has been completed and that notice has not revoked, varied or substituted.

498. *Subsection (7)* provides that notice that the withdrawal notice has become binding must be given to the Regulator, the trustees or managers and the employer. The notice must specify the time from which the Board will cease to be involved. *Subsection (8)* allows regulations to specify the form and content of notices under this section.

Cessation of involvement with a scheme

Section 149: Circumstances in which Board ceases to be involved with an eligible scheme

499. This section stipulates that the Board ceases to be involved with a scheme on the occurrence of the first withdrawal event after the beginning of the assessment period, thus bringing the assessment period to an end. Where a withdrawal notice is issued, the issue does not count as a withdrawal event until the notice has become binding, i.e. until appeal rights against its issue have been exhausted and any appeals have been resolved.

500. *Subsection (2)* lists withdrawal events in relation to an eligible scheme as follows:

- a notice under *section 122(2)(b)*, that a scheme rescue has occurred, becoming binding (this includes a notice issued by the Board by virtue of *section 124*);
- a notice under *section 130*, that a scheme rescue has occurred, becoming binding;

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

- a notice is refused under *section 146 or 147* to assume responsibility becoming binding; and
- a notice of withdrawal given under *section 148* becoming binding.

501. *Subsections (3) to (5)* deal with cases where an event occurs during the period between a withdrawal notice being issued and it becoming binding, which, had the notice already been binding when the event occurred, would have been a qualifying insolvency event (or the equivalent event under *section 128*). This ensures that the event triggers a new assessment period once the withdrawal notice becomes binding.

502. *Subsection (6)* explains that for the purpose of Chapter 3 a withdrawal event in respect of a withdrawal notice is a possibility until each of the following are no longer reviewable:

- any withdrawal notice issued;
- any failure to issue a withdrawal notice;
- any other notice issued by the Board under Chapter 2 or 3 which is relevant to the issue of a withdrawal notice or to a withdrawal notice becoming binding;
- any failure to issue such a notice.

Section 150: Consequences of the Board ceasing to be involved with a scheme

503. This section sets out the consequences to the scheme where the Board ceases to be involved with it. It ensures that no member loses out as a result of the restrictions on contributions, accruals and transfers that apply during the assessment period.

504. *Subsection (1)* sets out that where the assessment period comes to an end the scheme must top up benefits which fell due to the level that would have been payable under scheme rules in respect of the entire assessment period in the absence of *section 138*. *Subsection (2)* states that where the winding up of the scheme began before the end of the assessment period the amount payable under *subsection (1)* in respect of benefits which fell due will take account of any reduction required by section 73 to 73B of the Pensions Act 1995 (as substituted by *section 270* (winding up) of this Act) which govern the benefits payable during the winding up period.

505. *Subsection (3)* applies where an assessment period comes to an end and the scheme is required to wind up. Where because of *section 138(6)* the benefits paid during that period exceeded the amount which would otherwise have been payable during winding-up, the trustees or managers must take steps to recover the excess amount paid.

506. *Subsection (5)* allows regulations to deal with cases where an assessment period ends and a person was in employment during the period but did not accrue benefits due to *section 133(5)* (no benefits accrue during an assessment period). Regulations will prescribe that in certain circumstances benefits will accrue under the scheme rules.

507. *Subsection (6)* sets out that regulations mentioned in *subsection (5)* may provide that:

- a) benefits may not accrue unless contributions are paid towards the scheme during a prescribed time frame;

- b) employee contributions may be paid by the member in respect of the assessment period;
- c) contributions mentioned in *subsections (6)(a) and (6)(b)* must be accepted in respect of the assessment period;
- d) section 31 of the Welfare Reform and Pensions Act 1999 (reduction of benefit where a person's shareable rights are subject to a pension debit) is to apply with modifications in cases where benefits accrue by virtue of this section.

508. *Subsection (7)* defines the meaning of "contributions" in relation to an eligible scheme.

Reconsideration

Section 151: Application for reconsideration

509. Where the Board initially determines that there is a scheme failure but that the scheme is not sufficiently underfunded to satisfy the conditions in *section 127(3)(a) or 128(2)(a)*, the scheme may apply for reconsideration under this section if it thinks that since the start of the assessment period it has become further underfunded. The application must be made within the "authorised period" mentioned in *subsection (6)*.

510. *Subsection (4)* provides for any application for reconsideration to be in the prescribed form and contain the prescribed information. In addition the application must be accompanied by a protected benefits quotation in the prescribed form and audited scheme accounts for a period, determined by regulations under this section. A protected benefit quotation is defined in *subsection (8)* but basically it is a quote from an insurance company for annuities which would provide for each scheme member benefits equivalent to the lower of:

- the compensation payable if the Board assumes responsibility for their scheme, and
- their scheme benefits.

511. *Subsection (5)* provides that the application must be made within the authorised period.

512. *Subsection (9)* states that scheme accounts must include a statement of the assets of the scheme (excluding those in respect of money purchase benefits) as at the reconsideration time (see *subsection (8)*), and must be prepared in accordance with other prescribed requirements.

513. *Subsection (10)* provides that regulations and guidance under *section 143* (Board's obligation to obtain valuation of assets and protected liabilities) will apply to the scheme accounts for the purposes of this section, as they apply for the purposes of a valuation under that section.

514. *Subsection (11)* enables regulations to require that, where an asset of a prescribed description has been acquired during the assessment period, the value assigned to the asset as at the reconsideration time is to be determined, for the purposes of the scheme accounts, in the prescribed manner. *Subsection (12)* provides for regulations and any guidance for the purposes of defining how the cost of securing benefits corresponding to the compensation payable from the Pension Protection Fund will be determined, calculated and verified for the

purpose of the protected benefits quotation. *Subsection (13)* also provides that no account is to be taken of winding up, when determining a person's entitlement to scheme benefits for the purposes of the quotation.

Section 152: Duty to assume responsibility following reconsideration

515. This section sets out the circumstances in which the Board will assume responsibility for a scheme on reconsideration.

516. *Subsection (2)* provides for the Board to assume responsibility for a scheme if it is satisfied that the value of the assets of the scheme as at the reconsideration date is less than the aggregate of: the amount quoted in the protected benefits quotation accompanying the application (i.e. the amount required to buy out the protected liabilities); the amount of the liabilities of the scheme not related to scheme members; and the estimated costs of winding up the scheme.

517. *Subsection (3)* provides that where the Board makes a determination under this section it must issue a 'determination notice' and give a copy of that notice to the trustees or managers of the scheme and the Regulator. *Subsection (5)* states that the Board is not required to assume responsibility for the scheme under *subsection (2)* until the determination notice issued under *subsection (3)* becomes binding.

518. *Subsection (7)* states that where a determination notice issued under *subsection (3)* becomes binding, the Board must give a notice to that effect and a copy of the binding notice to the trustees or managers of the scheme and the Regulator. *Subsection (8)* sets out the power to make regulations prescribing the form of the notice under *subsection (7)* and the information to be contained within it.

519. *Subsection (9)* allows the Board to obtain its own valuation of the assets of the scheme as at the reconsideration date if it wishes –rather than relying on the audited scheme accounts. *Subsection (10)* provides that for the purpose of calculating the estimated costs of winding-up, regulations and guidance under *section 143(4) and (6)* will apply as they apply for the purposes of *section 143*. *Subsection (12)* provides that this section is subject to *sections 146 and 147* under which the Board can refuse to assume responsibility for a scheme in certain circumstances.

Closed schemes

Section 153: Closed schemes

520. This section applies to cases where a scheme rescue is not possible and, although the scheme has sufficient assets to meet the protected liabilities, the high level of the scheme's liabilities mean that it cannot secure a buy-out quote for the scheme's pension liabilities from one or more insurance companies.

521. *Subsection (1)* states that this section applies to an eligible scheme where *section 151(2) or (3)* applies (that is where a scheme rescue is not possible but the scheme has sufficient assets to meet the protected liabilities).

522. *Subsection (2)* states that, if a scheme's trustees or managers cannot obtain a full buy-out quotation for the scheme liabilities, they must within the authorised period (within the meaning of *section 151(6)*), apply to the Board for authority to continue as a closed scheme.

Subsection (3) states that in order for scheme trustees or managers to decide whether they should apply to the Board under *subsection (2)* to continue as a closed scheme they must first take all reasonable steps to obtain a full buy-out quotation in respect of the scheme.

523. *Subsection (4)* states that the application mentioned in *subsection (2)* must be in the form required by regulations and must contain the information required by regulations. It must also be accompanied by evidence in the form required by regulations showing that the scheme trustees or managers have taken all reasonable steps to obtain a quotation. *Subsection (5)* provides that, where the Board receives an application under *subsection (2)* and is satisfied that the scheme trustees or managers have taken all reasonable steps to obtain a full buy out quotation but have been unable to do so, they must authorise the scheme to continue as a “closed scheme”.

524. *Subsection (6)* states that where the Board makes a determination on an application it must issue a determination notice to the trustees or managers of a scheme and the Regulator.

525. *Subsection (8)* states that, if the scheme trustees or managers do not comply with *subsection (2) or (3)*, section 10 of the Pensions Act 1995 (civil penalties) applies.

Winding up

Section 154: Requirement to wind up schemes with sufficient assets to meet protected liabilities

526. This section sets out the requirements for schemes to wind up when a scheme rescue is not possible but the scheme has sufficient assets to meet the protected liabilities. Schemes authorised to continue as closed schemes are required to wind up under this section, but because they cannot obtain buy-out quotations they may be forced to wind up by paying their liabilities as they fall due rather than buying out their members’ rights under the scheme by purchasing annuities.

527. Where an assessment period ends, the trustees or managers must wind up the scheme, or continue to wind up the scheme (if this had already commenced before the assessment period) if:

- a scheme rescue is not possible but the scheme has sufficient assets to meet the protected liabilities (see *section 151(2) or (3)*);
- the trustees or managers did not make an application for reconsideration (see *section 151*) or apply to continue as a close scheme (see *section 153(2)*) within the authorised period or if such an application was made it has been finally determined, and
- that if an application was made Board is not required to assume responsibility for the scheme under *section 152*.

528. *Subsection (4)* states that when an assessment period in relation to a closed scheme (as set out in *section 159(3)*) comes to an end because the conditions set out in *subsection (5)* have been met the scheme trustees or managers must continue the winding up of the scheme which was begun before the assessment period. The conditions are that: an application is made by, or notice is given to, the trustees or managers of a scheme as set out in *section 157*; the valuation obtained by the Board under *section 158(3)* has become binding; and the Board is not required to assume responsibility for the scheme under *section 158(1)*.

529. *Subsection (7)* provides that the Board may give directions to the trustees or managers of a scheme relating to the manner in which the scheme is wound up under this section. Under *subsection (8)* the Regulator may, by order, direct any person specified to take steps needed as a result of the winding up being backdated to the start of assessment period by virtue of *subsection (6)* or the continuation of a winding up which began before the assessment period and to take those steps within a prescribed period.

530. *Subsection (9)* states that section 10 of the Pensions Act 1995 (civil penalties) will apply to any trustee or manager who has failed to take all reasonable steps to secure compliance with *subsections (7) and (8)*. *Subsection (10)* states that *subsection (9)* also applies to any other person who, without reasonable excuse, fails to comply with a direction to him contained in an order under *subsection (8)*.

531. *Subsection (11)* states that the winding up of a scheme under this section has the same effect in law as if it had been done under powers conferred by or under the scheme. *Subsection (12)* states that this section must be complied with, regardless of any enactment's or rule of law or rule of a scheme that would normally prevent a scheme from winding up, or require a procedure to be implemented or consent obtained.

532. *Subsection (13)* provides that where an assessment period comes to an end with the scheme being required to wind up/continue winding up under this section (see *section 132(2)(b)(iii)* and *159(3)(b)(ii)*), *section 150(1) to (4)* will apply. Those provisions require adjustments to be made to the benefits paid during the assessment period, so that they reflect the benefits payable under the scheme (subject to the requirements of sections 73 to 73B of the Pensions Act 1995 (winding up)).

533. *Subsection (14)* provides that where a public service pension scheme is wound up regulations may modify any enactment containing the scheme rules or under which it is made.

Provisions applying to closed schemes

Section 155: Treatment of closed schemes

534. This section makes provision in respect of the treatment of schemes that the Board has authorised to continue as closed schemes under *section 154(3)*.

535. Although the scheme is no longer subject to an assessment period, *subsection (2)* states that the provisions set out in *subsection (3)* of this section apply to closed schemes at any time when the trustees or managers of a scheme are required to wind up or continue winding up.

536. A closed scheme is required to wind up/continue winding up unless and until an assessment period begins under *section 159*. The provisions which apply to a closed scheme include *section 40(5)* (Board to act as a creditor for a debt due by virtue of a contribution notice under *section 38*), and *section 133* (restrictions on admission of new members, payment of contributions etc).

537. *Subsection (4)* states that regulations may require the trustees or managers of a closed scheme in relation to which the provisions mentioned in *subsection (3)* apply to comply with such requirements as may be prescribed when providing for the discharge of any liability to, or in respect of, a member of the scheme for pensions or other benefits. This could, for example, be used to prevent a scheme discharging those liabilities which would not be

compensated were the Board to assume responsibility for the scheme (e.g. pensions which exceed the cap imposed by *Schedule 7*).

Section 156: Valuations of closed schemes

538. This section makes provision for regular valuations of closed schemes.

539. *Subsection (1)* enables regulations to require the trustees or managers of a closed scheme to obtain actuarial valuations of the scheme at certain intervals. This is in order that they can decide whether they should make an application to the Board requesting it to reconsider taking responsibility for the scheme.

540. Regulations and guidance will deal with how assets and liabilities are to be determined, calculated and verified in accordance with guidance issued by the Board. *Subsection (4)* provides for any provision of a scheme that limits the amount of its liabilities by reference to its assets to be disregarded when calculating the amount of the liabilities of a scheme for the purposes of this provision. *Subsection (5)* ensures that the trustees or managers are not required to obtain an actuarial valuation of the scheme while they are awaiting a final determination of their application to continue a closed scheme.

Reconsideration of closed schemes

Section 157: Applications and notifications where closed schemes have insufficient assets

541. This section sets out the requirements that apply when trustees or managers of a closed scheme become aware (probably as a result of a valuation under *section 156*) that the scheme no longer has sufficient assets to meet its protected liabilities (see *section 131*).

542. *Subsection (1)* states that when the trustees or managers of a closed scheme become aware that the scheme's assets are less than the protected liabilities, they must make an application to the Board for it to assume responsibility for the scheme. This must be done before the end of a period to be set out in regulations. (Once again references to assets here do not include assets relating to money purchase schemes.) The Board must give a copy of any application it receives to the Regulator.

543. *Subsection (3)* provides that the Regulator must issue a notice to the Board if at any time it becomes aware that a scheme's assets are less than its protected liabilities. *Subsection (4)* provides for the Board to issue a notice to the scheme trustees or managers when it receives notification from the Regulator.

544. *Subsections (5) and (6)* are aimed at preventing both an application under *subsection (1)* and a notice under *subsection (3)* being given in respect of the same set of facts.

545. *Subsection (7)* provides for regulations to state the format and information to be provided in notices and applications under this section. *Subsection (8)* states that civil penalties (section 10 of the Pensions Act 1995 (civil penalties)) apply if a trustee or manager of a scheme fails to take all reasonable steps to ensure compliance with *subsection (1)*.

Section 158: Duty to assume responsibility for closed schemes

546. This section sets out the Board's duty to assume responsibility for a closed scheme when the appropriate application or notification under *section 157* is made and where at the "relevant time" (as defined in *subsection (8)*) the assets were less than the protected liabilities.

547. *Subsection (1)* states that where the trustees or managers of a scheme make an application under *section 157*, or receive a notice from the Board under *section 157(4)*, the Board must assume responsibility for the scheme if the value of the assets was less than the value of the protected liabilities at the relevant time. *Subsection (2)* states that in relation to *subsection (1)* any reference to assets excludes any assets in relation to money purchase benefits. *Subsection (3)* provides that the Board must obtain an actuarial valuation (within the meaning of *section 143*) of the scheme, as soon as it possibly can, in order to determine whether the conditions in *subsection (1)* are satisfied.

548. *Subsections (4) to (6)* deal with requirements with which the valuation must comply and apply many of the provisions relating to an actuarial valuation under *section 143*.

549. *Subsection (7)* ensures that once an application is made or notification is given under *section 157* no further application/notification need be considered if it is made before the existing one is determined.

Section 159: Closed schemes: further assessment periods

550. This section ensures that a closed scheme enters a further assessment period if an application is made or a notification is given under *section 157*. As a result, all the provision restricting the operation of a scheme during an assessment period (see *sections 133 to 138*) will apply.

551. *Subsection (3)* provides that a further assessment period begins in relation to closed schemes when the application is made or the notice is received (under *section 157*) by the trustees or managers of the scheme, and ends when the trustees or managers of the scheme receive a transfer notice from the Board as set out in *section 160* or the conditions set out in *section 154(5)* (scheme sufficiently funded to meet protected liabilities) are met, whichever occurs first.

552. If the assessment period comes to an end because the conditions in *section 154(5)* are satisfied, the scheme continues as a closed scheme and the winding up of the scheme continues (subject to the fact that it may be unable to buy out its liabilities immediately). If the scheme subsequently becomes underfunded, a further application may be made or notification given under *section 157* and a further assessment period will begin under *section 159*.

Assumption of responsibility for a scheme

Section 160: Transfer notice

553. This section provides for the Board to issue a transfer notice to the trustees or managers in circumstances where they are required to assume responsibility for a scheme by virtue of *section 127, 128, 152 or 158*.

554. Once the transfer notice is received by the trustees or managers, *section 161* applies to transfer all property, rights and liabilities of the scheme to the Board. The trustees or

managers of the scheme are discharged from their pension obligations under the scheme from that time, and the Board is required to pay compensation to scheme members on an ongoing basis in accordance with the provisions of Part 2.

555. *Subsection (2)* provides for the Board to issue a transfer notice to the trustees or managers of a scheme once they are satisfied that they are required to assume responsibility for a scheme. *Subsections (3) and (4)* provide for the Board to issue a transfer notice in a case to which *section 127* (duty to assume responsibility for schemes following an insolvency event) or *section 128* (duty to assume responsibility for a scheme) applies only after the valuation obtained under *section 143* becomes binding. Similarly, in a case to which *section 158* (duty to assume responsibility for a closed scheme) applies, no transfer notice can be given until the valuation obtained by the Board under *section 158(3)* becomes binding

556. *Subsection (5)* states that a transfer notice may not be given in relation to a scheme during any period when the issue of, or failure to issue, a withdrawal notice under or by virtue of *section 146 or 147* (refusal to assume responsibility) is reviewable.

557. *Subsection (6)* provides for the Board to give a copy of the transfer notice to the Regulator and the insolvency practitioner in relation to the employer, or if there is none, to the employer.

558. *Subsection (7)* provides for this section to be subject to the provisions relating to fraud compensation cases, which provide that no transfer notice can be issued within the first twelve months of the assessment period or in circumstances where an application for fraud compensation is pending. This is to give time for a fraud compensation application to be made as the payment of such compensation may affect the scheme's ability to meet the cost for the protected liabilities, and so affect whether the Board must take responsibility for the scheme.

Section 161: Effect of Board assuming responsibility for a scheme

559. This section sets out the effect of the Board issuing a transfer notice to the trustees or managers of a scheme. All the property, rights and liabilities of the scheme transfer to the Board when the transfer notice is received by the trustees or managers of the scheme. The trustees or managers of the scheme are discharged from their pension obligations to the scheme at this stage. The Board is required from that point to pay compensation to scheme members on an ongoing basis under the statutory rules set out in Chapter 3 of Part 2. The Board is also responsible for ensuring that any adjustment is made which is required to ensure the correct amount was paid from the beginning of the assessment period (e.g. under *section 138* a person may have been receiving scheme benefits which were lower than the corresponding compensation entitlement and, if so, he will have to be paid the difference).

560. *Subsection (2)* sets out the effects of the Board assuming responsibility for an eligible scheme. The property, rights and liabilities of the scheme are transferred to the Board at the time the trustees or managers receive the transfer notice. This transfer is automatic and does not require the completion of any legal formalities. From that time, the trustees or managers of the scheme are discharged from their pension obligations (as defined) and the Board takes over responsibility for ensuring that compensation is and has been paid in accordance with the pension compensation provisions (as defined). The scheme is treated as having been

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wound up immediately after the transfer notice is received by the trustees or managers of the scheme and ceases to exist at this time.

561. *Subsection (3)* states that the liabilities transferred will not include money purchase benefits and any other liabilities as set out in regulations. *Subsection (4)* states that the trustees and managers are discharged of obligations in respect of guaranteed minimum pensions (Part V, Chapter 2 of the Pension Schemes Act 1993) and obligations to administer the scheme in accordance with the scheme rules or any other enactment.

562. *Subsection (7)* provides the power to make regulations to modify a term of a relevant “contract of insurance”. These are contracts entered by pension schemes to secure their liabilities in respect of a particular person. These contracts may require the scheme to pay the amount paid under the contract to the scheme member. But once the Board assumes responsibility for the scheme, this amount may exceed the member’s compensation entitlement under the Act. Under *subsection (7)* the contract may be modified so that the Board is not required to pay to the member an amount which exceeds his compensation entitlement.

Schedule 6: Transfer of Property, rights and liabilities to the Board

563. *Schedule 6* makes additional provision to that made under *section 161* in respect of the transfer of the property, rights and liabilities of an occupational pension scheme to the Board pursuant to a transfer notice issued under *section 160*.

564. *Paragraph 2(1)* states that property, rights and liabilities are to include property, rights and liabilities that would not otherwise be capable of being transferred, property situated anywhere in the UK or elsewhere, and rights and liabilities under the law of any part of the UK or any country or territory outside the UK. Contracts of employment between the trustees or managers and an individual will not transfer, but are terminated on the day preceding receipt of the transfer notice by the trustees or managers of the scheme.

565. *Paragraph 3* provides for any legal proceedings by or against any of the trustees or managers of the scheme, or applications to any authority which are pending immediately before the transfer to be continued by or against the Board. The liabilities transferred by *section 161* do not include any liabilities in respect of an existing or future cause of action against the trustees or managers where they would have been personally liable to meet the claim and would not have been indemnified from the assets of the scheme. These will remain liabilities of the trustees or managers.

566. *Paragraph 4* states that the transfer to the Board does not require consent from anyone. The transfer is binding in respect of all persons. *Paragraph 5* provides that the transfer shall not give anyone power to terminate or amend any interest or right of the trustees or managers of the scheme.

567. *Paragraph 6* provides that if there are any references in agreements etc to the trustees or managers they shall continue to have effect after the transfer as if they referred to the Board.

568. *Paragraph 7* provides that the Board will have to take all steps required so that foreign property, rights or liabilities are vested in it. Until this is effected under the relevant foreign law the trustees or managers will have to hold the relevant property or rights on behalf of the Board. They may also have to discharge a liability on behalf of the Board.

Section 162: The pension compensation provisions

569. This section provides that *Schedule 7* makes provisions for the compensation to be paid where the Board assumes responsibility for a scheme. This includes provision for:

- periodic compensation to be paid to or in respect of members;
- lump sum compensation to be paid to members;
- a cap to be imposed on the periodic compensation and lump sum compensation;
- annual increases to be made to periodic compensation.

570. *Subsection (2)* makes clear that references in Part 2 to the pension compensation provisions are to the provisions of this section, *section 140 to 142, 161(2)(c), 164 and 168 and Schedule 7*.

Schedule 7: Pension compensation provisions

571. This Schedule explains how the compensation payable from the Pension Protection Fund is to be determined. The amount of compensation paid is calculated as a percentage of the benefits a person was entitled to or in receipt of from the scheme. For example 100% compensation will be given where a person was in receipt of a pension immediately before the assessment date. The amount payable is limited by the compensation cap where a person was under normal pension age at the assessment date. Pension compensation may also be paid to survivors of persons in receipt of compensation

Pensions in payment at assessment date

572. *Paragraph 3* provides that where a person was in receipt of a pension prior to the assessment date, he will receive 100% of the protected pension rate he was entitled to from the scheme plus annual increases under *paragraph 28*. This will be subject to the Secretary of State's power to vary percentage rates (*paragraph 30*).

573. Where a person was in receipt of a pension from the scheme prior to the assessment date and had not attained normal pension age before that date, he will receive 90% compensation. This will not apply where he had received benefits as a result of ill-health subject to the power to review a person's ill-health pension – see *sections 140 to 142*. This will be subject to the compensation cap (*paragraph 26*) and the Secretary of State's power to vary percentages (*paragraph 30*).

574. *Paragraph 4* deals with where the pensioner who is in receipt of pension compensation dies. The widow or widower will receive, after his death 50% of his compensation. Regulations will set out when the widow or widower will not be entitled to compensation. This will allow provision to be made for cases where the scheme rules did not pay a pension to a widow or widower.

Pension benefits postponed at assessment date

575. *Paragraph 5* provides that 100% pension compensation will be paid where before the assessment date a person had been entitled to a pension, was over normal pension age and had postponed taking that pension. The compensation is calculated by reference to the protected pension rate he would have received plus any increases under *paragraph 28*. This is subject to the Secretary of State's power to vary the percentage (*paragraph 30*). The member may

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commute (convert into a lump sum) part of the pension compensation when it comes into payment (see *paragraph 24*). The pension compensation is paid from the assessment date, subject to any provision made to postpone entitlement under *section 164* during the assessment period.

576. *Paragraph 6* provides that 50% of the pension compensation in payment will be paid to the member's widow or widower when he dies. Regulations will set out when the widow or widower will not be entitled to compensation. This will allow provision to be made for cases where the scheme rules did not pay a pension to a widow or widower.

577. *Paragraph 7* provides that lump sum compensation can be paid from the Pension Protection Fund. This will be paid where the member had postponed entitlement to a lump sum from the scheme and he had attained normal pension age. 100% of the lump sum payable from the scheme will be paid at the assessment date. This is subject to the Secretary of State's power to vary percentages (*paragraph 30*) and does not include a lump sum received as a result of commutation.

Active members over normal pension age at assessment date

578. *Paragraph 8* provides that pension compensation of 100% is payable to active members of the scheme who were over normal pension age before the assessment date. The compensation is calculated by reference to the protected notional pension accrued plus increases calculated under *paragraph 28*. This is subject to the Secretary of State's power to vary the percentage (*paragraph 30*). The pension compensation is paid from the assessment date and part of it may be commuted for a lump sum (see *paragraph 24*).

579. *Paragraph 9* provides that 50% of the pension compensation in payment will be paid to the member's widow after he dies. Regulations will set out when the widow or widower will not be entitled to compensation. This will allow provision to be made for cases where the scheme rules did not pay a pension to a widow or widower.

580. *Paragraph 10* provides for when lump sum compensation can be paid from the Pension Protection Fund. This will be paid where the active member had a right to a lump sum and was over normal pension age. 100% of the accrued amount in respect of the lump sum plus any increases under the scheme's rules (referred to as the admissible rules) will be paid at the assessment date. This does not apply to a lump sum received through commutation.

Active member who have not attained normal pension age

581. *Paragraph 11* provides that 90% pension compensation is paid to active members who had not attained normal pension age before the assessment date. The amount payable will be calculated by reference to the accrued protected notional pension plus increases under *paragraph 28* plus the revaluation amount. This is subject to the compensation cap (*paragraph 26*) and the power of the Secretary of state to vary percentages (*paragraph 30*). The pension compensation will commence at his normal pension age and part can be commuted (see *paragraph 24*).

582. *Paragraph 13* provides that 50% of the pension compensation in payment, or payable, will be paid to the member's widow or widower after his death. Regulations will set out

when the widow or widower will not be entitled to compensation. This will allow provision to be made for cases where the scheme rules did not pay a pension to a widow or widower.

583. *Paragraph 14* provides for when lump sum compensation can be paid. Where the member has been entitled to a lump sum he will receive 90% of the accrued amount plus the revaluation amount. This will be paid when he attains normal pension age. This does not apply to a lump sum received through commutation. This is subject to the compensation cap (*paragraph 26*) and the Secretary of State's power to vary percentages (*paragraph 30*).

Deferred members who have not attained normal pension age at assessment date

584. *Paragraph 15* provides that 90% pension compensation will be paid to deferred members who have not attained normal pension age. The pension compensation paid is calculated by reference to the accrued protected pension plus the revaluation amount. This is subject to the compensation cap (*paragraph 26*) and the Secretary of State's power to vary the percentage (*paragraph 30*). The pension comes into payment from the deferred member's normal pension age and part may be commuted as a lump sum (see *paragraph 24*).

585. *Paragraph 18* provides that 50% of the pension compensation in payment or payable will be paid to the deferred member's widow or widower after he dies. Regulations will set out when the widow or widower will not be entitled to compensation. This will allow provision to be made for cases where the scheme rules did not pay a pension to a widow or widower.

586. *Paragraph 19* sets out when lump sum compensation is payable from normal pension age. 90% of the lump sum to which the deferred member was entitled under the scheme rules (referred to as admissible rules) will be paid. This does not apply to a lump sum received through commutation. This is subject to the compensation cap (*paragraph 26*) and the Secretary of State's power to vary percentages (*paragraph 30*).

Compensation in respect of scheme right to transfer payment or contribution refund

587. *Paragraph 20* sets out when a person is entitled to a lump sum of 90% of a protected transfer payment or protected contribution repayment. This is paid where a person's pensionable service terminates on the commencement of the assessment date and as a result he has a right to a transfer payment under the scheme ('the protected transfer payment') or a cash payment which refunds his contributions to the scheme ('the protected contribution repayment'). This is paid immediately after the Board issues the transfer notice under *section 160*.

588. Regulations may modify *paragraphs 8, 10, 11 or 14* as they apply where a person is entitled to compensation under this paragraph.

Pension credit members who have not attained normal benefit age at assessment date

589. *Paragraph 21* applies *paragraphs 15, 18 and 19* to pension credit members, with certain modifications, as if those paragraphs applied to them. The term normal benefit age is used for pension credit members rather than the term normal pension age.

Survivors who do not meet conditions for scheme benefits at assessment date

590. *Paragraph 22* provides that pension compensation may be paid to a survivor who became entitled to a pension after the assessment date as a result of the death of a member

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before the assessment date. The pension must be one which is paid to the survivor as a result of satisfying conditions in the scheme rules. It must also be paid in respect of the deceased member's pensionable service. The amount paid will be 100% of the pension which would have been paid by the scheme if entitlement had arisen before the assessment date plus any increases under *paragraph 28*. This is subject to the Secretary of State's power to vary percentages (*paragraph 30*).

Compensation in form of dependants' benefits

591. *Paragraph 23* provides that regulations may provide for compensation to be payable to partners and dependants of prescribed descriptions.

Commutation of periodic compensation

592. *Paragraph 24* provides that a person can commute part of his pension compensation as a lump sum but cannot commute more than 25% (this percentage may be changed by the Secretary of State). The amount paid as a lump sum will be 25% of the pension compensation payable after reductions are made to take account of the compensation cap. The lump sum payable will be the actuarial equivalent of the commuted portion of the pension compensation calculated from tables designated for this purpose by the Board. Regulation may set out the manner in which the option to commute may be exercised.

Early payment of compensation

593. *Paragraph 25* provides that regulations may prescribe when a person may receive pension compensation and lump sum compensation before his normal pension age. This applies to active members and deferred members under normal pension age. The Board will determine the actuarial reduction to be applied to compensation paid early under this paragraph.

Compensation cap

594. *Paragraph 26* makes provision for the compensation cap. This is the amount which will be specified by the Secretary of State by order. The compensation cap is expected to be £27,777 in the first year for persons who are aged 65. *Paragraph 27* requires him to increase the amount specified where a review under section 148(2) of the Social Security Administration Act 1992 concludes that there has been an increase in the general level of earnings.

595. The compensation cap will apply to persons in receipt of a pension from a scheme before the assessment date who were under normal pension age when the pension commenced and were not eligible for the pension on the grounds of ill health (*paragraph 3*). It will also apply when active members and deferred members under normal pension age become entitled to pension compensation and/or lump sum compensation (*paragraphs 11, 14, 15 and 19*). The compensation cap will apply at the date when a person became entitled to pension compensation. It may be actuarially adjusted if the person had not attained 65 or was 66 or over at the date when he first became entitled.

596. Where the member was entitled to a pension or other benefit under the scheme rules and this exceeds the compensation cap, he cannot receive more than 90% of the cap. If the total were less than the cap then he will receive 90% of that amount. Where a pension was already in payment (where under normal pension age) and part of it had been commuted, the

amount used for the purpose of calculating pension compensation will be the full amount of the pension before commutation and this total will be reduced to the level of the compensation cap, if it exceeded it. If a lump sum had already been paid then it will be added to any pension in payment for the purpose of calculating pension compensation. If this total exceeds the cap then no more than 90% of the cap can be paid as pension compensation.

597. When calculating the total benefits to which there is entitlement under the scheme, account will also be taken of benefits received from connected occupational pension schemes. Regulations will also provide that *paragraph 26* will apply with modifications where a person becomes entitled to pension compensation and had previously been entitled to compensation in respect of benefits under the scheme or a connected scheme or became entitled to one or more lump sums under the scheme or a connected scheme. A scheme is a connected scheme if it has the same employer.

598. Regulations may also prescribe sums to be disregarded for the purpose of *paragraph 26*.

Annual increase in periodic compensation

599. *Paragraph 28* provides that pension compensation will be increased each year by the lesser of the increase in retail price index and 2.5% ('the appropriate percentage'). This will apply to the portion of the pension compensation which relates to the member's service in the scheme after 6 April 1997.

Board's powers to alter rates of revaluation and indexation

600. *Paragraph 29* provides that the Board may determine the maximum revaluation rate for the purposes of *paragraphs 12(4) and 17(4)*.

601. The Board may also determine the 'appropriate percentage' for the annual increase in pension compensation under *paragraph 28*. This can only apply to future increases and can apply to all cases or those cases where entitlement arose after the determination.

602. The Board must consult persons it considers appropriate and publish details of the proposed determination as it considers appropriate. It must consider any representations made.

Secretary of State's powers to vary percentage paid as compensation

603. *Paragraph 30* provides that the Secretary of State may on the Board's recommendation vary any of the percentages listed in *paragraphs 3(4)(a) and (b), 5(3), 7(2), 8(3), 10(2), 11(3), 14(3), 15(3), 19(3), 20(3) and 22(3)*.

604. The Board must consult such persons it thinks appropriate and publish details of the proposed recommendation in relation to the percentages, in such manner as it thinks appropriate. It must consider any representations made.

Special provision in relation to certain pensions in payment before the assessment date

605. *Paragraph 31* applies to cases where immediately before the assessment date a person is in receipt of a pension, but because of the definition of "admissible rules" in *paragraph 35(2)* he is not entitled to compensation under *paragraph 3*. *Paragraph 31* provides that regulations may allow for the pensioner to be treated for the purposes of the pension

compensation provisions as entitled to a pension from the scheme before the assessment date and for the compensation payable to be determined as prescribed (any provisions of this Schedule may also be applied with modifications as prescribed). Regulations may also deal with any entitlement to compensation in respect of the pension which arises other than under *paragraph 3*.

Short periods of service which terminate on commencement of assessment date

606. *Paragraph 32 applies* where a member's pensionable service is terminated on the commencement of the assessment period and, as a result, the member has a right to receive a cash transfer sum or contribution refund under Chapter 5 of Part 4 of the Pension Schemes Act 1993. The member will receive compensation in the same way as other active members of the scheme as if they had rights to long service benefit and did not have any other rights to benefits under the scheme.

Power to modify Schedule in its application to certain schemes

607. *Paragraph 33* provides that regulations may modify the Schedule as prescribed where the scheme is a prescribed scheme or a scheme of a prescribed description. This power may be used to facilitate payment of benefits to members of cash balance schemes.

Normal pension age

608. *Paragraph 34* defines normal pension age as the age specified in the scheme's rules (referred to as admissible rules) as the earliest age at which the scheme pension or lump sum becomes payable without actuarial adjustment (excluding any rule making special provision as to early payment on grounds of ill-health or otherwise). Special provision is made where there are different ages for different parts of a pension or lump sum. If it is not possible to identify the normal pension age from the scheme's admissible rules the Board can decide how the normal pension age is to be determined having regard to those rules.

Scheme rules, admissible rules etc

609. *Paragraph 35* defines the meanings of admissible rules, recent rule changes and recent discretionary increases.

610. Admissible rules means the scheme rules, but disregarding, in certain circumstances, all recent rule changes (including any rules which come into operation as a result of winding-up or an associated event). A recent rule change is disregarded if before the assessment date the combined effect of the change, and any recent discretionary increases, was to increase the protected liabilities of the scheme.

611. Recent rules changes means a change which took effect three years before the assessment date or were made during the three year period (and took effect before that period). In addition any scheme rules which come into operation by reference to an insolvency event in relation to the employer or any prescribed event in relation to the employer, are also included as "recent rule changes". *Sub-paragraph (6)* lists rule changes which are exempted. These include, for example, changes required by any enactment or changes of a prescribed description.

612. Recent discretionary increases means an increase in the rate of a pension in payment or a postponed pension which took effect in the three years before the assessment date or was

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introduced during that period with effect from an earlier time *Sub-paragraph (8)* provides that certain increases may be disregarded.

Accrual rate, pensionable service and pensionable earnings

613. *Paragraph 36* defines the meaning of accrual rate, pensionable service and pensionable earnings.

Other definitions

614. *Paragraph 37* defines deferred member, normal benefit age, pension credit member, pension credit rights, retail prices index and the scheme.

615. References in the Schedule to a pension or lump sum or a right to such, do not include money purchase benefits.

616. Regulations may be made in relation to the meaning in this Schedule of references to ill health.

Section 163: Adjustments to be made where the Board assumes responsibility for a scheme

617. This section sets out what adjustments the Board has to make in relation to compensation amounts payable once it assumes responsibility for a scheme.

618. Where the Board has assumed responsibility for a scheme it must pay compensation in accordance with the pension compensation provisions. Where during the period beginning with the assessment date and ending with the receipt by the trustees or managers of the transfer notice, any benefits were paid (excluding money purchase benefits), these benefits will go towards discharging the liability to pay pension compensation.

619. If during this period a person became entitled to a benefit as a result of the death of a scheme member before the assessment period started, then regulations may be made under *subsection (3)*. These may provide that in prescribed circumstances all or part of the benefit may be treated as having become payable before the assessment date. Where they are treated as payable before the assessment date they will not be treated as discharging the Board's liability to pay pension compensation.

620. *Subsection (4)* provides that the Board must take steps to recover any amounts paid during the period in excess of entitlement to pension compensation together with interest. Where less than that entitlement had been paid the Board must pay the shortfall (plus interest). *Subsection (4)* does not apply to money purchase benefits or any other amounts prescribed in regulations. The Board will not be required to recover any amount which it considers trivial or to recover any amount from a person in such circumstances as may be prescribed in regulations

Section 164: Postponement of compensation entitlement for the assessment period

621. *Subsection (1)* enables regulations to postpone a person's entitlement to compensation for the whole or any part of the assessment period during which he continues in employment after attaining normal pension age. *Subsection (2)* allows regulations under this section to prescribe the terms and conditions of postponement (e.g. increments may be paid where entitlement is postponed).

Section 165: Guaranteed minimum pensions

622. This section deals with guaranteed minimum pensions (within the meaning of the Pensions Schemes Act 1993) when the Board takes responsibility for an eligible scheme. *Subsection (1)* states that the Board must notify the Inland Revenue when it has assumed responsibility for an eligible scheme and where the liability of the trustees or managers to provide guaranteed minimum pensions is discharged. *Subsection (3)* provides for section 47 of the Pension Schemes Act 1993 to be amended so that the necessary deduction from the state earnings related pension scheme (SERPS) can be made by the Inland Revenue (as the member will be receiving compensation in respect of his GMP).

Section 166: Duty to pay scheme benefits unpaid at assessment date

623. This section states that the Board, once it has assumed responsibility for a scheme, must pay benefits which a person had become entitled to before the assessment period but which remained unpaid when the Board assumed responsibility. This will not apply where the person postponed payment of the benefit or to a transfer payment or refund of contributions.

624. *Subsection (5)* allows regulations to treat a person's entitlement to a benefit as arising before the assessment date. This power applies where the member dies before the assessment period commences and the entitlement to the survivor's benefit arises on or after the assessment date but before the Board assumes responsibility for the scheme. This means that should the Board assume responsibility for the scheme and payment of the survivor's benefit is unpaid, then the Board will be required to make payment of this benefit.

625. *Subsection (6)* applies to prescribed rights which a person became entitled to before commencement of the assessment period. Regulations may be made requiring the Board to take prescribed steps in prescribed circumstances. One of the intended uses of this power is to deal with rights to contribution refunds which arose before the assessment period but had not been discharged before that period began.

626. *Subsection (7)* allows Chapter 3 of Part 2 of the Act and the scheme rules to be modified for the purpose of regulations under *subsection (6)*.

Section 167: Modification of Chapter where liabilities discharged during assessment period

627. This section provides that Chapter 3 of Part 2 can be modified by regulations. These regulations will apply where liability to provide a pension or benefit is discharged during an assessment period, or in prescribed circumstances where a prescribed liability is discharged before the commencement of the assessment period. This power is needed to ensure that no compensation is payable in respect of a liability which has been discharged

Section 168: Administration of compensation

628. The Secretary of State may make regulations with regard to the operation and administration of Chapter 3 of Part 2 (pension protection). These may relate in particular to:

- the method and timing of payments of pension compensation;
- calculating amounts payable;
- the payment of compensation to another person on behalf of a beneficiary;

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- payments when a beneficiary dies;
- the recovery of overpayments;
- the suspension of payments.

Discharge of Board's liabilities

Section 169: Discharge of liabilities in respect of compensation

629. This section enables the Board, once it has assumed responsibility for a scheme, to discharge any of its liabilities to pay compensation to members by: taking out one or more insurance policies; entering into one or more annuity contracts; transferring the benefit of such policies or contracts; payment of cash sum, as prescribed. In the majority of cases it is expected that the liability to pay compensation will be discharged not through this section but by making the compensation payments as they fall due under Chapter 3 of Part 2.

Section 170: Discharge of liabilities in respect of money purchase benefits

630. *Subsection (1)* provides for this section to apply where the Board assumes responsibility for an eligible scheme and one or more members have accrued rights under the scheme to money purchase benefits. *Subsection (2)* provides for regulations to require the Board to ensure that liabilities in respect of money purchase benefits transferred to the Board under *section 161* (effect of Board assuming responsibility for a scheme) are discharged in a prescribed manner. *Subsection (3)* provides for regulations under *subsection (2)* to include provision prescribing the manner in which protected rights (within the meaning of section 10 of the Pensions Schemes Act 1993 (civil penalties)) are disbursed.

Equal treatment

Section 171: Equal treatment

631. This section provides the mechanism to ensure that there is no discrimination between men and women arising from the use of the scheme rules when calculating entitlement to pension compensation or when the Board makes other payments (e.g. under *section 170*).

632. This section also provides that any of the Board's payment functions which have a discriminatory effect, directly or indirectly, must be modified so that the discriminatory effect is removed.

633. *Subsection (3)* provides this section does not operate where any difference in treatment is genuinely due to a material factor which is not a difference in sex. *Subsection (4)* also enables regulations to provide that the section does not operate in prescribed circumstances.

Relationship with fraud compensation regime

Section 172: Relationship with fraud compensation regime

634. *Subsection (1)* clarifies that no notice transferring responsibility for the scheme to the Board can be given within the first 12 months of the assessment period. This is to give time for a fraud compensation application to be made as the payment of such compensation may affect the scheme's ability to meet the cost for the protected liabilities, and so affect whether the Board must take responsibility for the scheme.

635. *Subsection (2)* states that, where there has been an application for a fraud compensation payment under *section 182*, (cases where fraud compensation can be made) no transfer notice can be given until the Board has decided the application, and the period within which the Board's decision can be reviewed has expired and any review, reconsideration or reference to the PPF Ombudsman against the decision and any appeal against his decision has come to an end.

636. If, during the assessment period the Board decides to make a fraud compensation payment and compensation becomes payable after the relevant time (as defined), then it will be regarded as an asset of the scheme at the relevant time, for the purpose of valuations referred to in *sections 127(2)(a), 128(2)(a), 152(2) or 158(1)*. This does not apply where the compensation payable relates to a reduction in value of assets relating to money purchase benefits.

The fund

Section 173: Pension Protection Fund

637. The Pension Protection Fund is a fund maintained by the Board, and is designed to ensure that income derived from the Pension Protection levies (including the initial levy), and assets transferred from schemes to the Board under *section 161* are kept separate from other assets and monies such as those held in the Fraud Compensation Fund or those relating to the administration of the Board.

638. The Pension Protection Fund comprises of:

- property and rights transferred from schemes to the Board under *section 161(2)(a)*;
- receipts from the initial levy (under *section 167*) or the pension protection levies (under *section 175*);
- money borrowed under *section 115* for the purposes of Chapter 3 of Part 2 (pension protection);
- investment income or capital gain arising from the assets in the Pension Protection Fund (see *subsection (2)*);
- any repayment of a loan which has been made to trustees or managers during the assessment period so that they can pay scheme benefits which the scheme was unable to pay during the assessment period, and any interest repaid on the loan (see *section 139*);
- amounts recovered by the Board after a scheme has entered the Pension Protection Fund because the trustees had overpaid an individual during the assessment period (*section 163(4)(a)*) or because the Board overpaid an individual following entry (see *section 168(2)(e)*);
- any amount which is paid in order to meet a debt owed under *section 40(7)* because a contribution notice has been issued by the Regulator under *section 38*. For example, under *section 38*, the Regulator may issue contribution notices where there is evidence that employers have attempted to prevent the recovery of or, avoid or otherwise than

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in good faith, reduce their liability for the “employer debt” that has or might become due under section 75 of the Pensions Act 1995 (deficiencies of assets);

- any property transferred or amounts paid to the Board as required by a restoration order issued by the Regulator under *section 52*. A restoration order may be issued by the Regulator in order to restore the position of a pension scheme and to protect the Pension Protection Fund against the effect of transactions at an undervalue involving scheme assets;
- any amount paid to the Board because the Regulator has issued a contribution notice where there has been a failure to comply with a restoration order under *section 55*;
- any amounts transferred from the Fraud Compensation Fund (as set out in *section 187*);
- additional categories of money required to be paid into the Pension Protection Fund by secondary legislation under *subsection (1)(k)*. However, the secondary legislation cannot allow money to be paid into Pension Protection Fund directly or indirectly from the Crown.

639. *Subsection (2)* states that the Board must credit to the Pension Protection Fund any income or capital gain which arises from the assets held in the fund.

640. *Subsections (3) and (4)* provide that only the following payments and transfers may be made from the Pension Protection Fund:

- sums required to pay any liabilities of schemes for which the Board assumes responsibility (as set out in *section 161(2)(a)*);
- payments of pension compensation to individuals under Chapter 3 of Part 2;
- money required for the repayment of, and the payment of interest on, funds borrowed by the Board as described under *subsection (1)(c)*. (There is further detail on borrowing under *section 115*);
- money required to make loans to trustees or managers unable to meet liabilities for pensions and benefits requiring immediate payments as set out under *section 139*;
- money required to make payments to individuals who were underpaid during the assessment period;
- money required to make payment of scheme benefits to individuals who were due to receive these payments before the assessment date (the beginning of the assessment period), but who remain unpaid at the point the Board assumes responsibility for the scheme (as set out in *section 166*);
- sums required to discharge liabilities under *sections 169 or 170* – for example, the purchase of annuities to cover money purchase benefits under a hybrid scheme, or the payment of scheme benefits outstanding at the point of entry to the Pension Protection Fund;
- any sums required to meet liabilities imposed on the Board by a restoration order where transactions at an undervalue have occurred (*section 52*);

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- any property (other than sums of money) required to meet liabilities imposed on the Board by a restoration order where it has assumed responsibility for a scheme;
- sums required to meet the cost of transferring foreign property, rights and liabilities from the scheme to the Pension Protection Fund (as set out in *section 161(5)*, and *paragraph 7 of Schedule 6*);
- sums required for purposes prescribed by regulations.

The Levy

Section 174: Initial Levy

641. Regulations will provide for the imposition of an initial levy on eligible schemes for a prescribed initial period. They must state the factors by reference to which the initial levy will be assessed, the rate of the levy and the time or times during the initial period when the levy, or any instalment of the levy, becomes payable.

Section 175: Pension protection levies

642. *Subsection (1)* requires the Board to impose a risk-based levy and a scheme-based levy in respect of eligible schemes for each financial year falling after the initial period as defined in *section 174*.

643. *Subsection (2)(a)* and *(3)* sets out the factors by reference to which the risk-based levy is to be assessed and *subsection (2)(b)* and *(4)* sets out the factors by reference to which the scheme-based levy is to be assessed.

644. *Subsection (5)* provides that before the beginning of each financial year the Board must determine:

- the factors to be used to assess the pension protection levies,
- the times by reference to which the levies are to be assessed,
- the rate of the levies, and
- the times when the levies become payable

645. *Subsection (6)* allows different risk factors, scheme factors or rates in respect of different schemes. *Subsection (7)* allows the rate to be nil in respect of a description of scheme.

646. The duty to impose these levies is subject to *section 177* (amount to be raised by pension protection levies) and *section 180* (transitional provision).

Section 176: Supplementary provisions about pension protection levies

647. This section sets out the requirement for the Board to consult such persons as it considers appropriate in the manner specified in secondary legislation before determining the pension protection levy factors where:

- it is the first financial year for which pension protection levies are imposed,
- there is a change in a proposed levy rate or factor from the previous year, or

- no consultation has been required under this section in relation to the pension protection levies imposed for the previous two financial years.

648. *Subsection (2)* requires the Board to publish details of any determination of the matters mentioned in *subsection (5)*.

Section 177: Amounts to be raised by the pension protection levies

649. This section sets out restrictions on the amounts to be raised by the pension protection levies.

650. *Subsection (1)* states that the Board must, when determining the pension protection levies, estimate the amount which will be raised by the levies it proposes to impose. *Subsection (2)* states that the Board must not impose levies for a financial year in a form which it estimates will raise an amount exceeding the levy ceiling (as outlined in *section 178*) for the financial year. *Subsection (3)* provides that 80% of the pension protection levies raised in any one financial year must be raised by the risk-based levy. *Subsection (4)* provides that regulations may modify the levy ceiling for the first financial year after the transitional period provided for by *section 180*. *Subsection (5)* provides that, in the second financial year after the transitional period and for any subsequent years, there shall be a restriction on the maximum amount of pension protection levies. The amount raised cannot exceed the amount raised in the previous year by more than 25%. This percentage can be modified by an order made by the Secretary of State, but he must consult appropriate persons before making such an order.

Section 178: The levy ceiling

651. This section requires the Secretary of State to specify a levy ceiling before the beginning of each financial year. The levy ceiling for the first financial year for which levies under *section 175* are imposed must have the approval of the Treasury. The first levy ceiling set by the Secretary of State is expected to be the amount he estimates would normally be required to be collected by the pension protection levies in a normal year.

652. *Subsection (3)* requires the levy ceiling to be increased each year by the percentage increase in the level of earnings in Great Britain for the review period (as defined in *section 178(4)*) For this purpose the Secretary of State is required by *subsection (5)* to review the general level of earnings for each review period and changes to earnings. He may estimate the general level of earnings in such manner as he thinks appropriate.

653. *Subsection (8)* allows the Secretary of State to specify an increase to the levy ceiling which exceeds the increase in the level of earnings required by *subsection (3)*. He can only do so if the Board makes a recommendation to that effect and the Treasury approves. The Board must consult appropriate persons before making this recommendation.

Section 179: Valuations to determine scheme underfunding

654. This section sets out the way in which valuations will determine scheme underfunding for the purposes of calculating the risk-based pension protection levy. *Subsection (1)* allows for regulations to require trustees or managers of each scheme to provide the Board with an actuarial valuation of the scheme or any other information the Board may require in respect of the assets and protected liabilities of the scheme at such intervals or times as may be determined by regulations.

655. *Subsection (3)* allows for regulations to prescribe how the assets and protected liabilities of schemes and their amount or value are to be determined, calculated and verified. *Subsection (4)* states that subject to any provision made under *subsection (3)* those matters should be determined, calculated and verified with guidance issued by the Board. *Subsection (5)* provides that where a scheme has a rule saying that its liabilities are limited to the amount of its assets, this rule is to be disregarded. *Subsection (6)* states that any reference to “assets” does not include assets relating to money purchase benefits.

Section 180: Pension protection levies during the transitional period

656. *Subsection (1)* of this section allows for regulations to modify the provisions relating to the pension protection levies (as set out in *section 175 and 177(2), 177(3)*) for the “transitional period”. The transitional period will immediately follow the initial period in *section 174* and will allow the Board the time it needs to implement a full risk-based levy.

657. Regulations may modify *section 177(2)* so that it applies in the transitional period as if its reference to the levy ceiling were a reference to a lower amount specified in the regulations. *Subsection (2)* states such modifications may only be made with the approval of the Treasury.

Section 181: Calculation, collection and recovery of levies

658. This section applies to the initial levy and the pension protection levies. It provides that these levies are payable to the Board by the trustees or managers of the scheme or any other prescribed person. *Subsection (3)* provides that the Board must determine the schemes which must pay any levy, calculate the amount of the levy to be paid, and notify any person of the amount of their liability and when it is payable. *Subsection (4)* allows the Board to delegate these duties to the Regulator. *Subsection (5)* provides that if schemes are eligible for only part of a year a proportion of the yearly levy is payable which reflects the proportion of the year during which the scheme is eligible. Exceptions to *subsection (5)* will be detailed in regulations. *Subsection (6)* and *(7)* provide for the levies to be a debt due to the Board which is recoverable by the Board or, if the Board determines, by the Regulator. *Subsection (8)* allows regulations to make provision for the collection and recovery of such debts and the circumstances in which the debt may be waived.

Chapter 4 – Fraud Compensation

Entitlement to fraud compensation

Section 182: Cases where fraud compensation payments can be made

659. This section deals with the payment of fraud compensation to occupational pension schemes. It is necessary to make an application for fraud compensation and the requirements to be met by the application will be set out in regulations. Regulations can specify particular schemes and descriptions of schemes which are not entitled to make fraud compensation applications.

660. Compensation will be paid if the value of the assets has been reduced since the ‘relevant date’ and the Board considers that there are reasonable grounds for believing the reduction was attributable to an act or omission constituting an offence prescribed by regulations for the purposes of this section. The relevant date in the case of schemes

established under trust is the 6 April 1997 and in other cases a date to be specified by the Secretary of State by order.

661. Compensation will be payable if *subsections (2), (3) or (4)* apply.

662. *Subsection (2)* applies where there is a qualifying insolvency event, a binding scheme failure notice (issued under *section 122(2)(a)*) where a scheme rescue is not possible) and a cessation event has not occurred and is not a possibility in relation to the period set out in paragraph (c). (A cessation event is defined in *subsection (9)*).

663. *Subsection (3)* applies where there has been an application or notification under *section 129* in respect of an eligible scheme that has not had an insolvency event but where the employer is unlikely to continue as a going concern, and the Board has issued a scheme failure notice, which has become binding.

664. *Subsection (4)* applies where a scheme is not an eligible scheme for the purposes of Chapter 3 of Part 2 (e.g. where it is a money purchase scheme). An application for fraud compensation can be made to the Board on the basis that the employer is unlikely to continue as a going concern and other requirements are satisfied (these will be set out in regulations). This section will give entitlement to fraud compensation if in response to such an application the Board issues a scheme failure notice under *section 183(2)* confirming that a scheme rescue is not possible. This notice must become binding.

665. *Subsection (6)* sets out requirements in relation to the “authorised period” – this is the period during which an application for fraud compensation can be made. An application must be made within twelve months of:

- in a case within *subsection (2)* where the scheme is an eligible scheme (under *section 126*) the qualifying insolvency event; or
- in a case within *subsection (2)* where the scheme is not an eligible scheme, the issue of a scheme failure notice under *section 122(2)(a)*; or
- in a case within *subsection (3)* the application or notification to the Board under *section 129*; or
- in a case within *subsection (4)*, the time it becomes clear that the employer in relation to a scheme, will not continue as a going concern;
- the time when the scheme’s auditor, actuary, trustees or managers first became aware of the fraud event, if this is later.

666. The Board may extend this period if it considers this appropriate. An application cannot be made once the Board has assumed responsibility for the scheme under Chapter 3 of Part 2..

Section 183: Board’s duties in respect of certain applications under section 182

667. This section applies where an application is made by a scheme which is not an eligible scheme for the purposes of Chapter 3 of Part 2 and the employer is not likely to continue as a going concern (and other requirements to be set out in regulations are met).

668. The Board will as soon as reasonably practicable issue a notice that a scheme rescue is not possible or has occurred. *Subsection (3)* provides that it must as soon as reasonably

practicable give a copy to the Regulator, the trustees or managers of the scheme, the person who made the application and the insolvency practitioner (and if there is no practitioner, the employer).

669. *Subsection (4)* provides that the notice becomes binding once the period for review has expired and any review, reconsideration and reference to the PPF Ombudsman and reference to any appeal against his decision had been disposed of and the notice has not been revoked, varied or substituted.

670. Where a notice becomes binding, a notice to that effect must be given along with a copy of the binding notice to those mentioned in *subsection (3)*. The form and contents of this notice will be set out in regulations.

671. *Subsection (7)* provides that *section 130* (circumstances in which scheme rescue can or cannot be confirmed by the Board) applies for the purposes of this section.

Section 184: Recovery of value

672. Trustees or managers of schemes which apply for fraud compensation are required to attempt to recover the value of the loss due to fraud where the recovery can be made without undue cost or delay.

673. *Subsection (2)* provides that fraud compensation cannot be made until the Board has set a “settlement date”. This is the date after which further recoveries would be unlikely without undue cost or delay. The Board must consult the trustees or managers before setting the date.

674. *Subsections (3) and (4)* provide that ‘recovery of value’ refers to payments received by the scheme in respect of the act or omission which resulted in the reduction of the scheme’s assets. This will not include payments from the Board. It is for the Board to decide whether a payment will be classified as a recovery of value.

Section 185: Fraud compensation payments

675. This section sets out the procedures to be followed by the Board when making a fraud compensation payment.

676. *Subsection (2)* permits the Board to set the terms and conditions of a payment, while *subsection (3)* states that total payment must not exceed the value of the loss less any recovered funds. The amount of the payment must be determined in accordance with regulations and must take account of any interim payments made (*subsection (4)*).

677. *Subsection (5)* requires the Board to give written notice of the payment to be made to the trustees or managers, the applicant (if different), the Regulator, and the insolvency practitioner or employer (if there is no insolvency practitioner).

Section 186: Interim payments

678. This section allows the Board to make interim payments to a scheme where it appears that the conditions in *section 182(1)* are satisfied and the trustees or managers would not be able to meet liabilities of a prescribed description. No interim payments may be made once a settlement date has been specified.

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679. *Subsection (2)* stipulates that interim payments must not exceed the amounts which will be determined as set out in regulations. Under *subsection (3)*, interim payments can be recovered by the Board if it decides the criteria in *section 182(1)* have not been met or the amount paid was excessive.

680. *Subsection (4)* permits the Board to set the terms and conditions of interim payments, including any requirement for repayment.

Section 187: Board’s powers to make fraud compensation transfer payments

681. Where the Board assumes responsibility for a scheme, the Board may make fraud compensation transfer payments to the Pension Protection Fund. This will occur where there had been a reduction in the scheme’s assets after the relevant date (as defined by *section 182(10)*) but before the transfer notice was received by the trustees or managers under *section 160* (transfer notices), ending the assessment period and confirming that the Board of the Pension Protection Fund will assume responsibility for the scheme, *section 182(1)(b)* applies and no application had been made for fraud compensation prior to the Board assuming responsibility for the scheme.

682. Under *subsections (3) and (4)*, the Board is required to attempt to recover the value of the loss (‘recovery of value’), where the recovery can be made without undue cost or delay. The trustees’ or managers’ rights of recovery will have been transferred to the Board when it assumed responsibility for the scheme. The transfer payment cannot be made until all reasonable attempts have been made to recover the loss. A transfer cannot be made until the Board considers it is unlikely to recover anything further without undue cost and delay.

683. *Subsection (5)* provides that “recovery of value” means any increase in the value of the Pension Protection Fund as a result of payment received by the Board that is attributable to the offence that caused the reduction in value.

684. *Subsection (6)* provides that it is for the Board to decide whether a payment it receives is a recovery of value.

685. *Subsection (7)* provides that the amount of fraud compensation transfer payment must not exceed the difference between the reduction in value and any subsequent recoveries.

686. *Subsection (8)* provides that regulations will set out how the Board is to determine the amount of any fraud compensation transfer payment.

687. *Subsection (9)* clarifies that “the relevant date” has the same meaning as in *section 182(10)*. This means that fraud compensation will only be paid in the case of an occupational pension scheme which is established under trust, if the value was reduced after 6 April 1997 and in the case of a scheme which is not established under trust, if the value was reduced after the date specified by an order under *section 182(10)*.

The fund

Section 188: Fraud Compensation Fund

688. As well as the Pension Protection Fund maintained under *section 173*, the Board has to maintain a Fraud Compensation Fund. This section identifies the amounts to be payable into the Fraud Compensation Fund, and lists the categories of expenditure that may be

charged to that Fund. *Subsection (1)* sets out that the Fraud Compensation Fund will consist of:

- designated assets transferred from the Pensions Compensation Board when it is abolished under Part 9 of this Act;
- the fraud compensation levy;
- money borrowed from a deposit taker to enable the Board to meet liabilities under this Chapter (*section 115*);
- interim compensation payments recovered under *section 186* by the Board;
- any income or capital gain arising from assets of the fund.

689. *Subsection (3)* lists permitted payments out of the Fund:

- sums needed to meet any outstanding liabilities of the Pensions Compensation Board which are designated as liabilities of the Pension Compensation Fund;
- fraud compensation payments made to the trustees or managers of schemes under *section 185*;
- interim compensation payments made to the trustees or managers of schemes under *section 186*;
- fraud compensation transfer payments made to the Pension Protection Fund under *section 187*;
- capital repayments on loans under *section 115* (borrowing) and interest payments on the capital borrowed.

690. Only those amounts specified in *subsection (3)* may be paid out of the Fraud Compensation Fund (*subsection (4)*).

The levy

Section 189: Fraud compensation levy

691. *Subsection (1)* of this section provides that the Board may impose a fraud compensation levy on occupational pension schemes which are eligible for fraud compensation.

692. *Subsection (3)* provides that the levy is payable to the Board by or on behalf of the trustees or managers or other prescribed person. *Subsection (4)* states that a compensation levy must be paid at a time and rate determined by the Board, but must not exceed the prescribed rate. When calculating the levy *subsection (5)* permits the Board to take into account estimated current and future expenditure as well as actual expenditure already incurred. *Subsection (6)* requires the Board to notify prescribed persons of the levy payable.

693. *Subsection (7)* sets out that the Board must determine the schemes to which the levy will apply. It must calculate the amount of the levy in respect of those schemes and notify any person liable to pay it of the amount and dates on which it is payable.

694. *Subsection (8)* enables the Board to delegate its functions under *subsection (7)* to the Regulator.

695. *Subsections (9) and (10)* provide that the amount of levy payable under this section is a debt due to the Board and is recoverable by the Board or by the Regulator on its behalf.

696. Further provision may be made through regulations for the Board to collect and recover the levy and the circumstances in which a levy may be waived.

Chapter 5 – Gathering Information

Section 190: Information to be provided to the Board etc

697. This section sets out that certain people will be required to provide prescribed information automatically to the Board, or to a person carrying out the Board’s functions, who is authorised for this purpose, and the circumstances where this will apply will be set out in regulations. In particular, the regulations may set out information which must be provided to enable a determination to be made of a person’s entitlement to pension compensation from the Pension Protection Fund.

698. The regulations must specify how individuals are to be notified of the identity of any person who is authorised to receive information on behalf of the Board.

Section 191: Notices requiring provision of information

699. The Board can require persons involved with a scheme to provide a specified document or information which is relevant to the exercise of the Board’s functions. The notice will specify the manner in which the information or document must be provided and the time limit for doing so. The notice can also be given on behalf of the Board by a person authorised by it.

Section 192: Entry of premises

700. This section allows the Board to appoint a person who may enter scheme premises in order to gather information that is relevant to the functions of the Board. This provision is not intended to be used in the same way as the Regulator’s inspection of premises powers. Instead, it is envisaged that it will be routine for an appointed person to visit scheme premises during an assessment period – normally with prior appointment. While on the premises, the appointed persons may:

- make such examination or inquiry as may be necessary;
- require persons to produce or secure the production of any required document or any other document for inspection;
- make copies of any such document;
- take possession of any document or take other steps to prevent interference with it;
- require information stored in electronic form to be made accessible;
- interview persons whom he has reasonable cause to believe to be able to give relevant information.

701. *Subsection (2)* states that “scheme premises” to which the powers in *subsection (1)* relate are those being used for the business of, or for the storage of information relevant to, the employer, or the employer’s insolvency practitioner, or used to keep documents relevant

to the administration of the scheme. Private dwelling which are not used for the purposes of trade or business are not included.

702. *Subsection (3)* requires an appointed person to produce his certificate of appointment if asked for it when seeking to enter premises, while *subsection (4)* allows the appointed person to be accompanied by such persons as he considers appropriate.

703. *Subsections (5) and (6)* set out that documents which are seized under this section may be kept by the Board for the retention period of 12 months. Where appropriate, the Board may extend that period by a further period of up to 12 months on an ongoing basis.

704. *Subsection (7)* defines “appointed person” as a person authorised by the Board to enter premises in order to gather information in relation to the scheme. In practice, this will often be an actuary or other professional who will be appointed to gather information in order to carry out a valuation during the assessment period.

Section 193: Penalties relating to sections 191 and 192

705. This section is designed to ensure that there are effective criminal sanctions available for use against those who intentionally fail to comply with their obligations under *section 191* (notices) and *section 192* (entry of premises). There are two types of offences as set out below, though it is envisaged that these penalties will only be used in exceptional circumstances. They are designed to act as an important deterrent, and to encourage individuals to provide the information which the Board will need to carry out its role.

706. When a person (without reasonable excuse) fails to comply with a request to provide information or produce a document when required by *section 191*, he will be guilty of an offence which can lead to a fine of up to level 5 on the standard scale. A person will also be liable to such a fine if he intentionally delays or obstructs a person exercising a power under *section 192* or does not secure production of a document or answer a question or provide information.

707. For the more serious offence of deliberately altering, destroying or concealing a document that a person may be asked to produce (again without reasonable excuse), a person will be guilty of an offence, which can lead to a fine or imprisonment or both.

708. This section should be read in conjunction with *section 195* (offence of providing false or misleading information to the Board).

Section 194: Warrants

709. *Subsection (1)* provides that the Board may apply to a justice of the peace for a warrant to enter premises, using force if necessary. A warrant can be issued if the justice of the peace is satisfied by information given on oath by or on behalf of the Board that there are reasonable grounds for believing:

- that there are documents on the premises which have been requested under *section 191 or 192* which have not been provided, or if the documents were requested, they would either not be produced, or would be removed from the premises, hidden, tampered with, or destroyed;

- that an individual will misuse or misappropriate assets of the scheme, and there is information on the premises which relates to whether the act will be done and could be requested using *sections 191 or 192*.

710. *Subsection (2)* outlines what a warrant can authorise a person, who is appointed by the Board, to do. This person (an inspector) may enter premises (using force if necessary), take possession of any document mentioned in *subsection (1)* or take necessary steps to preserve the document or take copies. The inspector may also require any persons named in the warrant to give an explanation in relation to the document. The inspector may also require that the document be produced in a form in which it may be taken away and is legible.

711. *Subsection (3)* provides that an inspector may be accompanied by any person he considers necessary (such as an expert to carry out a valuation of the property, or an accountant to identify relevant accounts). *Subsection (4)* sets out that a warrant under this section shall be valid for one month from the date of issue.

712. *Subsection (5)* sets out that documents which are seized by an inspector with a warrant may be retained by the Board (or individuals authorised by the Board) for twelve months from the date of possession. However, *subsection (6)* allows the Board to extend the retention period for a further period of up to twelve months, and they may repeat this extension on an ongoing basis.

Provision of false or misleading information

Section 195: Offence of providing false or misleading information to the Board

713. A person who knowingly or recklessly provides false or misleading information is guilty of an offence if the information was provided to meet a requirement to provide information set out in regulations under *section 190*, in response to a notice under *section 191* in response to a request by an authorised person during entry under *section 192* or if the person providing information was aware that the Board would use the information for the purposes of discharging its functions. That person may be liable to a fine or imprisonment or both. This section should be read in conjunction with *section 193*.

Use of information

Section 196: Use of information

714. This provision ensures that where the Board holds information that is relevant to a particular function, it may also use that information for any other of its functions.

Disclosure of information

Section 197: Restricted information

715. Restricted information must not be disclosed by the Board or its agents except with the consent of the person to whom it relates and of the person who provided the information (if different), or except as allowed by *sections 198 to 203* and *section 235*. “Restricted information” is all information gathered by the Board, or individuals acting on behalf of the Board in carrying out its role. However, it does not include information which has already been made public or if the form of the information would prevent information relating to a person to be ascertained from it.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

716. Unauthorised disclosure of restricted information will represent an offence, the penalty for which may be a fine on summary conviction, or a fine and/or imprisonment for up to two years on conviction on indictment.

Section 198: Disclosure for facilitating exercise of functions by the Board

717. Restricted information may be disclosed for the purpose of enabling the Board to exercise its functions. *Subsections (2) and (3)* specify that the Board may disclose information to a person qualified to provide advice where such a disclosure is necessary in order to take professional advice which will enable it to carry out any of its functions.

Section 199: Disclosure for facilitating exercise of functions by the Regulator

718. Restricted information may be disclosed to the Regulator for the purpose of enabling it to exercise its functions. The Regulator has a similar power in order to allow it to disclose restricted information to the Board, where the information may assist the Board to exercise its functions.

Section 200: Disclosure for facilitating exercise of functions by other supervisory authorities

719. *Schedule 8* sets out a list of bodies to whom the Board may disclose restricted information where the Board considers the information is relevant to the discharge of the functions of that body specified in the Schedule. The Secretary of State may amend the Schedule after consultation with the Board by adding or removing bodies or functions from the list.

Schedule 8: Restricted information held by Board: certain permitted disclosures to facilitate exercise of functions

720. This Schedule sets out the list of bodies to whom the Board may disclose restricted information where the Board considers the information is relevant to the discharge of the functions of that body specified in the Schedule. The Secretary of State may amend the Schedule after consultation with the Board by adding or removing persons or altering functions in the list.

Section 201: Other permitted disclosures

721. Restricted information may be disclosed to the Secretary of State, the Commissioners of the Inland Revenue and the Department for Social Development in Northern Ireland if the disclosure appears to the Board to be in the interests of members of occupational pension schemes or in the public interest. Disclosure of restricted information is further allowed if the information relates to certain proceedings (see *subsection (2)*), to certain prosecution bodies (see *subsection (4)*), or to a Regulator- appointed trustee. Disclosure may also be made with the Board's consent (see *subsections (8) and (9)*) which will take account of any representations made.

Section 202: Tax Information

722. This section relates to disclosure of information by the Inland Revenue. It provides that the Inland Revenue will not be bound by the restrictions on disclosure imposed by section 182 of the Finance Act 1989, so long as the information is relevant to the exercise of the Board's functions. When the Inland Revenue discloses information to the Board, it should

treat it as “restricted information”. But by virtue of *subsection (4)*, it may not be further disclosed unless the Commissioners of the Inland Revenue or Customs and Excise have given permission, or criminal proceedings are being brought under this Act, the Pensions Act 1995 or the Pension Schemes Act 1993.

Provision of information to scheme members etc

Section 203: Provision of information to members of schemes etc

723. The Board may be required to provide certain information to certain people as set out in regulations. These regulations may require information to be given to scheme trustees or managers, the employer in relation to the scheme, and certain other individuals involved with the scheme. In particular, once the Board has assumed responsibility for a scheme it will be responsible for notifying individuals of their entitlement to compensation and other similar information.

724. The regulations may also require trustees or managers to disclose information to members of the scheme relating to the Board’s involvement with their scheme - for example, details of the valuation sent by the Board to the trustees or managers will be disclosed to members so that they may (if they wish) appeal the calculation of their individual entitlement.

725. *Subsection (2)* allows the Board to voluntarily disclose restricted information to individuals or their representative, where the disclosure relates to the entitlement of that person to compensation. Similarly, *subsection (3)* gives the Board the power to voluntarily disclose restricted information to individuals, where the information relates to the Board’s involvement with a scheme, the Board is satisfied that the disclosure is reasonable and the disclosure is made to all “affected persons”. (See *section 197* which deals with the disclosure of restricted information.)

726. The term “affected person” is defined under *subsection (4)* as a member of the scheme or a person nominated to receive information on their behalf, while *subsection (5)* further clarifies that a nomination may be made in writing by an individual for another person to receive information on their behalf. The nomination becomes effective when the notice is received by the Board, and ceases to be effective when the Board receives a further notice from the member withdrawing the nomination.

727. *Subsection (6)* also sets out that disclosure of restricted information is permitted in the case of an occupational pension scheme where the disclosure is made to a trustee or manager, any professional adviser, the employer or insolvency practitioner and it is relevant to the exercise of their function. The Board must consider it reasonable to make the disclosure to enable them to carry out their role in relation to the scheme.

Interpretation

Section 204: Sections 190 to 203: interpretation

728. This section provides interpretation of terms for the purpose of *sections 190 to 203*. The term ‘document’ is defined. References to ‘the Board’s functions’, ‘trustee’, ‘manager’, ‘professional adviser’ and ‘employer’ are also explained.

Reports

Section 205: Publishing reports etc

729. This section enables the Board to publish reports in any form (including for example on the internet), and sets out that the reports will be exempt from defamation, unless the reports are made with malice. The provision is designed to allow the Board to publish a variety of reports if it considers it appropriate. For example, this could include reports containing details of consultation exercises, or statistics concerning the Board's functions, or recommendations of good practice for schemes which are taken over by the Board. It will also allow the Board to publish details of its decisions, and its decision-making processes, where it is appropriate to do so

Chapter 6 – Reviews, Appeals and Maladministration

Review etc by the Board

Section 206: Meaning of “reviewable matters”

730. *Subsection (1)* provides that references in Chapter 6 of the Act to ‘reviewable matters’ means a matter mentioned in *Schedule 9*. For example, the issue by the PPF Board of a determination notice under *section 123* is listed in *Schedule 9*.

731. *Subsection (2)* allows regulations to provide that reference in *Schedule 9* to a “failure” is to be read as the Board's failure to do an act, or to make a determination within a prescribed period. Regulations may also provide that reference in *Schedule 9* to a “failure” is to be read as not including a failure which first occurs after a prescribed time.

732. Regulations under *subsection (3)* may suspend the effect of any determination, direction or other act or notice of the Board which relates to a “reviewable matter”, until all reviews, reconsiderations, references to the PPF Ombudsman and appeals against his determination have been disposed of and all time limits for requesting reviews have expired.

733. *Subsection (4)* provides for regulations to add reviewable matters to, or delete them from, *Schedule 9*. *Subsection (5)* provides that regulations under *subsection (4)* can make consequential modifications to this Part.

Schedule 9: Reviewable matters

734. This Schedule lists the “reviewable matters” for the purpose of *section 206*.

735. Where an insolvency event has occurred in relation to the employer, *section 122* (insolvency practitioner's duty to issue notices confirming status of scheme) requires an insolvency practitioner to issue one of the following notices in relation to the occupational pension scheme:

- a “scheme failure notice”, if able to confirm that a scheme rescue is *not* possible;
- a “withdrawal notice”, if able to confirm that a scheme rescue *has* occurred; or
- a notice to the effect that he has not been able to confirm whether a scheme rescue is not possible/has occurred.

736. If the Board is satisfied that the insolvency practitioner's notice was correct, it issues a “determination notice” in accordance with *section 123* (approval of notices issued under

section 122). The Board's determination notice, is a reviewable matter under *paragraph 1*. The Board's failure to issue a determination notice is a reviewable matter under *paragraph 2*.

737. If the Board determines not to approve the notice issued by the insolvency practitioner under *section 122* (insolvency practitioner's duty to issue notices confirming status of scheme); or the insolvency practitioner has failed to issue a notice under that section, the Board is required, under *section 124* (Board's duty where there is a failure to comply with section 122) to issue the notice that the insolvency practitioner should have issued. The notice issued by the Board (or the Board's failure to issue the required notice) is reviewable under *paragraph 3*.

738. *Section 130* (Board's duty where application or notification received under section 129) requires a scheme's trustees/managers to apply for the Board to assume responsibility for the scheme if they believe that the employer is unlikely to continue as a going concern and requirements to be prescribed (under *section 129(1)*) are met. If the Regulator becomes aware that the circumstances which would require such an application exist, it must notify the Board accordingly (*section 129(4)*). In either of these circumstances, under *section 130* (Board's duty where application or notification received under section 129) the Board is required to issue either a "scheme failure notice" confirming that a scheme rescue is not possible, or a "withdrawal notice" if a scheme rescue has occurred. *Paragraph 4* allows a review to be requested in respect of the Board's determination to issue either a "scheme failure notice" or a "withdrawal notice". A review may also be requested if the Board fails to issue such a notice.

739. *Paragraph 5* provides that any direction given, during an assessment period, by the Board under *section 134(2)*, (the investment of the scheme's assets, for example) including any variation or revocation of a direction, can be reviewed.

740. In general terms, *section 135* (restrictions on winding up, discharge of liabilities etc) precludes a scheme that is eligible to enter the Pension Protection Fund from starting to wind up during an assessment period or from otherwise discharging any liabilities of the scheme. However, the Board may validate (or not validate) any actions by a scheme's trustees or managers to wind up the scheme where such restrictions apply. *Paragraph 6* allows the Board's determination to be reviewed.

741. *Section 139* (loans to pay scheme benefits) provides for the Board to make short term loans to eligible schemes, to enable the trustees or managers to pay the Pension Protection Fund level of benefits when the scheme is unable to do so during an assessment period. The Board's determination under *section 139(2)* regarding the making of a loan, the amount of any such loan and the failure to make such a loan is reviewable under *paragraph 7*.

742. *Paragraph 8* provides for the Board's failure to obtain a valuation under *section 143(2)* (Board's obligation to obtain valuation of assets and protected liabilities) to be reviewed.

743. The Board's approval of the valuation under *section 144* (approval of valuation), or failure to approve the valuation, may be reviewed under *paragraph 9*.

744. The Board of the Pension Protection Fund may refuse to assume responsibility for an occupational pension scheme if:

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

- An eligible scheme has not satisfied the eligibility conditions throughout a prescribed period under *section 146* (schemes which become eligible schemes); or
- A new scheme has been created to replace an existing scheme under *section 147* (new schemes created to replace existing scheme).

745. The Board's determination to issue a withdrawal notice, or failure to do so, in either of these situations, is reviewable.

746. In certain circumstances where a former insolvency practitioner has not been able to confirm whether a scheme rescue has occurred/is not possible, he issues a notice to the Board to this effect (*section 122(4)* refers). Following receipt of that notice, the Board is required to issue a determination notice if satisfied that the insolvency practitioner's notice was correct (*section 123*).

747. When the insolvency practitioner's notice becomes binding, if the Board is able to decide that no insolvency event has occurred (or is likely to occur within six months from the date that the insolvency practitioner issued the *section 122(4)* notice), it issues a withdrawal notice. Conversely, if the Board is unable to decide that no insolvency event will occur, it waits until the end of the six month period, and if no insolvency event has occurred, it must issue a withdrawal notice. The issue of the withdrawal notice by the Board under *section 148* (or the failure to issue it) is reviewable under *paragraph 11*.

748. Where it has been confirmed that a scheme rescue is not possible during an assessment period and the Pension Protection Fund valuation has become binding, *section 154* (requirement to wind up schemes with sufficient assets to meet protected liabilities) requires the scheme to be wound up by the trustees or managers if the scheme's assets are sufficient to meet its Pension Protection Fund level of liabilities. In such cases, the scheme's trustees or managers can apply to the Board under *section 151* (application for reconsideration).

749. *Section 152* (duty to assume responsibility following reconsideration) requires the Board of the Pension Protection Fund to issue a determination notice to assume responsibility for the scheme at reconsideration, if satisfied that certain criteria are met regarding the value of the scheme's assets at the reconsideration date. The Board's determination notice under *section 152(3)*, or failure to issue such a notice, is reviewable under *paragraph 12*.

750. Where a scheme rescue is not possible for a large scheme and the scheme has sufficient assets to meet its Pension Protection Fund level of liabilities, the trustees or managers must apply to the Board for authority to continue as a closed scheme if they are unable to obtain a full buy-out quotation. The Board is then required to issue a determination to the scheme. The determination notice issued by the Board under *section 153(6)* (closed schemes) is reviewable under *paragraph 13*, as is the Board's failure to issue such a notice.

751. Where it has been confirmed that a scheme rescue is not possible during an assessment period and the Pension Protection Fund valuation has become binding, the scheme is to be wound up by the trustees or managers if the scheme's assets are sufficient to meet its Pension Protection Fund level of liabilities in accordance with *section 154* (requirement to wind up schemes with sufficient assets to meet protected liabilities). In such cases, the Board may direct the scheme trustees or managers as to the manner of winding up

the scheme. The Board may also vary or revoke a direction that it has given. Under *paragraph 14* any direction given by the Board is reviewable, as is a variation or revocation of a Board's direction.

752. *Paragraph 15* provides for a review to be requested where the Board has failed to issue a transfer notice under *section 160* (transfer notice).

753. *Paragraph 16* deals with the Board's determination of a person's entitlement to Pension Protection Fund compensation. So a person can challenge, for example, the number of years' accrued rights on which his compensation is based. A review may also be requested where the Board fails to determine a person's entitlement to Pension Protection Fund compensation.

754. Where the Board of the Pension Protection Fund assumes responsibility for a scheme, and the benefits paid (excluding money purchase benefits) during the assessment period were less than the entitlement rate, *section 163* (adjustments to be made where the board assumes responsibility for a scheme) requires the shortfall to be paid, with interest. *Paragraph 17* allows for a review to be requested where the Board has failed to pay the shortfall.

755. The Board's determination, or failure to reach a determination, under *section 181(3)(a)* (calculation, collection and recovery of levies) that a scheme is eligible to pay the initial or pension protection levy is reviewable under *paragraph 18*.

756. The Board's calculation under *section 181(3)(b)* (calculation, collection and recovery of levies) in relation to the amount of initial or pension protection levies payable is reviewable under *paragraph 19*. (So where the calculation was based on 500 members, for example, but the scheme had only 50 members, this matter is reviewable. But the formula for calculating the levies is not reviewable).

757. The Board can make fraud compensation payments to occupational pension schemes in circumstances to be prescribed under *section 182(1)* (cases where fraud compensation payments can be made). *Paragraph 20* allows for the Board's determination of whether to make a fraud compensation payment, the amount of any payment and the Board's failure to make such a payment, to be reviewed.

758. This paragraph deals with certain types of schemes that are not eligible for Pension Protection Fund compensation, but can apply for fraud compensation (typically most defined contribution schemes). In such cases, if the Board decides that a scheme rescue has occurred or is not possible, *section 183(2)* (Board's duties in respect of certain applications under section 182) requires the Board to issue a notice to that effect. *Paragraph 21* allows the Board's notice (or a failure to issue the notice) to be reviewed.

759. The Board may not make a fraud compensation payment unless it has determined a settlement date (i.e. a date after which no further recoveries of value are likely to be made) under *section 184(2)* (recovery of value). The Board's determination regarding the settlement date, and its failure to determine such a date, are reviewable under *paragraph 22*.

760. In fraud compensation cases, if the scheme trustees or managers receive a payment, *section 184(4)* (recovery of value) requires the Board to determine whether the payment is to be treated as relating to the alleged fraud. The Board's determination can be reviewed under *paragraph 23*, as can the Board's failure to make a determination.

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which received Royal Assent on 18 November 2004*

761. *Section 186* (interim payments) allows the Board to make interim fraud compensation payments in certain circumstances. *Paragraph 24* allows the making of an interim payment, the amount of any such payment and the failure to make a payment to be reviewed.

762. Fraud compensation payments (including interim payments), made by the Board may be subject to certain terms and conditions (*sections 185(2)* (fraud compensation payments) and *186(4)* (interim payments) refer). The Board's terms and conditions may be reviewed under *paragraph 25*.

763. In general terms, where interim fraud compensation payments have been made, *section 186* (interim payments) provides for the Board to recover any amount that it determines was excessive. The Board's determination of the amount that was excessive is reviewable under *paragraph 26*.

764. The Board can determine that a payment is to be transferred from the fraud compensation fund to the pension protection fund. *Section 187(4)* (Board's powers to make fraud compensation transfer payments), provides that such payments cannot be made before the date determined by the Board (i.e. the date that no further recoveries in relation to the fraud are likely to be obtained without disproportionate costs and within a reasonable time). The Board's determination regarding the date can be reviewed under *paragraph 27*.

765. *Section 187(6)* requires the Board to determine whether anything received by it relates to repayment in an alleged fraud case. The Board's determination can be reviewed under *paragraph 28*.

766. A determination by the Board (or failure to reach a determination) under *section 189(7)(a)* (fraud compensation levy) that a scheme is eligible to pay a fraud compensation levy is reviewable under *paragraph 29*.

767. *Paragraph 30* allows for the Board's calculation to be reviewed in relation to the amount of fraud levy payable (as calculated under *section 189(7)(b)* (fraud compensation levy)).

Section 207: Review and reconsideration by the Board of reviewable matters

768. This section is a mandatory power, under which regulations must provide for the two stage internal process under which reviewable matters (as set out in *Schedule 9*) may be reviewed.

769. Regulations must provide that where an interested person makes a written application, on any matter which is reviewable under *Schedule 9*, the Board must give a 'review decision'. Where a further written application is made for a review of that "review decision" the matter must be considered by the Reconsideration Committee of the Board, which will issue a "reconsideration decision".

770. *Subsection (3)* provides that regulations may also permit reviews and reconsiderations to be made without a written application being made. (This gives the Board the power to review a decision of its own volition.)

771. *Subsection (4)* sets out the powers the Board will have under regulations when reviewing or reconsidering a decision. For example it will be able to vary or revoke an earlier decision.

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which received Royal Assent on 18 November 2004*

772. *Subsection (5)* provides that regulations must make provision regarding making applications and reaching and giving decisions.

Section 208: Investigation by the Board of complaints of maladministration

773. This section provides that regulations must make provision for dealing with complaints of maladministration against the Board of the Pension Protection Fund.

774. *Subsection (2)* provides that maladministration complaints may be made by a person who is, or might become entitled to compensation from the Pension Protection Fund. Complaints may also be made by a person who has made, or who may make, an application for fraud compensation under *section 182* (cases where fraud compensation may be made).

775. *Subsection (5)* provides that the Board of the Pension Protection Fund may pay compensation where a person has sustained injustice in consequence of the maladministration by the Board, or any person exercising functions on its behalf.

The Pension Protection Fund Ombudsman

Section 209: The Ombudsman for the Board of the Pension Protection Fund

776. This section provides for the creation of the Ombudsman for the Board of the Pension Protection Fund (“PPF Ombudsman”). *Subsection (2)* requires the Secretary of State to appoint the PPF Ombudsman on such terms and conditions as he determines. *Subsection (4)* provides that the Secretary of State may (by subordinate legislation) make provision for payment of the PPF Ombudsman (e.g. pensions, expenses, salary and reimbursement of expenses). The subordinate legislation will also make provision in relation to staff, delegation of functions to staff, charging fees and powers to obtain information and documents required to perform the PPF Ombudsman’s functions. The costs incurred under the subordinate legislation made under *subsection (4)* are to be paid to the PPF Ombudsman by the Secretary of State out of the money provided by Parliament, in accordance with *subsection (6)*. *Subsection (7)* provides for the imposition of a levy in respect of eligible schemes (*section 126*) (eligible schemes) for the purpose of reimbursing the Secretary of State’s expenditure under *subsection (6)*. Where the levy is imposed under *subsection (7)* some provisions in *section 117* (administrative levy) apply.

Section 210: Deputy PPF Ombudsman

777. This section provides for the Secretary of State to appoint one or more persons to act as deputy to the PPF Ombudsman. *Subsection (2)* requires the Secretary of State to determine the terms and conditions on which any deputy PPF Ombudsman is appointed. *Subsection (4)* sets out the circumstances in which a Deputy PPF Ombudsman may carry out the functions of the PPF Ombudsman. The circumstances are:

- where there is a vacancy in that office;
- at any time when the PPF Ombudsman is for any reason unable to discharge his functions; and
- at any other time, with the consent of the Secretary of State (such as when the PPF Ombudsman’s workload means the assistance of a Deputy is appropriate).

Section 211: Status etc of the PPF Ombudsman and deputies

778. *Subsections (1) and (2)* disqualify the PPF Ombudsman and any deputy from being either a member of the House of Commons or a Member of the Northern Ireland Assembly. *Subsection (3)* applies section 1 of the Superannuation Act 1972 to the PPF Ombudsman, his staff and any deputies. This allows them to have access to a civil service pension. *Subsection (4)* requires the PPF Ombudsman to pay to the Minister for the Civil Service sums attributable to those pensions. *Subsection (5)* provides an avenue for complaints of alleged maladministration against the staff of the PPF Ombudsman. Such complaints will be dealt with by the Parliamentary Ombudsman.

Section 212: Annual reports to Secretary of State

779. This section requires the PPF Ombudsman to prepare an annual report on the discharge of his functions. The report is to be sent to the Secretary of State as soon as practicable after the end of the relevant financial year. The Secretary of State must then arrange for the report to be published.

References to the PPF Ombudsman

Section 213: Reference of reviewable matter to the PPF Ombudsman

780. This section provides that regulations must make provision for prescribed persons to be able to refer reconsideration decisions under *section 207* (review and reconsideration by the Board of reviewable matters) to the PPF Ombudsman. *Subsection (3)* provides that the regulations must require the PPF Ombudsman to conduct an oral hearing or dispose of the matter by written representations. The PPF Ombudsman shall be allowed to consider any evidence not previously available to the Board or the Reconsideration Committee of the Board.

781. *Subsection (4)* provides that regulations may make provision in relation to investigations and determinations of the PPF Ombudsman. For example, the regulations may deal with rights to make representations to the PPF Ombudsman, costs and expenses, and staying certain proceedings in prescribed circumstances. *Subsection (5)* provides that regulations may also make other provision. For example, they may confer power on the PPF Ombudsman to direct the Board to pay such compensation as he may direct, and to confer on the Board such other powers as may be required when the PPF Ombudsman remits a matter to it.

Section 214: Investigation by PPF Ombudsman of complaints of maladministration

782. This section provides that regulations may make provision for the investigation and determination by the PPF Ombudsman of complaints of maladministration made against the Board. *Subsection (2)* provides that regulations must make provision for who may make references, the manner of making them, the procedure for investigations and determinations, the powers of the PPF Ombudsman when making determinations, conferring necessary powers on the Board, about notification of references, determinations and directions, rights to make representations, the consideration of evidence by the PPF Ombudsman, cost and expenses etc.

Section 215: Referral of questions of law

783. Where a “reviewable matter” or complaint of maladministration has been referred to the PPF Ombudsman for a determination, he may refer any question of law that arises to the High Court (or Court of Session in Scotland).

Section 216: Publishing reports etc

784. *Subsection (1)* provides for the PPF Ombudsman to publish a report of any investigation undertaken and its result. *Subsection (2)* provides that, for defamation purposes, any matter published by the PPF Ombudsman under Chapter 6 shall be absolutely privileged.

Section 217: Determinations of the PPF Ombudsman

785. This section provides that a determination or direction of the PPF Ombudsman is binding subject to a right of appeal, on a point of law, to the High Court or, in Scotland, to the Court of Session. *Subsection (2)* provides that a determination or direction is enforceable as if it were a judgement or order of court. Similar provision is made for enforcement in Scotland.

Section 218: Obstruction etc of the PPF Ombudsman

786. If the PPF Ombudsman is obstructed in the performance of his functions or if any person is guilty of an act or omission in relation to certain PPF Ombudsman investigations, this section provides that he may certify the offence to a court. The court may then inquire into the matter and deal with the person as if the offence in question had been made in relation to the court. *Subsection (4)* makes similar provision in Scotland.

Chapter 7 – Miscellaneous

Backdating the winding up of eligible schemes

Section 219: Backdating the winding up of schemes

787. This section enables the winding up of a scheme to be backdated to before the date of the qualifying insolvency event (see *section 127* (duty to assume responsibility for schemes following an insolvency event)) or the date of a notification or application under *section 129* (applications and notifications for the purposes of section 128).

788. This may be done provided that the winding up begins before the following:

- when a scheme failure notice or a withdrawal notice under *section 122(2)* becomes binding; or
- when a notice from an insolvency practitioner that he cannot confirm whether a scheme rescue is not possible or has occurred, has become binding in a case where *section 148* does not apply (e.g. because the Board has previously withdrawn under *section 147*); or
- when a withdrawal notice under *section 148* becomes binding.

789. *Subsection (4)* provides that the Regulator may direct persons to take steps necessary as a result of the backdating of the winding up and any failure to comply with a direction will render that person subject to a civil penalty (section 10 of the Pensions Act 1995 (civil penalties)).

Section 220: Pension sharing

790. *Subsection (1)* provides that regulations may modify Part 2 where there has been a pension sharing order against a member of an eligible scheme. Regulations will deal with where a member's shareable rights (his accrued rights) have been reduced so as to give a former spouse a pension credit which will be provided by the scheme.

791. Regulations will also deal with where a pension sharing order has been made before the Board assumes responsibility for a scheme, but takes effect after that date. The Board will have to provide pension compensation in respect of the person entitled to the pension credit (who becomes a member of the scheme). The Board will be responsible for implementing the pension sharing order and regulations will be made using the power in *subsection (2)* to deal with this. These regulations will amend Chapter 1 of Part 4 of the Welfare Reform and Pensions Act 1999.

PART 3 – SCHEME FUNDING

Summary

792. This Part of the Act sets out the statutory framework for the scheme funding requirements which will replace the Minimum Funding Requirement (MFR). The MFR, introduced from April 1997, applies to most private sector defined benefit occupational pension schemes. Schemes currently subject to the MFR are required to hold a minimum level of assets to meet their pension liabilities, as assessed on the basis of the MFR test, and to make good any shortfalls against the MFR within specified timescales. In carrying out MFR valuations actuaries must use a prescribed actuarial method, and a prescribed set of actuarial assumptions.

793. Under the arrangements set out in this Part of the Act, schemes will not be required to fund to a common funding measure. Instead the scheme will have to meet a statutory funding objective which can take account of the particular circumstances of the scheme. Pension scheme trustees, having taken advice from the actuary, will be required to agree with the sponsoring employer a strategy for funding the pension commitments and for correcting any funding deficits, and to set this out in a statement of funding principles. The new funding framework carries forward the existing statutory requirements for regular actuarial valuations and for a scheme to have in place a schedule of contributions.

Introductory

Section 221: Pension schemes to which this Part applies

794. This section sets out the scope of the scheme funding provisions. It provides for this Part of the Act to apply to every occupational scheme apart from money purchase schemes. The section also provides a power for regulations to exclude other schemes from all or part of this Part, and the intention is that the scheme funding provisions will broadly apply to those schemes to which the Minimum Funding Requirement currently applies, subject to the scope of the provisions of the requirements of the European Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (the IORP Directive).

Scheme funding

Section 222: The statutory funding objective

795. *Subsection (1)* requires schemes subject to this Part to be funded to meet a statutory funding objective that they have sufficient and appropriate assets to cover their technical provisions. This requirement reflects the provisions of the IORP Directive.

796. *Subsection (2)* defines a scheme's "technical provisions" as the amount required, on an actuarial calculation, to provide for its liabilities. *Subsection (3)* gives powers to prescribe the liabilities to be taken into account for these purposes and the manner in which assets, liabilities and technical provisions should be determined.

797. *Subsection (4)* enables regulations to provide for trustees or managers to choose the method and assumptions appropriate for the calculation of their scheme's technical provisions according to alternative prescribed methods and assumptions, and in line with prescribed principles. The Regulator is required under *section 90(2)(d)* (codes of practice) to issue a code of practice giving practical guidance to trustees on their duties under Part 3 of the Act, including determining the basis for calculating their scheme's technical provisions.

798. *Subsection (5)* prevents a scheme from taking advantage of any provision in the scheme rules that would otherwise permit the liabilities taken into account for the purposes of this Part to be limited to the assets held by the scheme.

Section 223: Statement of funding principles

799. *Subsection (1)* requires the trustees or managers of a scheme to prepare, periodically review and if necessary revise a statement of funding principles. The statement of funding principles is a written statement of the trustees' policy for ensuring that the statutory funding objective is met, and such other matters as may be prescribed.

800. *Subsection (2)* requires that the statement records any decisions by the trustees or managers on:

- the methods and assumptions to be used in calculating the scheme's technical provisions; and
- the period over which a failure to meet the statutory funding objective would be rectified and the manner in which it will be rectified.

801. *Subsection (3)* enables regulations to set out the period within which the statement of funding principles must be prepared, and setting out requirements for its review and, where necessary, revision. It is intended that the statement of funding principles should be reviewed at least every three years.

802. *Subsection (4)* enables the Regulator to impose a civil penalty on trustees or managers who do not take reasonable steps to comply with these requirements.

Section 224: Actuarial valuations and reports

803. This section requires the trustees or managers of a scheme to arrange for a written valuation of the assets and technical provisions of the scheme from the scheme actuary. *Subsection (1)* provides for such valuations to be undertaken annually, although valuations

may take place every three years if the trustees arrange for actuarial reports for the intervening years.

804. *Subsection (2)* defines the various terms used in this Part:

- an actuarial valuation is a written report, valuing the scheme's assets and calculating its technical provisions, prepared and signed by the scheme actuary;
- the effective date of an actuarial valuation is the date by reference to which the assets are valued and the technical provisions are calculated;
- an actuarial report is a written report, prepared and signed by the scheme actuary, on changes to the scheme's technical provisions since the last actuarial valuation;
- the effective date of an actuarial report is the date to which the information in the report relates.

805. *Subsection (3)* cross-refers to *subsection (1)* and stipulates that the intervals of not more than one year referred to in *subsection (1)* are the intervals between the effective dates of successive actuarial valuations or reports.

806. *Subsection (4)* enables regulations to require the trustees or managers to ensure that a valuation or report is received by them from the scheme actuary within a prescribed period of its effective date.

807. *Subsection (5)* makes clear that the requirements of this section do not affect any power or duty of the trustees or managers to obtain valuation or reports more frequently, or on other occasions than those required by *subsection (1)*.

808. *Subsection (6)* enables regulations to set out further requirements in relation to the actuarial valuation or report, such as its format and content.

809. *Subsection (7)* requires the trustees or managers to make the valuation or report available to the employer within seven days of its receipt.

810. *Subsection (8)* enables the Regulator to impose a civil penalty on trustees or managers who have not taken reasonable steps to comply with *subsection (1), (4) or (7)*.

Section 225: Certification of technical provisions

811. *Subsection (1)* requires that the actuary must certify the calculation of the scheme's technical provisions when carrying out an actuarial valuation.

812. *Subsection (2)* requires that the certificate must state whether, in the actuary's opinion, the calculation of the technical provisions is made in accordance with regulations under *section 222*. The requirement for the calculation of the technical provisions to be certified reflects the provisions within the IORP Directive.

813. If, within the timescale allowed for the valuation to be completed, the actuary cannot certify that the calculation of the technical provisions meets those requirements, *subsection (3)* requires him to notify the Regulator within a reasonable period. The Regulator is required under *section 91(2)(a)* to issue a code of practice setting out what a reasonable period is in these circumstances. The Regulator is able to impose a penalty on an actuary who fails to make this report.

Section 226: Recovery plan

814. This section sets out requirements for a recovery plan where it appears to the trustees or managers of a scheme from an actuarial valuation that the statutory funding objective is not met.

815. *Subsection (1)* requires the trustees or managers to prepare a recovery plan (or, if a plan is already in force, to review and if necessary revise it) within a prescribed time.

816. *Subsection (2)* provides that the recovery plan must set out the steps to be taken to meet the statutory funding objective, and the timeframe over which this is to be achieved. Additionally, *subsection (3)* provides that the recovery plan must be appropriate to the nature and circumstances of the scheme and any prescribed requirements, and *subsection (4)* enables regulations to require the trustees or managers to take account of such matters as may be prescribed.

817. *Subsection (5)* enables regulations to prescribe the circumstances in which a recovery plan may, or must, be reviewed and (if necessary) revised.

818. Under *subsection (6)* the trustees or managers must (except in circumstances which may be set out in regulations) send a copy of the recovery plan to the Regulator within a reasonable period of its preparation or revision, along with any information prescribed by regulations.

819. *Subsection (7)* provides for penalties to apply to trustees or managers who have failed to take reasonable steps to comply with these provisions.

Section 227: Schedule of contributions

820. *Subsection (1)* provides that the trustees or managers must prepare, periodically review and, where necessary, revise a schedule of contributions. *Subsection (2)* provides that a schedule of contributions is a statement setting out the contribution rates payable to the scheme by or on behalf of the employer and the active members of the scheme, and the dates on or before which the contributions are to be paid.

821. *Subsection (3)* enables regulations to specify the period within which the schedule must be prepared, reviewed, and if necessary revised, and the period for which the schedule is to be in force. It is intended that the period to be covered by the schedule will be five years where the valuation shows that the statutory funding objective was met.

822. *Subsection (4)* contains a regulation making power to prescribe further requirements in relation to the schedule. The intention is to use this power, for example: to require the employer to sign the schedule; and to require that contributions relating to the recovery plan to make good a deficit are shown separately on the schedule.

823. *Subsections (5) and (6)* require the actuary to certify the schedule of contributions where he is satisfied that it is consistent with the statement of funding principles; and where he is satisfied that the rates of contributions in the schedule are such that:

- where the valuation shows that the funding objective was not met, the statutory funding objective can be expected to be met by the end of the period in the recovery plan determined by the trustees or managers; or

- where the valuation shows that the funding objective was met, the statutory funding objective can be expected to continue to be met for the period covered by the schedule. The schedule will not be in force until the actuary has so certified it.

824. The schedule will not be in force until the actuary has so certified it.

825. *Subsection (7)* requires the trustees or managers to send, within a reasonable period, a copy of the schedule of contributions to the Regulator if the valuation shows that the statutory funding objective was not met.

826. *Subsection (8)* empowers the Regulator to impose a penalty on trustees or managers who do not take reasonable steps to comply with these requirements.

827. *Subsection (9)* requires an actuary who is unable to certify the schedule of contributions to notify the Regulator within a reasonable period and empowers the Regulator to impose a penalty on an actuary who fails to comply without reasonable excuse.

828. Where the Regulator has imposed a schedule of contributions under the power conferred by *section 231, subsection (10)* of this section disapplies certain provisions of this section.

Section 228: Failure to make payments

829. This section applies where an amount payable in accordance with the schedule of contributions by or on behalf of the employer or an active scheme member is not paid on time. *Subsection (2)* imposes a requirement on the scheme's trustees or managers, to report to the Regulator and the members the failure to make the payment, but only if they have reasonable cause to believe that the failure is likely to be of material significance to the Regulator in the exercise of its functions. This subsection also includes a power to prescribe circumstances in which the requirement to notify the Regulator will not apply.

830. *Subsection (3)* ensures that the amount of the unpaid contributions shall be treated as a debt on the employer to the trustees or managers, where this would not otherwise be the case.

831. *Subsection (4)* provides for civil penalties to apply to a trustee or manager, an actuary or auditor, who fails to report to the Regulator a material failure to make a payment to the scheme; and an employer who fails to make a payment.

832. *Subsection (5)* makes it clear that these provisions also apply to payments due under a schedule of contributions which has been imposed by the Regulator (under *section 231*).

Section 229: Matters requiring agreement of the employer

833. *Subsection (1)* of this section imposes a requirement on the trustees or managers of a scheme to obtain the agreement of the employer: to any decision about the methods and assumptions which are to be used by the actuary in calculating the scheme's technical provisions; to any matter which is to be included in the scheme's statement of funding principles; to any recovery plan; and to any matter to be included in the schedule of contributions.

834. *Subsection (2)* applies where the trustees or managers of a scheme conclude that they will not be able to obtain the employer's agreement (within prescribed time limits) to any of these matters. In these circumstances this section confers a power on the trustees or managers

(if the employer agrees) to modify the future accrual of benefits under the scheme in order to obtain the employer's agreement.

835. *Subsection (3)* prohibits any modification under *subsection (2)* that would adversely affect the subsisting rights of any scheme member or their survivor. For the purposes of this legislation the definition of "subsisting right" and "survivor" is given in Section 67A of the Pensions Act 1995.

836. *Subsection (4)* requires the trustees or managers to record any such modification in writing, and to notify active scheme members (that is, those who will be affected by the change) within one month of the modification taking effect.

837. *Subsection (5)* imposes a requirement on the trustees or managers to report a failure to reach agreement with the employer on any of the matters set out in *subsection (1)* to the Regulator, in writing, within a reasonable period.

838. *Subsection (6)* provides for civil penalties to apply to a trustee or manager who fails to take all reasonable steps to comply.

Section 230: Matters on which advice of actuary must be obtained

839. *Subsection (1)* imposes a requirement on the trustees or managers of a scheme to obtain advice from the scheme actuary before making any decision about: the methods and assumptions which are used by the actuary in calculating the scheme's technical provisions; preparing or revising the scheme's statement of funding principles; preparing or revising a recovery plan; preparing or revising the schedule of contributions; or modifying the scheme as regards the future accrual of benefits.

840. *Subsection (2)* provides a power for regulations to impose obligations on scheme actuaries to comply with any prescribed requirements when providing advice to the scheme's trustees or managers on these matters.

841. *Subsection (3)* provides for these regulations to require the actuary to take account of prescribed guidance. Such guidance would be prepared and reviewed by a prescribed body, such as the Faculty and Institute of Actuaries, and approved by the Secretary of State. It is intended that such guidance would specify factors and considerations which the actuary would be required to take into account when providing advice to the scheme's trustees or managers within *subsection (1)*.

842. *Subsection (4)* provides for civil penalties to apply to a trustee or manager who fails to take all reasonable steps to comply.

Section 231: Powers of the Regulator

843. This section confers powers on the Regulator to take action aimed at resolving difficulties arising in the operation of the scheme funding provisions. *Subsection (1)* specifies the circumstances in which these powers may be used, and the powers themselves are set out in *subsection (2)*.

844. The powers conferred by this section will be exercisable where it appears to the Regulator (whether as a result of a report made to the Regulator or otherwise) that:

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

- the trustees or managers have failed to comply with the requirement in *section 223* with respect to the preparation and revision of the statement of funding principles, or to review and revise such a statement;
- the trustees or managers have failed to obtain an actuarial valuation as required by *section 224(1)*;
- the actuary is unable to certify the calculation of the scheme's technical provisions or its schedule of contributions;
- the trustees or managers have failed to comply with the requirements of *section 226* with respect to the preparation and revision of a recovery plan;
- the trustees or managers: have failed to comply with the requirements of *section 227* with respect to the preparation and revision of a schedule of contributions;
- the actuary is unable to certify a schedule of contributions;
- the employer has failed to make payments in accordance with the schedule of contributions (or payments treated as a debt under *section 228(3)*, and that failure is of material significance to the Regulator in the exercise of its functions.
- the trustees or managers have been unable to reach agreement with the employer within the prescribed timescale about one or more of the matters on which agreement is required under *section 229*.

845. *Subsection (2)* confers the following powers, any (or all) of which the Regulator will be able to use by means of an order:

- to modify future benefit accruals under the scheme;
- to give directions about the manner in which the scheme's technical provisions should be calculated, including the methods and assumptions which should be used in the calculation;
- to give directions about how, and over what period, any failure to meet the statutory funding objective should be rectified;
- to impose a schedule of contributions on the scheme setting out the contributions to be paid and the dates by which they are to be paid.

846. *Subsection (3)* prohibits any modification under *subsection (2)* that would adversely affect the subsisting rights of any scheme member or their survivor. For the purposes of this legislation the definition of "subsisting right" and "survivor" is given in Section 67A of the Pensions Act 1995.

847. *Subsection (4)* provides a power to make regulations specifying requirements with which the Regulator must comply when exercising these powers. *Subsection (4)* makes it clear that these powers for the Regulator are additional to any others proposed by this Act, or conferred by the Pensions Act 1995 (c.26).

Supplementary provisions

Section 232: Power to modify provisions of this Part

848. This section provides a power for regulations to modify the provisions of this Part as they apply in prescribed circumstances. It mirrors the current section 61 of the Pensions Act 1995, which provides a similar power for regulations to modify the operation of the Minimum Funding Requirement. The operation of the Minimum Funding Requirement legislation is modified under section 61 in respect of specified types of scheme including, for example schemes in wind-up, shared cost schemes, multi-employer schemes, schemes without active members, schemes which are partially guaranteed by Ministers of the Crown, and schemes which are exempt from the requirement to appoint an actuary.

Section 233: Construction as one with the Pensions Act 1995

849. This section makes it clear that words used in this Part of the Act should be interpreted as having the same meaning as they do in Part 1 of the Pensions Act 1995.

PART 4 – FINANCIAL PLANNING FOR RETIREMENT

Summary

850. Sections under this Part of the Act provide the Secretary of State with the power to promote and facilitate financial planning for retirement and enable him to receive the information to do so. They also provide powers to require schemes to provide combined pension forecasts and employers to provide their employees with access to information and advice about pensions and saving for retirement.

Retirement planning

Section 234: Promoting and facilitating financial planning for retirement

851. *Subsections (1) and (2)* enable the Secretary of State and the Department for Social Development in Northern Ireland to take action for the purpose of promoting or facilitating financial planning for retirement. The action can include providing facilities to enable people to:

- estimate the financial resources they are likely to need after retirement;
- estimate the financial resources that are likely to be available to them after retirement (from both pensions and other sources);
- ascertain what action might be taken to increase financial resources available to them after retirement.

852. *Subsection 3* provides that the section does not authorise the Secretary of State or the Department for Social Development in Northern Ireland to take action that section 21 of the Financial Services and Markets Act 2000 would otherwise prohibit them from taking.

Section 235: Supply of information for purposes of section 234

853. This section allows anyone holding certain information about pensions and savings to supply it to the Secretary of State or the Department for Social Development in Northern Ireland. *Subsection (1)* provides that the section applies to information:

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which received Royal Assent on 18 November 2004*

- for determining pensions and benefits that may be payable to a person;
- relating to a person's financial resources;
- about action taken regarding providing facilities for personal saving or promoting or facilitating personal saving.

854. *Subsection (2)* provides that the information can be supplied to and used by the Secretary of State or the Department for Social Development in Northern Ireland for the purposes of the functions conferred by *section 234(1)*. The section limits the extent to which information supplied to the Secretary of State or the Department for Social Development in Northern Ireland can be further disclosed by them. *Subsection (3)* provides that information supplied under *subsection (2)* cannot be disclosed onwards except;

- where the information concerns an individual -
 - to that individual or a person authorised by the individual;
 - to another person with the individual's consent;
- in any event -
 - to a person to whom it can be supplied under *subsection (2)*;
 - for the institution or purposes of relevant criminal proceedings.

855. *Subsection (4)* provides that "relevant criminal proceedings" mean criminal proceedings under the Pensions Schemes Act 1993, the Pensions Act 1995, the Pensions Act 2004 or any Northern Ireland enactment corresponding to any of those three Acts.

856. *Subsection (6)* provides that this section is subject to *sections 88 and 202* (tax information disclosed to the Regulator or the Board of the Pensions Protection Fund).

Section 236: Use and supply of information: private pensions policy and retirement planning

857. This section introduces *Schedule 10*, which makes provision about the use and supply of information for purposes relating to private pensions policy and retirement planning.

Schedule 10: Use and supply of information: private pensions policy and retirement planning

858. *Paragraph 1* amends section 3 of the Social Security Act 1998 to extend the uses to which information held by the Secretary of State or the Department for Social Development in Northern Ireland can be put. The effect is that information held by the Secretary of State or Department for Social Development in Northern Ireland for purposes relating to social security, child support or war pensions or employment or training can be used for purposes related to private pensions policy or promoting financial planning for retirement. Also, information held by the Secretary of State or the Department for Social Development in Northern Ireland for purposes related to private pensions policy or promoting financial planning for retirement can be used for purposes relating to social security, child support or war pensions or employment or training.

859. Private pensions policy is defined (in this context and in the rest of the Schedule) as policy relating to occupational pension schemes or personal pension schemes.

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which received Royal Assent on 18 November 2004*

860. *Paragraph 2* allows information held by the Commissioners of the Inland Revenue or Customs and Excise (or persons providing services to them) to be supplied to the Secretary of State or the Northern Ireland Department (or persons providing services to them) for use for functions relating to private pensions policy and promoting financial planning for retirement.

861. An authorised officer is defined as an officer of the Secretary of State or the Northern Ireland Department authorised by the Secretary of State or the Northern Ireland Department.

862. *Paragraph 3* amends section 122D of the Social Security Administration Act 1992 to allow the Secretary of State to use information relating to housing benefit or council tax benefit for purposes relating to private pensions policy or promoting financial planning for retirement.

Section 237: Combined pension forecasts

863. This section provides a power to allow regulations to be made requiring trustees or managers of an occupational or personal pension scheme to provide scheme members with combined (state and occupational or personal) pension forecasts at the times specified in the regulations. The intention is that this should be a reserve power of the Secretary of State, its use depending on the extent to which combined pension forecasts are issued by schemes on a voluntary basis. *Section 298* (disclosure of state pension information) is also relevant in this context, since it facilitates the provision of state pension information to occupational and personal pension schemes who apply for such information in order to provide a combined pension forecast.

Employee information and advice

Section 238: Information and advice to employees

864. *Subsection (1)* provides a power to make regulations requiring employers to act so as to enable employees to have access to information and advice about pensions and saving for retirement. The regulations for example, would define the type of information and advice employers must provide for employees to access. *Subsection (2)* provides that regulations under *subsection (1)* may provide that they shall:

- apply to certain prescribed employers and employees;
- make different provision for different employers and employees;
- make provision as to the action employers must take;
- make provision describing the information and advice to which requirements apply;
- make provision describing the type of person authorised to provide such information and advice.

865. *Subsection (3)* also requires employers to provide information to the Regulator about what they have done to comply with any regulations introduced under *subsection (1)*. *Subsection (4)* provides that regulations may prescribe the information to be provided under *subsection (3)*, as well as the form, manner and time period in which it is to be provided. *Subsection (5)* enables the Regulator to apply sanctions under section 10 of the Pensions Act 1995 where an employer fails (without reasonable excuse) to comply with the requirement to provide information to the Regulator in accordance with *subsection (3)*). The intention is that

the use of these powers, including the content of the secondary legislation, will be informed by pilots conducted with employers on a voluntary basis.

PART 5 – OCCUPATIONAL AND PERSONAL PENSION SCHEMES: MISCELLANEOUS PROVISIONS

Summary

866. This Part outlines a number of measures which will apply to occupational and personal pension schemes. These largely fall into three groups of provisions. The first group of measures provides simplification or easements for the administration of pension schemes. Requirements for member-nominated trustees, payments by employers, amendments to the Pensions Compensation Board (before its functions are subsumed into the Pension Protection Fund), internal dispute resolution, contracting out and the new subsisting rights provisions fall into this category. Additionally, changes to the mandatory annual increase in the rate of certain pensions will provide scope for financial easements to companies running such schemes.

867. Other provisions in this Part will extend the obligations of employers and schemes. For example, *sections 247 – 249* impose an obligation on trustees to have a certain level of knowledge and understanding in order to carry out their functions as trustees. Trustees will also be required to draw up a Statement of Investment Principles and review this at least every three years. *Sections 257 and 258* provide pension protection for employees who are subject to a transfer of employment.

Categories of pension scheme

Section 239: Categories of pension scheme

868. *Subsection (3)* of this section substitutes the definitions of “occupational pension scheme” and “personal pension scheme” in section 1 of the Pension Schemes Act 1993.

869. The new definition of an “occupational pension scheme” defines such a scheme as one that provides benefits for people with service in employment (or self-employment) described in the scheme rules and which may also provide benefits to members who are not in that kind of employment (or self-employment). An occupational pension scheme for this purpose is one that has its main administration in the UK or outside the European Union. (A scheme whose main administration is in another EU Member State will be regulated primarily by the authorities in that state, but see Part 7 of the Act.) For a scheme to be an occupational pension scheme, at least one of the persons establishing the scheme must be within new section 1(2) of the Pension Schemes Act 1993. The new definition of an “occupational pension scheme” also includes a pension scheme that is prescribed in regulations or that is of a kind prescribed in regulations.

870. A “personal pension scheme” is defined as a pension scheme (see new section 1(5)) which is not an occupational pension scheme and which is established by a person within section 154 of the Finance Act 2004 (the persons by whom registered pension schemes may be established). That section says that a pension scheme may be registered for tax purposes only if it is an occupational pension scheme for tax purposes or has been established by a person listed in subsection (1) of that section. The persons listed include insurance companies, managers of unit trust schemes, banks and building societies.

871. *Subsection (4)* inserts new subsections (2) to (6) into section 1 of the Pension Schemes Act 1993. The effect of new subsection (2) is that for a scheme to be an occupational pension scheme, at least one of the persons establishing it must be an employer, employee or self-employed person or a representative of employers, employees or self-employed people. One effect of new subsection (3) is that a pension scheme established for paid office-holders by the person who pays them can be an occupational pension scheme. New subsection (4) provides that an occupational pension scheme may cater for more than one kind of employment (or self-employment). New subsection (5) defines a pension scheme for the purposes of section 1 of the Pensions Schemes Act 1993 (Categories of pension schemes) as one which provides benefits on retirement, on having reached a particular age or on termination of service. New subsection (6) allows the definition of personal pension scheme to be amended if the list in section 154 of the Finance Act 2004 (the persons by whom registered pension schemes may be established) of persons who may provide such schemes is itself amended by order under that section.

Section 240: Meaning of employer in Part 1 of the Pensions Act 1995

872. This section amends section 125 of the Pensions Act 1995 (supplementary provision relating to interpretation) to enable regulations to be made to prescribe, by the affirmative procedure, that in particular circumstances, certain persons shall be treated as "employers" for the purposes of any provisions of the Act.

Requirements for member-nominated trustees and directors

Section 241: Requirement for member-nominated trustees

873. *Sections 241, 242, and 243* replace the existing provisions in sections 16 to 21 of the Pensions Act 1995. Sections 43 to 46 of the Child Support, Pensions and Social Security Act 2000, which were not commenced, are also repealed.

874. *Subsection (1)(a)* requires trustees of an occupational trust scheme to make arrangements for at least one-third of the total number of trustees to be member-nominated trustees. The arrangements must be put in place within a reasonable time of the section applying to the scheme. The Regulator is required to issue a code of practice on the meaning of "reasonable time" under *section 90* of this Act (codes of practice). *Subsection (1)(b)* requires trustees to ensure the arrangements are implemented.

875. *Subsection (2)* defines "member-nominated trustees" as trustees of an occupational trust scheme who are nominated by a process in which at least the following are eligible to participate:

- all the active members or, an organisation which adequately represents the active members, and
- all the pensioner members or, an organisation which adequately represents the pensioner members

876. The meaning of "adequate" will be covered in the code of practice issued by the Regulator under *section 90*. As the section says "at least" the trustees have the option to involve both members and representative organisations.

877. The selection process must involve some or all of the members of the scheme.

878. If the number of nominations is equal to or less than the number of vacancies, the nominees can be deemed to be selected under *subsection (5)(d)*. *Subsection (4)* provides that, where an employer approves, the arrangements may provide for more than the minimum number necessary to meet the one-third requirement under *subsection (1)(a)*.

879. *Subsection (5)* provides more details of the required arrangements. The purpose of *subsection (5)(a)* is to ensure that the arrangements will not leave vacancies unfilled for an unreasonable length of time, and *subsection (5)(b)* ensures that unfilled vacancies must be re-advertised at reasonable intervals. Under *subsection (5)(c)* the arrangements must provide that where the employer so requires someone who is not a member of the scheme must have the employer's approval to qualify for selection as a member-nominated trustee.

880. *Subsection (6)* ensures that a member-nominated trustee cannot be removed without the agreement of all the other trustees. *Subsection (7)* prevents the arrangements excluding member-nominated trustees from exercising functions which other trustees can exercise simply on account of their being member-nominated trustees.

881. *Subsection (8)* provides for exceptions. The section does not apply in the case of an occupational trust scheme if:

- every member of the scheme is a trustee of the scheme and no other person is such a trustee;
- every trustee of the scheme is a company (in which case *section 242* applies), or;
- the scheme is of a prescribed description.

882. *Subsection (9)* provides for civil penalties under section 10 of the Pensions Act 1995 (civil penalties) to apply to any trustee who has failed to take all reasonable steps to secure compliance if the arrangements securing at least one-third member-nominated trustees are not in place or are not being implemented.

Section 242: Requirement for member-nominated directors of corporate trustees

883. This section sets out broadly the same requirements as *section 241*, except that it applies where every trustee of an occupational trust scheme is a company. In this case, the requirement is for at least one-third of the directors of each company to be member-nominated directors.

884. The effect of *subsections (8)* and *(9)* is to allow a company that is trustee in relation to more than one scheme to treat the schemes as if they were a single scheme for the purposes of meeting the member-nominated directors' requirement. The company can however elect not to aggregate the schemes.

885. *Subsection (10)* provides that this section does not apply to an occupational trust scheme if the scheme is of a prescribed description.

886. *Subsection (11)* provides for civil penalties under section 10 of the Pensions Act 1995 (civil penalties) to apply to a company if the arrangements securing at least one-third member-nominated directors are not in place as required under *subsection (1)(a)* or are not being implemented.

Section 243: Member-nominated trustees and directors: supplementary

887. *Subsection (1)* is an order making power that permits the Secretary of State to change the minimum proportion of member-nominated trustees or directors from one-third to one-half.

888. *Subsection (2)* is a modification power that will be used to modify application of the provision in prescribed circumstances, for example to disregard independent trustees for the purpose of calculating the minimum number of member-nominated trustees or directors.

889. *Subsection (3)* defines the terms “company” and “occupational trust scheme” for the purposes of *sections 242 and 243*.

Obligations of trustees of occupational schemes

Section 244: Investment Principles

890. This section substitutes a new section 35 of the Pensions Act 1995 for the existing section 35 which governs the requirement on trustees to prepare a statement of investment principles.

891. New section 35(1) and (2) requires the trustees of a scheme to prepare a written statement of the investment principles governing decisions about the investments of their scheme. The trustees are required to maintain and review this statement.

892. New section 35(3) enables regulations to set out requirements that the trustees of a scheme must comply with before preparing or revising a statement of investment principles.

893. New section 35(4) enables regulations to specify the form and content of a statement of investment principles. Some of the matters that will have to be included in a statement of investment principles are the kind of investments to be held and the balance between the different types of investments.

894. By virtue of new section 35(6) a trustee is subject to a civil penalty under section 10 of the Pensions Act 1995 (civil penalties) if he has failed to take all reasonable steps to comply with the requirements relating to a statement of investment principles.

Section 245: Power to make regulations governing investment by trustees

895. *Subsection (2)* inserts a new section 36(1) and (1A) into the Pensions Act 1995 requiring trustees, to exercise their powers of investment in accordance with regulations and section 36(3) and (4) of that Act. Where the trustees have delegated responsibility for investment to a fund manager then that fund manager has to exercise his responsibility in accordance with regulations.

896. *Subsection (4)* amends the existing section 36(3) so that before making investments trustees have to obtain and consider proper advice on whether the investment is satisfactory. In considering whether the investment is satisfactory the trustees must have regard to the requirements of regulations under section 36(1) to the extent that these relate to the suitability of investments and to the principles contained in any statement of investment principles required by section 35.

897. *Subsection (5)* amends the existing section 36(8) so that the Regulator cannot issue a prohibition order under section 3 of the Pensions Act 1995 to a trustee who doesn't take all

reasonable steps to comply with the requirements in section 36 to obtain and consider advice. The Regulator may still issue a civil penalty under section 10 of the Pensions Act 1995 (civil penalties) to such a trustee.

898. *Subsection (6)* inserts a new section 36(9) to allow the provisions of section 36 to be disapplied to certain schemes.

Section 246: Borrowing by trustees

899. This section inserts a new section 36A into the Pensions Act 1995. The new section 36A provides a power to enable regulations to be made which would prevent trustees, and fund managers to whom they had delegated responsibility for investment from borrowing money or acting as a guarantor.

Section 247: Requirement for knowledge and understanding: individual trustees

900. This section provides that an individual who is a trustee of an occupational pension scheme must be conversant with specified scheme documents and have knowledge and understanding of matters relating to the performance of his functions as a trustee of that scheme.

901. *Subsection (3)* requires a trustee to be conversant with:

- the trust deed and scheme rules;
- the statement of investment principles under section 35 Pensions Act 1995, if any;
- where appropriate, the most recent statement of funding principles;
- any other policy document relating to the administration of the scheme generally.

902. *Subsection (4)* requires a trustee to have knowledge and understanding of:

- the law in relation to pensions and trusts;
- the principles relating to investment of assets;
- the principles relating to scheme funding;
- such other matters as are prescribed in regulations.

903. *Subsection (5)* provides that a trustee of a scheme must have an appropriate level of knowledge and understanding to enable him properly to exercise his functions as a trustee of that scheme.

904. Under *section 90* the Regulator must issue a code of practice regarding the obligations imposed on trustees by this section.

Section 248: Requirement for knowledge and understanding: corporate trustees

905. This section essentially reproduces the provisions of *section 247* in respect of corporate trustees. It requires a corporate trustee to ensure that any individual who exercises any trustee functions that the company has is conversant with the scheme documents and to have the knowledge and understanding outlined at *section 247*, in so far it is relevant to the functions performed by that individual.

Section 249: Requirement for knowledge and understanding: supplementary

906. This section sets out supplementary provisions in respect of *section 247 and 248*. The section defines the functions of a trustee and specifies that these provisions do not affect any other rule of law affecting trustees' knowledge or expertise. The section also enables regulations to provide that *sections 247 and 248* do not apply to a trustee or apply with modifications.

Payment of surplus to employer

Section 250: Payment of surplus to employer, and Section 251: Payments of surplus to employer: transitional power to amend scheme

907. *Sections 250 and 251* provide new rules governing payments to an employer from an actuarial surplus in an ongoing occupational pension scheme.

908. To retain tax-exempt status, tax law currently requires an occupational pension scheme to take appropriate steps to reduce an excessive actuarial surplus. The valuation of the scheme's assets and liabilities must be carried out in accordance with Schedule 22 of the Income and Corporation Taxes Act 1988 (ICTA). This includes Inland Revenue rules which stipulate methods of calculation on an ongoing basis, and the requirement for a plan for the elimination of an excessive surplus to be approved by the Inland Revenue. One of the ways by which a scheme may reduce the surplus is by a payment to the employer, taxable at 35%.

909. Section 37 of the Pensions Act 1995 allows payments to be made to an employer from a tax-approved occupational pension scheme only when it has an excessive surplus according to Revenue rules, and sets out further conditions that must be met before such a payment can be made.

910. The tax simplification measures in the Finance Act 2004 remove the requirement to dispose of an excessive surplus. It remains the case that a payment of surplus to an employer would be taxed at 35%.

911. *Section 250* substitutes a new section 37 of the Pensions Act 1995 to govern the circumstances under which trustees may make a payment to an employer from an actuarial surplus, and how such a surplus should be determined.

912. Subsections (1) and (2) of new section 37 repeat relevant provisions at the original section 37(1) and (2), ensuring that such payments can be made from an ongoing scheme only if scheme rules permit the payment of surplus to an employer and providing that any scheme power for the payment of a surplus to the employer must be exercised by the trustees.

913. Subsection (3) of new section 37 prevents trustees from making a payment to the employer unless:

- they have a certificate from a prescribed person that the assets and liabilities of the scheme have been calculated and verified in accordance with prescribed requirements, and stating the maximum amount of the payment that may be made;
- the payment does not exceed the maximum amount given on the certificate;
- the trustees are satisfied that it is in the interests of the members for the payment to be made;

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- where appropriate, the employer has requested, or consented to, the payment;
 - the Regulator has not issued a freezing order against the scheme under *section 23* of this Act; and
 - scheme members have been notified in accordance with prescribed requirements.
914. Subsection (4) allows the Secretary of State to make provisions in regulations for:
- the valuation of the scheme's assets and liabilities;
 - the assets and liabilities to be taken into account for the valuation;
 - the valuation to be carried out in the prescribed manner by a prescribed person;
 - the certificate referred to in subsection (3);
 - the duration of the validity of the certificate; and
 - the maximum amount of the payment.
915. Regulations made under subsection (5) will require trustees to inform both the Inland Revenue and the Regulator when making a payment.
916. Subsections (6) and (7) allow the Regulator to impose sanctions under section 10 of the Pensions Act 1995 (civil penalties) where these rules are not complied with. *Sections 13, 15 and 16* of this Act would also permit the Regulator respectively to issue an improvement notice (e.g. requiring that the procedures be properly followed), to seek an injunction from the Court preventing such a payment, or to require restitution of a payment made improperly.
917. In exchange for the imposition of a higher threshold before a payment to the employer may be made, the new provision does not reproduce the requirement that, before a payment may be made to the employer, 5% limited price indexation (LPI) protection must be extended to all scheme pensions (over and above the protection in respect of rights accrued after 1997 provided by the main statutory LPI provisions). Guaranteed pension increases, as required by the LPI legislation or by scheme rules, would be included in the assessment of liabilities for the purpose of the full buy out calculation, and this will be set out in the regulations.
918. *Section 251* introduces transitional powers for trustees to amend scheme rules to take account of the repeal of the Income and Corporation Taxes Act 1988 provisions and the substitution of a new section 37 of the 1995 Pensions Act.
919. In schemes where current rules allow payments to the employer other than in order to comply with Revenue requirements, but which may have been constrained by section 37 of the Pensions Act 1995, trustees may choose to revive their original powers, limit them or leave them un-revived. In schemes where rules are framed so as only to allow payments in circumstances specified under the Income and Corporation Taxes Act 1988, trustees may choose whether and how they wish to take a power to make payments of surplus to the employer. Revenue requirements for tax approval have generally required scheme rules to prohibit payments of surplus except with Revenue approval and in accordance with the Income and Corporation Taxes Act 1988 rules.
920. In both cases, trustees:
- must be satisfied that such a rule change is in the interests of scheme members;

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- can only make one such decision,
- must make it within five years of the commencement of these provisions, and
- must give written notice to the employer and scheme members that they plan to change the scheme rules on payments to the employer.

921. In each case, any new rules will be subject to the overriding provisions in *section 250*.

Restrictions on payment into occupational pension schemes

Section 252: UK-based scheme to be trust with effective rules

922. This section requires that an occupational pension scheme which has its main administration in the UK must be established under irrevocable trusts.

923. *Subsections (1) and (2)* provide that where an occupational pension scheme has its main administration in the UK, it can only accept “funding payments” (see *subsection (6)*) if it is established under irrevocable trusts.

924. *Subsection (3)* provides that a scheme must also have proper written rules about benefits under the scheme before it can accept funding payments.

925. Regulations made under *subsection (4)* may exempt certain schemes from the requirement to be established under irrevocable trust. Specifically, statutory schemes could be exempted under this power.

926. *Subsection (5)* gives the Regulator the power to sanction trustees or managers who accept payments into a scheme which is not trust based or which does not have proper written rules.

Section 253: Non-European scheme to be trust with UK-resident trustee

927. This section sets out requirements for an occupational pension scheme that has its main administration outside the EU but receives contributions from: employers in the UK (wherever their employees work); or from employers anywhere in the world in respect of their employees who work in the UK. It provides that the employers must not make contributions unless the scheme is established under trust and there is a trustee in the UK.

Section 254: Representative of non-European scheme to be treated as trustee

928. This section specifies that where a non-EC occupational pension scheme appoints someone to act on their behalf in the UK, that person is to be treated as the trustee for the purpose of UK pensions legislation as defined in *subsection (3)*.

929. *Subsection (2)* provides a power to make regulations excluding such persons from being treated as trustees.

Activities of occupational pension schemes

Section 255: Activities of occupational pension schemes

930. This section implements article 7 of the EU Directive on the activities and supervision institutions for occupational retirement provision (Directive 2003/41/EC).

931. *Subsection (1)* places a requirement on the trustees of an occupational pension scheme based in the UK requiring them to limit its activities to those relating to providing retirement

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benefits. Such an occupational pension scheme must not, for example, also provide mortgages.

932. *Subsection (2)* provides a power to make regulations exempting certain schemes from this limitation. This is in line with the option given in article 5 of the Directive to enable Member States to exempt schemes with less than 100 members, or certain statutory schemes, from provisions such as *subsection (1)*.

933. *Subsection (3)* enables the Regulator to impose a civil penalty, under section 10 of the Pensions Act 1995 (civil penalties), on trustees or managers who have failed to take all reasonable steps to ensure that the scheme's activities are exclusively related to retirement-benefit provision.

934. *Subsections (4) and (5)* respectively define retirement-benefit activities and retirement benefits in line with the Directive. Schemes may provide benefits related to reaching retirement and may also provide benefits which supplement such benefits such as those relating to death, disability, termination of employment, sickness or poverty.

No indemnification for fines or civil penalties

Section 256: No indemnification for fines or civil penalties

935. This section provides that a trustee or manager of an occupational or personal pension scheme cannot be reimbursed out of scheme assets in respect of a fine imposed for an offence of which he is convicted, or a civil penalty imposed under either section 10 of the Pensions Act 1995 (civil penalties) or section 168(4) of the Pension Schemes Act 1993 regarding a failure for which he is personally liable. *Subsection (2)* provides that this includes a prohibition on providing for the payment of premiums in respect of an insurance policy, where the risks include the imposition of such a fine or the requirement to pay such a penalty.

936. *Subsection (3)* provides that where any amount is paid out of the assets of an occupational or personal pension scheme contrary to this section, section 10 of the Pensions Act 1995 (civil penalties) applies to any trustee or manager who fails to take all reasonable steps to ensure compliance.

937. *Subsection (4)* provides that where a trustee or manager of a scheme is reimbursed out of occupational or personal pension scheme assets for matters set out in *subsection (1)(a)* or *(b)* and he knows, or has reasonable grounds to believe, that he has been so reimbursed, he will be guilty of an offence unless he has taken all reasonable steps to ensure that he is not so reimbursed. *Subsection (5)* provides that a person guilty of an offence under *subsection (4)* is liable on summary conviction to a fine not exceeding the statutory maximum and on conviction on indictment to imprisonment for a term not exceeding two years, or a fine or both.

Pension protection on transfer of employment

Section 257: Conditions for pension protection

938. *Sections 257 and 258* protect the pension position of employees who are involved in a business transfer to which the TUPE regulations apply. If, prior to the transfer, the transferred employee had access to an occupational pension scheme to which the employer contributed, or would have had access to such a scheme if he had been employed by the

transferor for a longer period, then the new employer must secure at least a prescribed level of pension provision for the employee following the transfer. *Section 257* sets out the conditions in which those employees are eligible for the pension protection provided by *section 258*.

939. *Subsection (5)* ensures that employees are still protected even if the transferor has withdrawn their occupational pension scheme by reason of the transfer.

940. References to transferor include any associate of the transferor and for the purposes of determining who is to be an associate of the transferor for the purposes of this section the criteria in section 435 of the Insolvency Act 1986 (meaning of “associate”) are to apply.

Section 258: Form of protection

941. This section specifies the pension provision that transferee employers must make for employees where the conditions in *section 257* apply;

942. *Subsection (1)* makes it a condition of the employee’s employment contract with the transferee that the transferee complies with either the requirement in *subsection (2)* or the requirement in *subsection (3)*.

943. The requirements in *subsection (2)* are:

- that the transferee secures that the employee is, or is eligible to be, a member of an occupational pension scheme in relation to which the transferee is the employer;
- where the scheme is a money-purchase occupational pension scheme, that the transferee is, or would be, required to make relevant contributions to the scheme in respect of the employee; and
- where the scheme is not a money-purchase scheme, that it must satisfy either the statutory standard in section 12A of the Pension Schemes Act 1993 (the Reference Scheme Test) or an alternative requirement to be prescribed in regulations.

944. The requirement in *subsection (3)* is that the transferee makes relevant contributions to a stakeholder pension scheme of which the employee is a member.

945. *Subsections (4)* and *(5)* allow the requirement in *subsection (3)* to be treated as complied with so long as the transferee employer has offered membership of a stakeholder pension scheme to the employee with the promise that the transferee will make relevant contributions from the time the employee becomes a member of that scheme.

946. *Subsection (6)* allows for variation by agreement between the transferee employer and the employee of the contractual term which imposes the requirement.

947. *Subsection (7)* leaves “Relevant contributions” to be defined in regulations.

Consultation by employers

Section 259: Consultation by employers: occupational pension schemes

948. This section provides a power for regulations to be made prescribing the circumstances in which an employer in relation to an occupational pension may be required to consult certain persons before prescribed decisions are made by the employer, or the trustees or managers about changes to the scheme. It provides a power for regulations to prescribe the

types of decisions leading to major or significant changes to occupational pension schemes that will trigger the requirement to consult. It also provides a power for regulations to be made requiring that trustees or managers of an occupational pension scheme may not make a prescribed decision in relation to that scheme unless they have first notified the employer of the proposed decision and they are satisfied that the employer has undertaken any consultation required by the regulations.

949. *Subsection (1)* enables regulations to be made to prescribe which employers will be obliged to consult prescribed persons, and will enable certain employers to be exempt from the requirement to consult. There is power to prescribe which decisions will trigger the consultation requirement and power to prescribe how the consultation should take place.

950. *Subsection (2)* enables regulations to be made that may require trustees or managers of an occupational pension scheme not to make a prescribed decision, unless they have first notified the employer of the proposal to make a prescribed decision and they are satisfied that the employer has undertaken the consultation process as required under *subsection (1)*.

951. *Subsection (3)* provides that the validity or otherwise of a prescribed decision in relation to an occupational pension scheme is not affected by any failure to comply with regulations made under this section. *Subsection (4)* refers to *section 261* which contains further provisions about regulations made under this section.

Section 260: Consultation by employers: personal pension schemes

952. *Subsection (1)* of this section provides a power to make regulations requiring prescribed employers who have direct payment arrangements in place for their employees in respect of a personal pension schemes to consult certain prescribed persons in a prescribed manner before making a prescribed decision in respect of the personal pension scheme.

953. *Subsection (2)* provides that the validity or otherwise of any decision prescribed for the purposes of *subsection (1)(b)* is not affected by any failure to comply with regulations made under this section. *Subsection (3)* refers to *section 261* which contains further provisions about regulations made under this section.

Section 261: Further provision about regulations relating to consultation

954. *Subsection (1)* of this section provides that for the purposes of this section “consultation regulations” means regulations under *section 259 or 260*.

955. *Subsection (2)* provides that consultation regulations may be made specifying how consultation must be carried out including making provision for the time periods for consultation, the information that must be provided to those consulted, and who is to be consulted, including any discretion the employer may have as to the persons to be consulted. The prescribed requirements may also contain provision about representatives that employees may have and the method of selecting those employees. *Subsection (2)* also makes provision for regulations to be made to protect employee representatives (such as Trade Union and Information and Consultation (I&C) representatives) involved in the pensions consultation process from suffering any detriment or unfair dismissal by reason of carrying out their consultation duties, and to ensure they are given adequate time and remuneration to carry out their consultation duties. This mirrors existing protection provided to employee

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representatives by reason of the Employment Rights Act 1996 and the protection that is proposed for I&C representatives.

956. *Subsection (2)* also provides for regulations to be made enabling any requirement to consult on future pension changes to be waived or relaxed by order of the Regulator in appropriate circumstances. The section also makes provision for regulations to require the employer to communicate to the trustees or managers of the scheme any representations received by the employer as part of the consultation process.

957. *Subsection (3)* provides that where employers, trustees or managers have obligations imposed on them by the consultation regulations, they must, if required by the Regulator, provide information to the Regulator to show that they have complied with those obligations. *Subsection (4)* provides for regulations to be made identifying the type of information to be provided to the Regulator under *subsection (3)* as proof of compliance, and the form, manner and time period within which it must be provided.

958. *Subsection (5)* makes it clear that where employers have other duties to consult on changes to future pension arrangements those duties are unaffected by the new consultation regulations.

Modification of pension rights

Section 262: Modification of subsisting rights

959. This section replaces section 67 of the Pensions Act 1995 (restriction on powers to alter schemes).

960. The new sections are designed to enable schemes to make rule changes that could affect member's subsisting rights, provided certain provisions and restrictions are met, for example trustees must agree to a modification being made and members must be informed about proposed changes. The rights which are protected are referred to as 'subsisting rights' – this covers accrued rights and pensions or benefits which are in payment.

961. Two categories of modification are created, 'protected modifications' and 'detrimental modifications'. A protected modification (for example a change that would convert accrued defined benefit rights into defined contribution rights) can only be made with the informed consent of the member concerned (the consent requirement – see section 67B). A detrimental modification can be made with the informed consent of an affected member (see section 67B). Where this is done without such consent, the actuarial value of that member's accrued rights at the time the modification takes effect must be maintained (the member must not suffer a reduction in the actuarial value of those rights as at the date the modification is put into effect) (see sections 67C and 67D). The actuarial equivalence requirements will enable schemes to restructure the 'package' of a member's accrued rights without his consent (subject to the rules governing 'protected modifications') whilst ensuring that the actuarial value of those rights are maintained.

962. Where a detrimental modification or protected modification is made the trustees must give their approval and they cannot do so unless the relevant requirements concerning consent or actuarial equivalence have been satisfied (see section 67E).

963. Once a detrimental or protected modification has been made the trustees must notify members who were required to consent. Where actuarial equivalence applied they must take reasonable steps to notify affected members (see section 67F).

964. The Regulator shall have power to declare a detrimental or protected modification void and may make incidental orders such as requiring the trustees to take certain steps or declaring rights granted with the modification void (see sections 67G and 67H). The Regulator may also impose civil penalties on trustees and any persons who incorrectly make scheme modifications (see section 67I).

965. *Section 67 – The subsisting rights provisions*

966. This section sets out the scope of the ‘subsisting rights’ provisions and refers to the requirements that must be satisfied when making a change to a scheme that would or might have a detrimental effect on any member’s subsisting rights, or where the change is one that falls within the definition of a ‘protected modification’ at section 67A(3). A detrimental modification is one which would or might adversely affect subsisting rights. A protected modification is where defined benefit rights are converted to defined contribution rights or where a pension in payment is reduced.

967. Subsection (1) provides that the subsisting rights provisions apply to any power that any person has under the scheme to modify an occupational pension scheme. It does not apply to a power conferred on a public service pension scheme or a prescribed scheme or scheme of a prescribed description. This power will for example be used to exclude scheme which have less than two members.

968. Subsection (2) provides that a modification may be declared void by the Regulator (under the powers contained in section 67G) unless the following requirements are satisfied:

- where the modification is a protected modification, the consent requirements at section 67B have been satisfied in respect of each affected member;
- where the modification is a detrimental modification, either the consent requirements at section 67B or the actuarial equivalence requirements at section 67C are satisfied for each affected member;
- the trustees of the scheme have met the trustee approval requirement at section 67E and the reporting requirement at section 67F.

969. Subsection (3) provides that the subsisting rights provisions do not apply when a modification is made for a purpose connected with debits under section 29(1) of the Welfare Reform and Pensions Act 1999 (which covers the treatment of pension rights on divorce) or in a prescribed manner.

970. Subsections (5) and (6) cover situations where a member dies after the trustees have begun the process leading up to making a detrimental or protected modification (as defined in section 67(A)(2)) so that the trustees need not repeat steps which had already been satisfied in relation to the member when he died.

Section 67A – The subsisting rights provisions: interpretation

971. This section defines a number of terms used in these provisions. Subsection (2) defines “regulated modification” as a ‘protected modification’ or a ‘detrimental modification’ or both.

972. Subsection (3) defines the term ‘protected modification’ as meaning a modification that:

- on taking effect, would or might result in any subsisting rights of a member, or a survivor of a member, which are defined benefit rights becoming, or being replaced by, defined contribution rights;
- would or might result in the reduction in the amount of any pension currently in payment;
- is a modification of a prescribed description.

973. Modifications that fall within the definition of a ‘protected modification’ cannot be made without the consent of the affected member (see section 67C).

974. Subsection (4) defines the term “detrimental modification” as meaning a modification which, at the time the modification comes into effect, would or might adversely affect any subsisting rights of a member or survivor (see subsection (10)(b) which explains when a modification might have an adverse affect). Subsection (5) defines the term “affected member” as either being a member or a survivor.

975. Subsection (6) defines the term “subsisting rights” as any right which, at the time of the modification, has accrued to or in respect of the member to future benefits under the scheme rules, or any entitlement to the present payment of a pension or other benefit which a person has at the time of the modification under the scheme rules. Subsection (6)(b) provides that, in relation to the survivor of a member of the scheme, the definition covers any entitlement to a survivor’s benefit in payment, or right to any future benefits. Subsection (6) also provides that a pension credit right is included in the definition of ‘subsisting rights’.

976. Subsection (7) provides that the subsisting rights of an active member are to be determined as if the member had opted, immediately before the modification takes effect, to terminate his service in the pension scheme. Therefore any benefits to which the member would not be entitled on leaving service will not be included as subsisting rights. This will mean that benefits like death in service benefits will not be subsisting rights.

977. Subsection (8) defines the term “scheme rules” as meaning the rules of the scheme and relevant legislative provisions, and subsection (9) defines the term “relevant legislative provision” and the circumstances when these legislative provisions are to override any of the provisions of the scheme.

978. Subsection (10)(a) defines the term “survivor” for the purposes of this section as meaning the widow or widower of a member of a scheme, or a person who has survived the member and who has any entitlement to a benefit or to benefits payable in the future, under the scheme rules in respect of the member. Subsection (10)(b) also provides that a detrimental modification would or might have an adverse effect on that person’s subsisting rights if it

would alter the nature or extent of those entitlements or rights, in a way that would or might result in less generous benefits or future benefits being less generous.

Section 67B – The consent requirements

979. Subsections (1) to (3) set out the requirements that must be met when a modification is being made which requires the consent of the affected member. The requirements are the informed consent requirement and the timing requirement.

980. Subsections (4) and (5) set out the conditions which must be met in order to satisfy the informed consent requirement. The trustees must, before the modification is made, inform the member that the consent requirements apply; give the member information in writing explaining the modification and the effect it would have on him; advise the member that he may make representations to the trustees about the modification if he wishes and that he will have a reasonable opportunity to make such representations. Once these provisions have been complied with the modification may proceed only if the affected member gives his written consent.

981. Subsection (5) allows trustees to use the actuarial equivalence requirements (see section 67C) where consent has not been given to a detrimental modification. If this provision is used, the trustees will not have to undertake a second information exercise should they fail to obtain member consent.

982. If the trustees do not make this clear to the member at the outset when asking for member consent to a detrimental modification they will have to comply with the information requirements contained in the actuarial equivalence provisions (section 67C(4)) and provide the information a second time.

983. Subsection (6) sets out the timing requirement. Its effect is that a member's consent to a modification lapses unless the modification is made within a reasonable time after the consent is given.

Section 67C – The actuarial equivalence requirements

984. Subsection (2) provides that these requirements apply to detrimental modifications and where the trustees of a scheme have determined that they propose to make a modification under these provisions in respect of any affected members.

985. Subsection (3) notes the three elements that make up the actuarial equivalence requirements – the information requirement, the actuarial value requirement, and the actuarial equivalence statement requirement. Subsection (4) provides that in order to satisfy the 'information requirement' the trustees must, before the modification is made, inform the member that the actuarial equivalence requirements apply; give the member information in writing explaining the modification and the effect it would have on him; advise the member that he may make representations to the trustees about the modification if he wishes and afford him a reasonable opportunity to make such representations.

986. Subsection (5) places a duty on trustees to take appropriate action before making the modification to secure that the actuarial value of each affected member's subsisting rights will be maintained.

987. Subsection (6) provides that the actuarial equivalence statement requirement is satisfied in respect of an affected member if the trustees have, within a reasonable period following the date when the modification has taken effect, obtained an actuarial equivalence statement relating to that member in respect of the modification.

988. Subsection (7) provides that an “actuarial equivalence statement” under subsection (6) is a written statement provided by the scheme actuary (appointed to the scheme under section 47(1)(a) of the Pensions Act 1995). Provision may be made in regulations prescribing that a person other than the scheme actuary may give this statement. Subsection (8) defines how, for the purposes of subsections (5) and (7), actuarial value is maintained. It provides that this is achieved if the actuarial value of the member’s subsisting rights immediately after the time when a modification takes effect (i.e. under the scheme rules as amended by the modification), is equal to or greater than the actuarial value of his subsisting rights immediately before that time (i.e. under the scheme rules prior to the modification).

Section 67D – The actuarial equivalence requirements: further provisions

989. Subsection (2) provides that the information requirement already undertaken can still satisfy the requirements in section 67C(4) if it is proposed to revise the modification so long as the revised modification does not differ from the original modification in any material respect.

990. Subsection (3), which is a corollary of section 67B(5), will allow trustees to inform members that they are proposing to make a detrimental modification and to seek the member’s consent but, if that consent is not given, they will proceed with the modification using the actuarial equivalence provisions. If this provision is used, the trustees will not have to undertake a second information exercise.

991. Subsection (4) provides a power to prescribe that specific requirements must be met when calculating the actuarial value of an affected member’s subsisting rights. Subsection (5) enables the prescribed requirements in subsection (4) to provide that the actuarial equivalence calculations may be in accordance with guidance prepared by a prescribed body and that that guidance may be approved by the Secretary of State.

992. Subsection (6) clarifies that an actuarial equivalence statement can be given in respect of two or more affected members, or in respect of members of any particular description. The actuary may, for example, provide a single statement relating to all of the active scheme members.

Section 67E – The trustee approval requirement

993. The trustees must approve a detrimental or protected modification. Subsection (1) provides that where the trustees do not have power to make the modification they must give their consent. Where a modification is made (whether or not by the trustees) the trustees cannot approve it unless they are satisfied that the consent requirements (section 67B) or actuarial equivalence requirements (section 67C), as relevant, have been satisfied. Therefore approval cannot be given until after the consent requirements or actuarial equivalence requirements have been complied with.

994. Subsection (3) provides that the trustees must approve a modification within a reasonable period after the date the first member gave his consent. Trustees must therefore

not proceed with, or agree to a modification, where there has been an unreasonable delay following receipt of consent.

Section 67F – The reporting requirement

995. The effect of subsection (1) is that when the trustees determine to make, or give consent to, a modification, they must, within a reasonable period notify each member who consented to a modification that they have done so; taken all reasonable steps to notify each affected member to whom the actuarial equivalence requirements apply that they have done so.

Section 67G – Powers of the Authority: voidable modification

996. Where the exercise of a power to modify is voidable by virtue of section 67A-67H, the Regulator may make an order under subsection (2) that subsection (6) applies to a detrimental or protected modification. The order can declare that a modification or grant of rights under the scheme is void to the extent specified. It will be void in respect of specified people. The modification will be void from the date it was to take effect.

997. The modification may have made additional modifications or granted extra rights so as to balance any detrimental affects. These modifications will also have to be declared void so that members will not benefit from the Regulator's order. Subsection (3) allows the Regulator to make an order to secure this does not happen.

998. Subsection (4) gives the Regulator flexibility to apply the order to one or more affected members - "the specified persons". The order may therefore name the individual or individuals concerned, or may refer to them by describing the members covered by the order, for example by specifying that the order applies to all the active members of the scheme.

999. Subsection (5) provides that the Regulator may when declaring a modification void require the trustees to take the steps specified in the order, and to do so within the specified time. The Regulator may also ratify things done by the trustees which would otherwise have been in breach of the scheme rules (i.e. subsection (7) applies).

1000. Subsection (7) allows the Regulator to order that anything done by the trustees (as described in subsection (5)(b)) does not contravene the scheme rules.

1001. Subsection (8) provides that an order made under this section may be made either prior to or after the time when the modification or grant would, but for the order, have taken effect. This enables the Regulator to take action before and after the date when a modification is to take effect.

Section 67H – Power of the Authority to intervene

1002. The Regulator may under subsection (2)(a) direct a person not to make a detrimental or protected modification. This may be done only where the Regulator has reasonable grounds to believe a modification will be made which will be voidable.

1003. The Regulator may under subsection (2)(b) require the trustees to take any steps required to comply with the requirements in section 67(2). This order can be made before or after a detrimental or protected modification is made.

1004. *Subsection (3)(a)* provides that if a person makes a detrimental or protected modification in contravention of an order not to do so, the Regulator can declare that modification void using section 67G. *Subsection (3)(b)* provides that if the trustees fail to comply with an order to take steps under subsection (2)(b), the Regulator can declare the modification void using section 67G.

Section 67I – Subsisting rights requirement: civil penalties

1005. This section covers the circumstances when the Regulator may impose a civil penalty for a failure to comply with the subsisting rights provisions.

1006. Subsection (1) provides that subsections (2) and (3) apply where a detrimental or protected modification is voidable by virtue of section 67(2). Subsection (2) provides that where a modification is made either by the trustees of a scheme exercising a power vested in them, or by any other person in circumstances that are not provided for in subsection (3), section 10 of the Pensions Act 1995 (civil penalties) applies to any trustee who has failed to take all reasonable steps to secure that the modification is not so voidable.

1007. Subsection (3) provides that section 10 of the Pensions Act 1995 (civil penalties) applies to people who are not trustees who, without reasonable excuse, exercise a power to make a modification if either:

- the trustees have not given their consent to the modification as required under section 67E(1) or,
- the timing requirement in section 67B(6) has not been complied with.

1008. Subsection (4) provides that section 10 of the Pensions Act 1995 applies to any trustee who has failed to take all reasonable steps to secure compliance with any requirements imposed under subsection (5)(a) of section 67G requiring trustees to take specified steps within the time specified.

1009. Subsection (5) provides that where a detrimental or protected modification is made by the exercise of a power in contravention of an order made by the Regulator not to make the modification (section 67H(2)(a)) section 10 of the Pensions Act 1995 applies to:

- any trustee who fails to take all reasonable steps to secure compliance with the order (where the power in question is exercised by the trustees), and
- any other person who, without reasonable excuse, exercises the power in contravention of the order.

1010. Subsection (6) provides that where the trustees fail to comply with any requirement specified in an order made by the Regulator to take certain steps in the time specified, either before or after the regulated modification is made (section 67H(2)(b)), section 10 of the Pensions Act 1995 applies to any trustee who fails to take all reasonable steps to secure such compliance.

Short service benefit

Section 263: Increase in age at which short service benefit must be payable

1011. This section amends Chapter 1 of Part 4 of the Pension Schemes Act 1993, which provides for the basic preservation of benefits for people who leave pensionable service

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before normal pension age and who have at least two years' qualifying service, or have had a transfer payment into the scheme in respect of rights under a personal pension scheme. Section 71(3) of the Pension Schemes Act 1993 previously provided that deferred short service benefits payable under scheme rules must be payable from normal pension age, or if that is earlier than 60, no later than age 60.

1012. *Subsection (1)* amends section 71(3) of the Pension Schemes Act so that short service benefit must be payable from no later than age 65 except where normal pension age is over 65, in which case short service benefit must be paid from normal pension age.

1013. *Subsection (2)* adds to section 72 of the Pensions Act 1993 a new subsection (4) which provides that payment of short service benefit from an age other than normal pension age under section 71(3) does not conflict with the basic principle that short service beneficiaries are not treated less favourably than long service beneficiaries.

Early leavers

Section 264: Early leavers: cash transfer sums and contribution refunds

1014. This section introduces a fifth chapter into Part 4 of the Pension Schemes Act 1993 consisting of new sections 101AA to 101AI. They make provision for members who leave after three months pensionable service in a scheme, but before their rights have vested in the scheme, to be entitled to a cash transfer or a refund of employee contributions. The new sections 101AA to 101AI do not preserve those rights in the scheme so that the person has a preserved pension entitlement. But they provide instead for the member to have the choice of a cash transfer sum or a refund of their contributions.

Section 101AA – Scope of Chapter 5

1015. Subsection (1) provides that Chapter 5 is to apply to any member of an occupational pension scheme whose pensionable service ends before normal pension age, who has at least three months qualifying service but does not have relevant accrued rights in the scheme. In other words his full rights have not vested. Subsection (2) sets out the three month qualifying service condition and what service periods count towards it. It includes service in another scheme where there has been a cash transfer from that scheme into this scheme. Subsection (3) provides that a period under subsection (2) only counts as far as it counts towards the qualification of long service benefits within the meaning of Chapter 1.

1016. Subsection (4) defines for the purpose of subsection (1) “the relevant accrued rights to benefit under the scheme”. These are rights in the scheme which are not pension credit rights and would entitle the member to a short service benefit as in section 71(1) of the Pension Schemes Act 1993. Subsection (5) provides that all references in Chapter 5 to “a member in relation to an occupational pension scheme” are to a person to whom the provisions in Chapter 5 apply.

1017. *Paragraph 30 of Schedule 12* (which makes minor and consequential amendments in connection with the Act) includes an amendment to section 179 of the Pension Schemes Act 1993 (which sets out what counts as linked qualifying service) so that it will include a transfer of a cash transfer sum as provided by the new Chapter 5 of Part 4 inserted by this section.

Section 101AB – Right to cash transfer sum and contribution return

1018. Section 101AB sets out the circumstances in which a right to a cash transfer sum, or refund of contributions arises. Subsection (1) provides that a member has the right to either a cash transfer sum, or a refund of contributions when his pensionable service ends. Subsection (2) provides that the right to the options in subsection (1) is subject to the provisions of Chapter 5. Subsection (3) defines the term cash transfer sum as being the cash equivalent value of the benefits which would have accrued in respect of the member had the scheme not had a rule requiring a minimum period of service before those rights could vest.

1019. Subsection (4) defines the term contribution refund as being a sum representing contributions paid by or on behalf of the member on the member's own account and, where rights have been transferred into the scheme, any employee contributions into the first scheme which are included in the transfer payment. Subsection (5) defines what is meant by the term "employee contributions" in subsection (4). It means contributions made to the scheme by or on behalf of the member on his own account but does not include any transfer payment or amount paid to the scheme which is attributable to a pension credit.

Section 101AC – Notification of right to cash transfer sum or contribution refund

1020. This section sets out what the trustees or managers of the scheme must do when the pensionable service of a member ceases and he acquires a right under the provisions in section 101AB. Subsection (1) provides that this section only applies when the member's pensionable service under the scheme has ended. Subsections (2) and (3) provide that the trustees or managers must, within a reasonable period, give the member written information setting out the amount of the cash transfer sum, how it may be used, the amount of the contribution refund and such other information as may be required by regulations. The notification must also include the date by which the member must notify the trustees or managers of his choice.

1021. Subsection (4) provides that the information required by regulations may include information about any tax liability on the options open to the member and about the effect on any other options the member may have under scheme rules or otherwise. Subsection (5) provides that the trustees or managers may notify the members that if he fails to exercise his choice by the due date given in the notification the trustees or managers may be entitled to pay a contribution refund to him. Subsection (6) provides that any trustee or manager who has failed to take reasonable steps to comply with the requirements in subsection (2) may be liable to a civil penalty under section 10 of the Pensions Act 1995 (civil penalties).

Section 101AD – Exercise of right under 101AB

1022. Subsection (1) explains that this section applies where a member has acquired a right under section 101AB to a contribution refund or cash transfer sum. Subsection (2) provides for the member to exercise his right by notifying the trustees or managers in writing of his choice of a cash transfer sum or a contribution refund. If he opts for the cash transfer sum he must also state which one of the permitted ways outlined in the letter he wishes to use. Subsection (3) requires that the reply must be within the date specified by the trustees or managers, or any other later date that they may allow.

Section 101AE – Permitted ways of using cash transfer sum

1023. This sets out the permitted ways of using a cash transfer sum under section 101AB. Subsection (2) provides that a cash transfer sum may be used to: acquire rights under another occupational pension scheme, or a personal pension scheme, providing the receiving scheme is willing and able to accept the transfer and the receiving scheme meets prescribed requirements, or to purchase one or more appropriate annuities. It also provides for regulations to set out other ways in which the cash transfer sum may be used. Subsection (3) defines “appropriate annuity” as an annuity which satisfies prescribed requirements and, is to be purchased from an insurer who is chosen by the member, satisfies the requirements in section 19(4) of the Pension Schemes Act 1993 and is willing to accept payment from the trustees or managers.

Section 101AF – Calculation of cash transfer sum and contribution refund

1024. This provides for regulations to prescribe how cash transfer sums and refunds of contributions are calculated. Subsection (2) provides that the contribution refund must be calculated in accordance with any requirements in regulations. Subsection (3) provides that regulations may enable administrative costs to be deducted from cash transfer sums and for cash transfer sums and contribution refunds to be increased or reduced in prescribed circumstances.

1025. Subsection (4) provides that those circumstances that may be prescribed under subsection (3)(b), may include failure of the trustees or managers to take the necessary action required under section 101AG(2) or (4) of the Pension Schemes Act 1993 once a member has exercised his right to a cash transfer or contribution refund, and the state of scheme funding, (for example, to allow a cash transfer sum to be reduced if the scheme is underfunded or where the transfer has already been made to the member under scheme rules). Subsection (5) allows regulations to provide for the cash transfer sum or contribution refund to be reduced to the extent that a member may not receive anything.

1026. *Paragraph 30 of Schedule 12* (which makes minor and consequential amendments in connection with the Act) includes an amendment to section 179 of the Pension Schemes Act 1993 which sets out what counts as linked qualifying service so that it will include a transfer of a cash transfer sum as provided by the new Chapter 5 of Part 4 inserted by this section.

1027. *Paragraph 18 of Schedule 12* (which makes minor and consequential amendments in connection with the Act) introduces a new section 113A to the Pension Schemes Act 1993. This will enable regulations to specify the information which must be provided to trustees or managers of the receiving occupational pension scheme when rights are transferred from one scheme to another. The powers will enable trustees of the receiving scheme to obtain information about employee contributions paid in the transferring scheme.

Section 101AG – Duties of trustees or managers following exercise of right

1028. This sets out the duties on the managers or trustees of the scheme when they receive the reply from the member exercising his choice within the time limit. Subsection (2) requires the trustees or managers to take whatever steps are needed to comply with the member’s request for a cash transfer sum within a reasonable period of receiving it. Subsection (3) discharges the trustees or managers of any obligation in respect of any rights (other than

pension credit rights) the member may have in the scheme or to provide a contribution refund in respect of any rights in the scheme when they have taken the steps required.

1029. Subsection (4) requires the trustees or managers to take whatever steps are needed to comply with the member's request for a contribution refund within a reasonable period of receiving it. Subsection (5) provides that where trustees or managers have taken the steps required to pay the contribution refund they are discharged from any obligation in respect of any rights (other than pension credit rights) the member may have in the scheme, or if the member also has a right under scheme rules for a contribution refund, the amount of the contribution refund paid under Chapter 5 may be offset against it. Subsection (6) provides that where the trustees or managers fail to carry out the action required in subsections (2) and (4) they may be liable to a civil penalty under section 10 of the Pensions Act 1995.

Section 101AH – Powers of trustees or managers where right not exercised

1030. This applies where the member has failed to respond to the notification issued by the trustees or managers as required in section 101AC. Subsection (1) applies the provisions in this section when the member fails to exercise his right by the reply date, or any other later date set by the trustees or managers who have notified him in accordance with section 101AC(3).

1031. Subsection (2) makes provision for the trustees or manager to pay a contribution refund within a reasonable period beginning with the reply date or later date agreed by the trustees or managers, if the member has not exercised his right by the dates in subsection (1). Subsection (3) provides that where trustees or managers have paid the contribution refund they are discharged from any obligation in respect of any rights the member may have in the scheme or if the member also has a right under scheme rules for a contribution refund, the amount of the contribution refund paid under Chapter 5 may be offset against it.

Section 101AI – Rights under section 101AB: further provisions

1032. This sets out the further provisions that may apply to the right of a cash transfer sum or contribution refund under section 101AB. Subsection (1) provides that a member will lose any right acquired under 101AB in the case of the scheme having been wound up, or subject to the provisions in subsection (2), if he fails to exercise his right by the due date.

1033. Subsection (2) allows for the trustees or managers, on application from the member, to set a later reply date within which the member can exercise his right. Subsection (3) provides that the trustees or managers must notify the member in writing of any later date determined by them and that the later date is treated as the reply date for the purposes of subsection (1). Subsection (4) provides that a notification under subsection (3) of this section, section 101AC(2) and section 101AD(2) may be given to the member by delivering it to him, leaving it at his proper address, or by posting it to him at that address.

1034. Subsection (5) provides that the proper address is, in the case of a corporate body, the registered or principal office and in all other cases the last known address. Subsection (6) provides that Chapter 5 is subject to any provision made under section 61 of the Pension Schemes Act 1993 that permits a deduction from any payment of a contribution refund, or requiring the payment of a contribution refund to be delayed. Subsection (7) defines the expressions of “applicable rules”, “member”, “permitted way”, “relevant benefits” and “reply

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date” for the purpose of Chapter 5. Subsection (8) lists what provisions are relevant legislative provisions for the purposes of subsection (7).

Safeguarding pension rights

Section 265: Paternity leave and adoption leave

1035. This section adds two new paragraphs into Schedule 5 of the Social Security Act 1989. The new paragraphs apply provisions in respect of paid paternity leave and paid adoption leave that mirror those found at paragraph 5 of that Schedule (which are headed “unfair maternity provisions” and provide that employer pension contributions during periods of paid maternity leave should be made as if the woman was working normally).

Section 266: Inalienability of occupational pension

1036. Section 91(1) of the Pensions Act 1995 sets out the general rule that entitlement or a right to an occupational pension cannot be assigned, surrendered or charged, or a lien or set-off be exercised in respect of it. Section 91(5) sets out a number of exceptions to that rule. This section amends section 91(5), at subsection (5)(f), to provide for a further exception to section 91(1), where a payment of a pension is made in error, giving rise to a monetary obligation in favour of the scheme. This amendment brings section 91 into line with what had always been the policy intent.

Voluntary contributions

Section 267: Voluntary contributions

1037. *Subsection (1)* removes section 111 of the Pension Schemes Act 1993 (the voluntary contribution requirement), which required occupational and personal pension schemes to allow additional voluntary contributions to be paid by members. In addition it provided that they are prohibited from imposing restrictions on the contributions made by members, they must secure that any such contributions must be used to provide additional benefits and that the value of such benefits must be reasonable.

1038. *Subsection (2)* removes the reference to the voluntary contribution requirements from section 132 (duty to bring schemes into conformity with indirectly-applying requirements) of that Act. This section required the trustees or managers or person responsible for administration of a public service scheme to ensure the rules of the scheme comply with the voluntary contribution requirement.

1039. *Subsection (3)* removes the definition of “voluntary contribution requirements” from section 181 (general interpretation) of that Act.

Payments by employers

Section 268: Payments made by employers to personal pension schemes

1040. This section amends section 111A of the Pension Schemes Act 1993 (monitoring of employers’ payments to personal pension schemes) by inserting new subsections (3) to (7A). These require the trustees or managers of a scheme to monitor the payment of contributions by the employer under the direct payment arrangements. These are defined by section 111A(2) of that Act as arrangements under which contributions are paid by employers on behalf of the employee or by the employer on his own account. In order to carry out this

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obligation, the trustees and managers can request the employer provide them with information on payments. The employer must then comply with this request within a reasonable period. If an employer does not comply with the request for payment information the trustees or managers must within a reasonable period give notice of this to the Regulator.

1041. New subsection (7A) of section 111A of that Act requires trustees or managers to give the Regulator a notice. This will be required where a contribution under the direct payment arrangements has not been paid by its due date, and the trustees or managers have reasonable cause to believe that the failure is likely to be of material significance to the Regulator in the exercise of any of its functions. The notice must be given to the Regulator and the employee within a reasonable period after the due date. Under *section 90*, the Regulator must issue a code of practice on the meaning of ‘material significance’ in relation to the exercise of its functions, and on the meaning of ‘reasonable period’.

1042. *Subsection (3)* amends section 111A(8) of that Act so that a civil penalty under section 10 of the Pensions Act 1995 (civil penalties) may apply where the employer does not take all reasonable steps to comply with the trustees or managers request for payment information and as a result they were not able to comply with their duty to monitor payment of contributions.

1043. A civil penalty under section 10 of the Pensions Act 1995 (civil penalties) may also be imposed on an employer where a contribution payable is not paid by its due date.

1044. *Subsection (4)* amends section 111A(9) of that Act so that it refers to new subsections (7) and (7A) rather than old subsection (6) and (7). Under subsection 111A(9) a civil penalty may be imposed on trustees or managers who fail to take all reasonable steps to comply with the requirement to give the Regulator notice as required.

Section 269: Payments made by employers and members to occupational pension schemes

1045. This section amends two sections of the Pensions Act 1995.

1046. *Subsection (1)* amends section 49(9) of that Act (duty of trustee etc to report a failure by employer to pay contributions deducted from earnings on time). This amendment applies where an amount which has been deducted from earnings (corresponding to a contribution payable on behalf of an active member of an occupational pension scheme) has not been paid to the managers or trustees of the scheme within the prescribed period. The trustees or managers (except in prescribed circumstances) must give notice of this failure to the Regulator, within a reasonable period after the date when the payment became due where they have reasonable cause to believe that the failure is likely to be of material significance to the Regulator in the exercise of any of its functions.

1047. This section also replaces section 88(1) of that Act (schedules of payments to money purchase schemes). It will continue to apply to occupational pension schemes where there has been a failure to pay any amount on or before the due date under a contribution schedule required under *section 87* (other permitted disclosures). The trustees or managers must give notice of this failure to the Regulator where they have reasonable cause to believe that the failure is likely to be of material significance to the Regulator in the exercise of any of its functions. Regulations may prescribe circumstances when they must not give notice. Under

section 90 the Regulator must issue a code of practice on the meaning of ‘material significance’ in relation to the exercise of its functions, and on the meaning of ‘reasonable period’, in respect of these amended sections.

Winding up

Section 270: Winding up

1048. This section amends the provisions in the Pensions Act 1995, which give the order in which all occupational pension schemes’ liabilities are discharged when they are wound up. Broadly speaking, the amendments are intended to ensure that the benefits provided for members on the winding up of a scheme should not be less than the compensation that would have been provided by the Board of the Pension Protection Fund had the Board assumed responsibility for the scheme under Part 2 of the Pensions Act 2004.

1049. *Subsection (1)* substitutes new sections 73, 73A and 73B for the existing section 73 of the Pensions Act 1995 (preferential liabilities on winding up).

1050. New section 73(1) and (2) provides that section 73 applies to an occupational pension scheme which is being wound up, other than a scheme which is a money purchase scheme, a prescribed scheme or a scheme of a prescribed description. It is intended that the schemes to which section 73 applies will be broadly similar to the schemes which are “eligible schemes” within the meaning given by *section 126* of the Act.

1051. New section 73(3) provides that a scheme’s assets must be applied first to satisfy the liabilities in respect of pensions and other benefits set out in new subsection (4). If the scheme’s assets are insufficient to meet all these liabilities then the assets must be applied to satisfy the liabilities in the earlier paragraphs of subsection (4) first. If there are insufficient assets to satisfy the liabilities in a particular paragraph in full then those liabilities have to be satisfied proportionately.

1052. New section 73(4) provides for the following priority order for scheme liabilities in respect of pensions and other benefits:

- (a) liabilities for pensions or benefits under relevant pre-1997 contracts of insurance that cannot be surrendered or in respect of which the surrender value does not exceed the liability secured by the contract;
- (b) liabilities for pensions and benefits not exceeding the corresponding Pension Protection Fund liability, excluding liabilities falling within paragraph (a) ;
- (c) liabilities for pensions and benefits derived from voluntary contributions, excluding liabilities falling within paragraph (a) or (b);
- (d) other liabilities for pensions and benefits that do not fall within paragraph (a), (b) or (c).

1053. New section 73(5) defines what is meant by: “corresponding Pension Protection Fund liability” and “relevant pre-1997 contract of insurance”. The “corresponding Pension Protection Fund liability” in relation to any liability for a pension or other benefit is the cost of securing benefits corresponding to the compensation under Part 2 of the Pensions Act 2004 that a person would have received in respect of the pension or other benefit had the Board of the Pension Protection Fund assumed responsibility for the scheme. Subsection 73(6)

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provides that in determining corresponding Pension Protection Fund liabilities regulations may be made that modify the provisions of Part 2 of the Pensions Act 2004 which govern the payment compensation under that Part.

1054. New section 73(7) provides that regulations may modify the priority order in subsection (4). New section 73(8) provides that regulations may prescribe how it is to be determined which paragraph of subsection (4) a liability derived from voluntary contributions falls within. Section 73(9) provides a power to make regulations modifying Chapter 5 of Part 4 of the Pension Schemes Act 1993 where that Chapter applied to a person on the commencement of the winding up period.

1055. New section 73(10) defines the meaning of “assets”, “liabilities”, “the pension compensation provisions”, “scheme rules” and “winding up period”.

1056. New section 73A(1) states that section 73A applies where a scheme to which section 73 applies is being wound up. Section 73A(2) provides that the trustees or managers must secure that, during a winding up period, any pensions or benefits paid to or in respect of a scheme member are reduced, so far as necessary, to reflect the liabilities that will be satisfied under the priority order in section 73(4). It also provides that trustees or managers may take such steps as necessary to recover any overpayment or pay any shortfall arising from the requirement to reduce pensions and benefits.

1057. Section 73A(3) provides that during a winding up period no benefits accrue under the scheme rules and no new members are to be admitted to the scheme.

1058. Sections 73A(4) to 73A(6) qualify the prohibition in section 73(3) and ensure that it does not prevent the accrual of increases in pensions and other benefits; any accrual derived from the investment of payments made in respect of money purchase benefits; or the discharge of a person’s pension credit rights derived from the scheme by the grant of rights under the scheme.

1059. Section 73A(7) and (8) provide powers to make regulations requiring the trustees or managers of a scheme to adjust the entitlements of a person to a discretionary award (such as an enhanced ill-health pension) or to a survivors benefit in certain circumstances. This will allow provisions to be made which prevent a discretionary award during the winding up period increasing the cost to the scheme of discharging the liabilities in respect of a member. The regulations may provide how the required adjustments are to be determined and the manner in which they are to be made and make provision about the consequences of breaching those regulations.

1060. Section 73A(9) states that if any person other than the trustees or managers of a scheme, (such as the employer in relation to the scheme) has powers under a scheme to distribute the assets of a scheme during a winding up, then those powers cannot be exercised by that person but, subject to sections 73, 73A and 73B Pensions Act 1995, may instead be exercised by the trustees or managers. Subsection 73A(10) defines the meaning of “appropriate rights”, “discretionary award”, and “shareable rights” and provides that subsection 73(10) also applies to section 73A.

1061. Section 73B(1) provides that actions taken in contravention of section 73A(3) are void. Subsection (2) provides that the Regulator may issue trustees or managers with a civil

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penalty if they do not take all reasonable steps to comply with the winding up provisions. Subsections (4) and (5) provide powers to make regulations about the determination, calculation and verification of scheme assets and liabilities and to modify the winding up provisions in certain cases (for example, in relation to multi employer schemes). Subsection (6) sets out that the winding up provisions do not apply to certain liabilities.

1062. Subsection (7) provides that the winding up provisions apply to liabilities under Chapter 4 of Part 4 of the Pension Schemes Act 1993 that arise before the commencement of the winding up period and were not discharged before that time. Subsection (8) confers powers to make regulations which provide that in prescribed circumstances entitlement to benefits arising from the death of a scheme member can be treated as having arisen immediately before the commencement of the winding up period. This is to provide for situations where a person does not satisfy the conditions for entitlement to a death benefit immediately on the member's death.

1063. Subsection (9) provides that, if immediately before a winding up period a person is entitled to an amount of pension or benefit but has postponed payment, the person is not to be regarded as having become entitled to that amount before the beginning of the winding up period and so the winding up provisions will apply to that liability. Section 73B(10) states that, for the purpose of section 73B, "winding up provisions" means sections 73, 73A and 74.

1064. *Subsection (2) of section 270* amends section 74 of the Pensions Act 1995 (discharge of liabilities by insurance etc) The amendments to section 74 introduced under this subsection bring it in line with the new section 73. *Subsection (2)(a)* amends section 74(1), so that it applies to a scheme which is winding up and to which section 73 applies. *Subsection (2)(b)* removes the words "(including increases in pensions)" from 74(2). Increases are referred to separately in the current section 73. However, the new section 73 no longer refers to increases separately and therefore the words in 74(2) are no longer necessary. *Subsection (2)(c)* adds a new sub-paragraph to section 74(3) of the Pensions Act 1995 and provides that the discharge of a liability for a pension or other benefit by payment of a cash sum in circumstances where prescribed requirements are met will be a discharge meeting the requirements of section 74(2). *Subsection (2)(d)* changes the reference in section 74(4) from "rules of the scheme" to "scheme rules". It also removes the words "(including increases in pensions)" from 74(4) as they are no longer necessary. *Subsection (2)(e)* removes subsection (5)(b) from section 74(2). Subsection (5)(b) is no longer necessary because new section 73B(2)(b) contains a power which will allow the modification of section 74 in relation to prescribed descriptions of schemes. *Subsection (2)(f)* inserts new subsection (6) which provides that money purchase assets and liabilities are excluded from the application of section 74. It also defines "scheme rules" by reference to the definition in the *section 318*.

Deficiency in assets of certain occupational pension schemes

Section 271: Debt due from the employer when assets insufficient

1065. This section amends section 75 of the Pensions Act 1995 (deficiencies in the assets). In summary new section 75 ensures that in certain circumstances a debt can be placed on the sponsoring employer of an occupational pension scheme, if the value of the scheme's assets is less than its liabilities. Broadly speaking, a debt for an amount equal to the difference is triggered if the scheme winds up or the employer becomes insolvent or there is an application

to the Board of the Pension Protection Fund to assume responsibility for the scheme on the basis that the employer is unlikely to continue as a going concern or a resolution is passed for the voluntary winding up of the solvent employer. Detailed conditions apply to the three circumstances in which a debt can be imposed and these are set out in new subsections (2), (4), (4B) and (4C) of section 75.

1066. *Subsection (2)* replaces the existing subsection (1) to (4) of section 75 with new subsections (1) to (4C).

1067. New section 75(1) as amended applies the section to occupational pension schemes that are not money purchase schemes, prescribed schemes or schemes of a prescribed description. The current prescribing powers in section 75(9) are removed by *subsection (6)*.

1068. New section 75(2) and (3) set out when a debt falls due from an employer if there is a deficit in the scheme's assets at a time when the scheme is winding up but before any relevant event occurs. The trustees or managers can trigger a debt equal to the amount of the deficit by designating that time under *subsection (2)(b)*. "Relevant event" is defined in new subsection (6A). However, a debt is not triggered under this section if a relevant event within subsection (6A)(a) or (b) (an insolvency event etc) occurs before the scheme begins to wind up and that event has not been "cancelled" by a binding "cessation notice" issued before the start of wind up.

1069. Similarly the amount of any deficit becomes a debt due by the employer under *subsection (4)* if the employer becomes insolvent, there is an application or notification regarding the scheme or enters into members' voluntary liquidation. *Subsection (4)* sets out detailed rules about this. In the case of an insolvent employer, and an application or notification, the debt is contingent upon either confirmation that a scheme rescue is not possible or the scheme starting to wind up.

1070. New section 75(6A) defines relevant events as:

- where an insolvency event (as defined as in *section 121* occurs in relation to the employer in relation to an occupational pension scheme;
- where the trustees or managers apply to the Board under *section 129* asking it to assume responsibility for a scheme on the basis that the employer is unlikely to continue as a going concern or the Regulator notifies the Board of the Pension Protection Fund of such a scheme under that section;
- where in relation to the employer a resolution is passed for a voluntary winding up, in circumstances where the employer is solvent.

1071. New section 75(6B) defines cessation notices and cessation events for the purpose of this section. Broadly a cessation notice is where a withdrawal notice is issued or the insolvency practitioner issues a notice that he is unable to confirm the status of a scheme under *section 148* does not apply. A cessation event occurs when a cessation notice becomes binding. A cessation event is a possibility until the notices specified in subsection (d) and (e) are no longer reviewable and any review has been concluded.

1072. New section 75(6D) provides that a debt does not arise on a voluntary winding up of a solvent employer if the resolution for the voluntary winding up has been stayed or the

winding up has been converted to a creditor's voluntary winding up. The subsequent creditor's voluntary winding up will itself be a relevant event for the purposes of subsection (4)

Section 272: Debt due from the employer in the case of multi-employer schemes

1073. This section introduces a new provision which enables section 75 of the Pensions Act 1995 (deficiencies of assets) to be modified in order to provide flexibility in calculating the section 75 debt when a participating employer withdraws from a multi-employer scheme. The detail of this provision will be set out in regulations.

1074. In tandem with *sections 43 to 47* of this Act, this section is designed to avoid situations where, whether by chance or design, withdrawal from multi-employer arrangements leaves pension liabilities situated in a company which is substantially weaker than other companies with which it is associated. Such a situation increases the risk that the scheme could wind up without having the funds to pay members their benefits. This could mean significant liabilities were passed on to the Pension Protection Fund or that certain members had their benefits cut back.

1075. *Subsection (2)* provides that regulations may in particular provide for the circumstances in which a debt is to be treated as due under section 75 from an employer in relation to a multi-employer scheme.

1076. *Subsection (3)* provides that a section 75 debt may be treated as due in relation to a multi-employer scheme in circumstances other than those in which the scheme is being wound up or a relevant event occurs (as defined in section 75). For example, in multi-employer schemes, debts can be triggered on the withdrawal of an individual employer from the scheme at a time when other employers remain.

1077. *Subsection (4)* provides that for the purpose of multi-employer schemes regulations may prescribe alternative manners for determining, calculating and verifying the liabilities and assets of a scheme and their amount or value.

1078. *Subsection (5)(a)* provides that regulations may allow an alternative manner of valuation to be used if certain requirements are met. *Subsection (5)(b)* provides that regulations may give the Regulator power to direct that a section 75 debt which has been calculated using an alternative manner, is unenforceable for a specified period and that the debt should be recalculated applying a different manner if certain requirements are met within that period. Employers will be permitted to seek approval of arrangements after the date on which the event triggering the debt has occurred. Where the Regulator approves a particular arrangement, a new basis for calculating the debt can be substituted. This alternative basis will, in most cases, be the scheme's ongoing funding basis in accordance with Part 3 of this Act.

1079. *Subsection (6)* provides that the requirements mentioned in *subsection (5)* may include a requirement that a prescribed arrangement is in place which is approved by the Regulator.

1080. The amount of a debt on a withdrawal of an employer from a multi-employer scheme will usually be calculated on a full buy-out basis. Regulations made under this power will allow an alternative (usually lower) basis for calculation to the full buy-out basis to be adopted where approved arrangements are entered into with a view to ensuring that the

scheme is supported in the future. The regulations will provide that in the case of all approved arrangements (other than transfers of benefits out of the scheme) the debt will be recalculated on the scheme's ongoing funding basis adopted in accordance with Part 3 of this Act. The regulations will provide that any liabilities actually transferred out of the scheme should be excluded from the debt calculation. The approved arrangements will be very similar to those set out in *section 45(2)* (meaning of financial support).

1081. *Subsection (7)* sets out that regulations may provide that the Regulator may not approve the details of such an arrangement unless certain conditions are met. These conditions may include a requirement that the arrangements identify persons against whom the Regulator may issue a contribution notice. The Regulator may also have to be satisfied of prescribed matters in relation to such persons. This will include that the consent of a person must be obtained before the person can be identified in this way.

1082. *Subsection (9)* provides that a "contribution notice" imposes a liability upon the person to whom it is issued to pay the sum specified in the notice to the trustees of the multi-employer scheme or, where the Board of the Pension Protection Fund has assumed responsibility for the scheme, to the Board. *Subsection (10)* provides that a contribution notice may be issued if an arrangement ceases to be in place or the Regulator considers that it is no longer appropriate. The Regulator must also be of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice. *Subsection (11)* provides that any sum specified in a contribution notice is to be treated as a debt due from the person to whom it is issued. The debt will be owed to the person named in the notice.

1083. *Subsection (12)(a)* provides that regulations must provide for how the sum specified in the contribution notice is to be determined, provide for circumstances in which joint and several liability for the debt can be applied, provide for the matters which the notice must contain, and provide for who may exercise the powers to recover the debt due. *Subsection (12)(b)* provides that the regulations may apply with or without modifications any of the provisions of *sections 47 to 51* (financial support directions) of this Act in relation to contribution notices issued under the regulations.

1084. *Subsection (13)* defines "multi-employer scheme" as a trust scheme which applies to earners in employments under different employers. *Subsection (14)* provides that this section operates without prejudice to the powers conferred by *sections 75(5), 75(10), 118(1)(a) and 125(3)* of the Pensions Act 1995.

Pension disputes

Section 273: Resolution of disputes

1085. This section replaces section 50 of the Pensions Act 1995 with a new section 50 and sections 50A and 50B, and sets out revised requirements relating to the dispute resolution arrangements for occupational pension schemes.

New section 50 of Pensions Act 1995 – Requirement for dispute resolution arrangements

1086. Subsection (1) provides that trustees or managers of an occupational pension scheme must ensure that dispute resolution arrangements are made and implemented. Subsection (2) provides that dispute resolution arrangements are such arrangements as are required under this section for resolving pension disputes.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

1087. Subsection (3) defines a pension dispute as being a dispute about matters relating to the scheme between the trustees or managers of the scheme on the one hand and one or more persons “with an interest in the scheme” on the other. Certain disputes are exempted under subsection (9).

1088. Subsection (4) requires the dispute resolution arrangements to provide a procedure for any party to a dispute who is a person “with an interest in the scheme” to be able to apply to the trustees or managers of the scheme to make a decision on the matters of the dispute.

1089. Subsection (5) provides that where a dispute is referred to the trustees or managers for a decision, they must make a decision within a reasonable period of receiving the application and notify the applicant of the decision within a reasonable period. Under *section 90* the Regulator is required to issue a code of practice on what constitutes a “reasonable period”.

1090. Subsection (6) requires that the dispute resolution arrangements must comply with the requirements set out in new section 50B.

1091. Subsection (7) provides that the dispute resolution arrangements must have effect on existing schemes on or after the commencement date of this section in relation to applications made on or after that date.

1092. Subsection (8) exempts from the application of this section schemes where every member of the scheme is a trustee and schemes with no more than one member, and provides a power for further exemptions to be set out in regulations. Subsection (9) sets out the types of dispute to which the dispute resolution arrangements do not apply and provides a power for further exemptions to be set out in regulations.

1093. Subsection (10) provides for section 10 of the Pensions Act 1995 (civil penalties) to apply to trustees or managers who do not take reasonable steps to make or implement dispute resolution arrangements under section 50.

New section 50A – Meaning of “person with an interest in the scheme”

1094. Subsection (1) sets out the meaning of “a person with an interest” in the scheme for the purposes of section 50. It reflects the definitions currently set out in the Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996 (SI 1996/1270).

1095. Subsection (2) sets out the meaning of “non-dependant beneficiary” for the purposes of subsection (1)(c).

1096. Subsection (3) sets out the meaning of “prospective member” for the purposes of subsection (1)(d).

New section 50B – The dispute resolution procedure

1097. This new section sets out the matters which must be included in the dispute resolution procedure.

1098. Under subsection (2) the procedure must provide for the representation of a person in order for an application for the resolution of a dispute to be made or continued where (i) that person dies, (ii) that person is a minor or a person otherwise incapable of acting, or (iii) in any other case, that person nominates a representative.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

1099. Subsection (3) provides that the dispute resolution procedure may include provision about the time limits for making an application for the resolution of a dispute but further provides that the procedure must (in the case of a person with an interest in a scheme as mentioned in section 50A(1)(e) or 50A(1)(f)) require a six-month time limit for making the application.

1100. Subsection (4) requires the dispute resolution arrangements to set out details about how the application is to be made; what information should be included in the application; and the way in which decisions are to be reached and given.

1101. Subsection (5) provides for the dispute resolution procedure to cease if, after the application is made, the dispute becomes one in respect of which proceedings have been commenced in any court or tribunal or the Pensions Ombudsman has commenced an investigation as a result of a complaint made or a dispute referred to him.

The Pensions Ombudsman

Section 274: The Pensions Ombudsman and Deputy Pensions Ombudsmen

1102. *Subsections (1) and (2)* of this section amend section 145 of the Pension Schemes Act 1993, which established the office of the Pensions Ombudsman. The amendments provide that the Pensions Ombudsman may resign or be removed from his office only on the grounds set out in his terms and conditions of appointment.

1103. At present, section 145(4C) of the Pension Schemes Act 1993 enables the Pensions Ombudsman to delegate his functions to any of his employees, but he cannot delegate the determination of complaints made and disputes referred to him. This means that if the Pensions Ombudsman was incapacitated, or if he died or resigned from his office, no determinations could be made until a new Pensions Ombudsman was appointed. Alternatively, if the Pensions Ombudsman had a particularly heavy workload, complaints and disputes awaiting determination might be delayed while he determined outstanding complaints and disputes.

1104. *Subsection (3)* of this section inserts a new section 145A into the Pension Schemes Act 1993.

1105. New section 145A(1), (2) and (3) provides for the appointment of one or more persons to act as a deputy to the Pensions Ombudsman. A Deputy Pensions Ombudsman will have all the functions and powers of the Pensions Ombudsman and will be appointed upon such terms and conditions as the Secretary of State may think fit.

1106. New section 145A(4) sets out the circumstances in which a Deputy Pensions Ombudsman may carry out the functions of the Pensions Ombudsman. The circumstances are:

- where there is a vacancy in that office;
- at any time when the Pensions Ombudsman is for any reason unable to discharge his functions; and
- at any other time, with the consent of the Secretary of State (such as when the Pensions Ombudsman's workload means the assistance of a Deputy is appropriate).

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

1107. New section 145A(5) provides that all the provisions in legislation relating to the performance of the Pensions Ombudsman's functions are to be interpreted as including a Deputy Pensions Ombudsman who is performing those functions.

1108. New section 145A(6) provides for the Secretary of State to pay to, or in respect of, a Deputy Pensions Ombudsman, remuneration, compensation for loss of office, pension, allowances and gratuities, or other benefits as determined by the Secretary of State. This provides similar provisions to those relating to the Pensions Ombudsman.

1109. *Subsection (4)* provides that any Deputy Pensions Ombudsman is to be added to the persons disqualified from being elected as a Member of Parliament (and consequently, disqualifies him or her from being elected as a Member of the European Parliament). This brings the position regarding a Deputy Pensions Ombudsman in line with the existing position regarding the Pensions Ombudsman.

1110. *Subsection (5)* provides for both the Pensions Ombudsman and any Deputy to the Pensions Ombudsman to be disqualified from being elected to the Northern Ireland Assembly. This mirrors the position of disqualifying the Pensions Ombudsman and any Deputy Pensions Ombudsman from being elected as a Member of Parliament.

1111. *Subsections (6)* provides for a Deputy Pensions Ombudsman to join a pension scheme established under section 1 of the Superannuation Act 1972 by the Minister for the Civil Service. *Subsection (7)* enables the Pensions Ombudsman to pay to the Minister for the Civil Service any amount that the Minister may direct in respect of a person who is a Deputy Pensions Ombudsman joining such a scheme. *Subsection (8)* requires the Pensions Ombudsman to make payments to the Minister for the Civil Service, where such payments are directed, in respect of the Pensions Ombudsman's and his employees' membership of a pension scheme established under section 1 of the Superannuation Act 1972.

Section 275: Jurisdiction

1112. In the case of *Brittanic Asset Management v. the Pensions Ombudsman*, the Court of Appeal drew a distinction between a person who undertakes "an act of administration concerned with the scheme" and a person "concerned with the administration of the scheme". It noted that the former fell outside the Pensions Ombudsman's jurisdiction. This section provides that the Pensions Ombudsman will be able to investigate complaints involving "one-off" acts of administration.

1113. *Subsection (1)* inserts a new subsection (4A) into section 146 of the Pension Schemes Act 1993. Under section 146(4), regulations may treat a person who is not a trustee, manager or employer, but who is concerned with the financing or administration of, or the provision of benefits under, a pension scheme as though he were a person responsible for the management of the scheme. Section 146(4A) provides that a person or body of persons is concerned with the administration of a scheme where the person or body is responsible for carrying out an act of administration concerned with the scheme.

1114. *Subsection (2)* provides that new section 146(4A) will not have retrospective effect and will only apply in relation to disputes and complaints in relation to matters taking place on or after the date the new section 146(4A) comes into force.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

1115. *Subsection (3)* provides that for the purpose of *subsection (2)*, questions in relation to the carrying out of a sole trustee's functions are to be treated as a "dispute". This allows them to come within the ambit of *subsection (2)*.

Section 276: Investigations

1116. This section repeals section 54 of the Child Support, Pensions and Social Security Act 2000 and removes the amendments made to sections 148, 149 and 151 of the Pension Schemes Act 1993 by that section. Section 54 was brought into effect for the purposes of making rules and regulations only, and no rules or regulations have ever been made. Section 54 is repealed by *subsection (1)*. *Subsection (2)* repeals the amendments made to sections 148, 149 and 151 of the Pension Schemes Act 1993.

Pension compensation

Section 277: Amendments relating to the Pensions Compensation Board

1117. *Subsection (2)(a)* amends section 80 of the Pensions Act by inserting a new subsection (2A). This ensures that the Pensions Compensation Board may review any determination even though an application has not been made.

1118. *Subsection (2)(b)* replaces section 80(4) and (5) with a new subsection (4). This provides that regulations may make provision with respect to reviews applications and procedures for an application.

1119. *Subsection (3)* amends section 81 of that Act which sets out the conditions which must apply in order to apply for compensation. It will no longer be necessary for a scheme to be underfunded. The other conditions in section 81 will continue to apply, namely the value of the assets must have been reduced due to an act or omission and the employer must be insolvent.

1120. *Subsection (4)* replaces section 83(3) and (4) of that Act with a new subsection (3). This removes the requirement that the compensation paid must not exceed the amount required to eliminate the scheme's underfunding. The amount payable is the shortfall minus any amounts recovered by the trustees plus interest on that amount (if any).

1121. These provisions will only operate until the new Board of the Pension Protection Fund takes over the functions of the Pensions Compensation Board and the latter is abolished under Part 9 of this Act.

Annual increases in rate of pensions

Section 278: Annual increase in rate of certain occupational pensions

1122. Section 51 of the Pensions Act 1995 requires that certain private sector occupational pensions on or after 6th April 1997 must be increased annually by at least the appropriate percentage. This is the lesser of the revaluation percentage and 5%. This requirement is modified by *section 278* so that pensions derived from salary related benefits built up on or after the "commencement day" are to be increased by at least the annual percentage increase in the Retail Prices Index (the general level of prices in Great Britain) or 2.5%, whichever is the lesser. In addition, the requirement for an annual increase will not apply to pensions deriving from money purchase benefits which come into payment on or after the

“commencement day”. The “commencement day” is the day appointed for the coming into force of *section 278*.

1123. *Subsection (2)* amends section 51(1) in order to clarify the basis on which the section applies.

1124. *Subsection (3)* ensures that pensions derived from money purchase benefits that are already in payment before the commencement day, continue to be required to be indexed.

1125. *Subsection (4)* amends section 51(4)(b) by specifying that the maximum “relevant percentage” for Category X and Category Y pensions is 5% and 2.5% respectively. The relevant percentage is the minimum amount by which a pension must be indexed – that is the Retail Price Index or 5%/ 2.5%, whichever is the lesser,

1126. *Subsection (5)* inserts new subsections (4A), (4B) and (4C). New section 51(4A) defines a Category X pension as being one which is in payment before the commencement day or is a pension which will derive wholly from pensionable service before the commencement day. New section 51(4B) defines a Category Y pension as being one which will derive wholly from pensionable service on or after the commencement day. New section 51(4C) provides for different indexation requirements to apply where the pension becomes a pension in payment on or after the commencement day and will derive from pensionable service before and after the commencement day.

1127. *Subsection (6)* amends section 51(5) so that any regulations made under this subsection may provide that any of the provisions of section 51 apply to a pension as if so much of it as would not otherwise be attributable to pensionable service or to payments in respect of employment were attributable to such service or payments before or on or after the commencement day.

1128. *Subsection (7)* inserts new section 51ZA into the Pensions Act 1995 and provides a new definition for the “appropriate percentage” (the minimum amount by which a scheme must increase its pensions in payment). This replaces the definition in section 54(3) of that Act.

Section 279: Annual increase in rate of certain personal pensions

1129. Section 162 of the Pensions Act 1995 requires that personal pensions deriving from protected rights (rights that derive mainly from a National Insurance contribution rebate and its investment return) built up on or after 6th April 1997 must be increased by at least the appropriate percentage. This is the lesser of the percentage which appears to the Secretary of State to be the percentage increase in the Retail Price Index and 5%. This requirement is modified by *section 279* so that the annual increase does not apply to pensions deriving from protected rights which come into payment on or after the “commencement day”.

1130. *Subsection (2)* amends section 162(1) in order to clarify the basis on which the section applies. It has the effect of removing the requirement to increase pensions that come into payment on or after the “commencement day”.

1131. *Subsection (3)* amends section 163(3) of the Pensions Act 1995 by:

- amending the definition of “appropriate percentage” to bring it into line (in part) with the definition as used in section 51 of that Act; and

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

- defining “commencement day” as being the day appointed for the coming into force of *section 279*.

Section 280: Power to increase pensions giving effect to pension credits etc

1132. Section 40 of the Welfare Reform and Pensions Act 1999 is concerned with pensions in payment derived from a pension credit where there has been a pension sharing order. It contains a power that enables the Secretary of State to make provision for pensions provided to give effect to eligible pension credit rights or safeguarded rights to be increased by the Retail Price Index not exceeding 5%. These requirements are modified in line with the changes being made under *sections 278 and 279*.

1133. *Subsection (2)* amends section 40(1) of the Welfare Reform and Pensions Act 1999 by replacing the reference to “5%” with “the maximum percentage”.

1134. *Subsection (4)* inserts new subsection (2A) into section 40 of the Welfare Reform and Pensions Act 1999 to ensure that subsection (2) of section 40 does not apply to pensions derived from money purchase benefits coming into payment on or after the “commencement day”.

1135. *Subsection (4)* also inserts new subsection (2B) into section 40 of the Welfare Reform and Pensions Act 1999 and this defines “the maximum percentage” as being:

- 5% for pensions in payment before the commencement day or where entitlement arose before that day;
- 2.5% where entitlement arose on or after the commencement day.

1136. *Subsection (5)* amends section 40(3) of the Welfare Reform and Pensions Act 1999 by defining the “commencement day” as being the day appointed for the coming into force of *section 280*. The terms “money purchase benefit” and “relevant pension credit” are also defined.

Revaluation

Section 281: Exemption from statutory revaluation requirement

1137. This section amends section 84 of the Pension Schemes Act 1993 (basis of revaluation) to enable schemes to satisfy the statutory revaluation requirements by revaluing the total pension or other benefit fully in line with the Retail Prices Index. This effectively restores the situation to that which existed before the provision was repealed by the Pensions Act 1995. New subsection (6) defines the meaning of “Retail Prices Index”.

Contracting out

Section 282: Meaning of “working life” in Pension Schemes Act 1993

1138. This section amends the meaning of “working life” in section 181 of the Pension Schemes Act 1993. This definition is used for calculating an earner’s Guaranteed Minimum Pension (GMP). The existing definition of “working life” has the same meaning as in paragraph 5(8) of Schedule 3 to the Social Security Contributions and Benefits Act 1992 (i.e. “working life” is the period between (inclusive) the tax year in which the person attained the age of 16; and (exclusive) the tax year in which he attained pensionable age or died under that age). Under section 126 of and Schedule 4 to the Pensions Act 1995, pensionable age for

women to which paragraph 5(8) refers will be raised from 60 to 65 in stages commencing in 2010, to bring women's pensionable age into line with that for men. By virtue of the amendments made by this section "working life" for the purposes of calculating an earner's GMP will now end with the tax year before the person reaches the age of 65 (in the case of a man) or 60 (in the case of a woman), or if earlier, the tax year before the person dies. The amendment made by this section brings the definition of "working life" into line with the definition of "pensionable age" for GMPs, which will remain unchanged from 2010.

Section 283: Power to prescribe conditions by reference to Inland Revenue approval

1139. This section adds a new section 9(5A) to the Pension Schemes Act 1993 to enable regulations to be made in relation to contracted-out occupational pension schemes and appropriate schemes containing requirements based on whether the scheme complies with certain provisions of tax legislation.

Section 284: Restrictions on commutation and age at which benefits may be received

1140. *Subsection (1)* amends section 21(1) of the Pension Schemes Act 1993 (which refers to commutation, surrender and forfeiture) to provide that where a scheme is required to comply with section 13 (minimum pensions for earners) or section 17 (minimum pensions for widows or widowers) of the Pension Schemes Act 1993 in providing a guaranteed minimum pension, then the scheme may provide for payment of a lump sum instead of that pension to the extent that this is permitted by regulations.

1141. *Subsection (2)* amends section 17 of the Pension Schemes Act 1993 (minimum pensions for widows and widowers) to provide that where a person has received a lump sum instead of a guaranteed minimum pension in circumstances prescribed by regulations, that person will be treated as if they had not received the lump sum for the purposes of calculating the minimum pension payable to their widow or widower.

1142. *Subsections (3) to (7)* amend sections 28 and 29 of the Pension Schemes Act 1993 to remove certain restrictions on protected rights which build up in contracted-out money-purchase occupational pension schemes and appropriate schemes (a personal pension scheme that meets the requirements of section 7(4) of the Pension Schemes Act 1993.). *Subsections (3) to (5)* enable regulations to provide for protected rights to be paid as lump sums in certain circumstances and subject to certain restrictions. *Subsections (6) and (7)* remove the restrictions as to the age at which members' protected rights can be given effect, except in occupational pension schemes where, unless the member agrees a later date, they must be given effect to no later than the member's 65th birthday.

Stakeholder pensions

Section 285: Meaning of "stakeholder pension scheme"

1143. This section makes two clarifying amendments to section 1 of the Welfare Reform and Pensions Act 1999 (the WRAP Act) which outlines the meaning of 'stakeholder pension scheme'. The section amends section 1(5) of the WRAP Act to clarify that the limitation on the application of stakeholder pension funds of scheme members to defray administrative expenses (the "charge cap") applies not only to contributions paid by or on behalf of members, but also to contributions paid by an employer on his own account to the designated scheme of one of his employees, and contributions made by another third party such as a

relative. The section therefore amends reference to member contributions to cover contributions made ‘by, or on behalf or in respect of’. This section also inserts section 1(10) into the WRAP Act, to clarify that stakeholder pension schemes must be contracted-out schemes to satisfy a qualifying condition for registration by the Regulator to the effect that they must accept transfer payments (including contracted-out rights) in respect of members’ rights in other private pension schemes.

PART 6 – FINANCIAL ASSISTANCE SCHEME FOR MEMBERS OF CERTAIN PENSION SCHEMES

Summary

1144. This Part requires the Secretary of State to establish a financial assistance scheme to help those who are or were members of a defined benefit occupational pension scheme that is winding-up and is underfunded to such an extent that the members will not have their accrued benefits secured. The detail, such as the level of the assistance and the administrative arrangements, will be prescribed in regulations. By the virtue of *section 316* (parliamentary control of subordinate legislation) these regulations are subject to affirmation resolution procedure.

Section 286: Financial assistance scheme for members of certain pension schemes

1145. *Subsection (1)* requires the Secretary of State, through regulations, to establish a system of financial support to, or in respect of, qualifying members of qualifying pension schemes to be known as the "financial assistance scheme".

1146. *Subsection (2)* defines “qualifying member”, “qualifying pension scheme” and “scheme’s pension liabilities” for the purposes of the section.

1147. *Subsection (3)* is an inclusive list of matters that may be covered by regulations under *subsection (1)*:

- *Subsection (3)(a)* allows for regulations to provide for the financial assistance scheme to be managed by the Secretary of State or by another person or body;
- *Subsection (3)(b)* allows for regulations to permit the person appointed to manage the financial assistance scheme to manage and apply the funds in accordance with the regulations. If the financial assistance scheme is set up as a trust, the regulations may specify that the manager is to manage and apply the funds in accordance with the deed of trust.
- *Subsection (3)(c)* allows for regulations to permit the financial assistance scheme to take over the funds and liabilities of qualifying pension schemes and to govern the circumstances under which this may occur. Where this occurs, the regulations may allow for the pension scheme trustees to be discharged of their liabilities.
- *Subsection (3)(d)* allows for regulations to specify the conditions that must be met before a payment is made and that this payment may be made either directly to the qualifying member or to a third party on his behalf. It also allows for regulations to lay down the way the amount to be paid is calculated. If the financial assistance scheme is set up as a trust, the regulations may allow for these matters to be covered by the deed of trust.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

- *Subsection (3)(e)* allows for regulations to authorise the Secretary of State to pay grants to the financial assistance scheme.
- *Subsection (3)(f)* allows for regulations to govern the circumstances under which money is paid into or out of the financial assistance scheme.
- *Subsection (3)(g)* allows for regulations to make provision for or in connection with both reviews of and appeals from decisions made in connection with the financial assistance scheme and the investigation of complaints of maladministration. The amendment would also allow for an appeals body to be established through regulations.
- *Subsection (3)(h)* allows for regulations to give the Regulator or the Board of the Pension Protection Fund certain functions in relation to the financial assistance scheme.
- *Subsection (3)(i)* allows for regulations to allow for the exercise of discretion in relation to any matter concerning the financial assistance scheme.
- *Subsection (3)(j)* allows for regulations to apply any provision of Part 1 or Part 2 of this Act to the financial assistance scheme and for those provisions to apply with modifications where they are so applied.

1148. *Subsection (5)* prevents regulations under *subsection (1)* funding the financial assistance scheme by imposing a compulsory levy or charge, on any person.

1149. *Subsections (6) and (7)* prevent regulations under *subsection (1)*, where they determine whether payments are to be made to or in respect of qualifying members and the amounts of those payments, from taking account of any income or capital that the qualifying member has, other than that deriving from the qualifying pension scheme of which he is, or was, a member.

1150. *Subsection (8)* allows for the period during which a person or scheme must meet conditions to qualify for assistance to include a period before the Pensions Act 2004 was passed.

PART 7 – CROSS-BORDER ACTIVITIES WITHIN EUROPEAN UNION

Summary

1151. *Sections 287 to 295* contain provisions that are required in order to comply with the requirements of the European Pensions Directive¹ concerning the activities and supervision of institutions for occupational retirement provision who are engaged in ‘cross-border activity’. A key objective of the Directive is to put in place a regulatory framework which will enable an occupational pension scheme located in one EU Member State to accept contributions from an employer based in another Member State.

UK occupational pension scheme receiving contributions from European employer

¹ Directive 2003/41/EC

Section 287: Occupational pension scheme receiving contributions from European employer

1152. This section details the conditions an occupational pension scheme located in the UK must meet before it can begin to operate as a cross-border scheme. *Subsection (1)* provides that trustees or managers of an occupational pension scheme cannot accept any contribution to the scheme from a European employer unless the conditions in *subsections (2) to (6)* are met. A scheme must:

- be ‘authorised’ under *section 288* by the Regulator to engage in such activity (*subsection (2)*); and
- have been approved under *section 289* by the Regulator to receive contributions in respect of a particular employer from a different Member State (*subsection (3)*).

1153. *Subsection (4)* provides that the scheme must not operate cross-border until its trustees or managers have been notified, by the Regulator, of the social and labour law of the host Member State, together with details of any additional investment restrictions under Article 18(7) and information rules under Article 11 of the Directive that the host Member State requires the scheme to comply with. If a period of two months has passed since the Regulator notified the scheme that it is approved under *section 289* and this information has not been provided by the Regulator, this condition is taken to be satisfied.

1154. *Subsection (5)* enables the Regulator to take action to impose a civil penalty under section 10 of the Pensions Act 1995 (civil penalties) against the trustees or managers of a scheme who commence cross-border activity without having complied with the conditions listed above.

1155. *Subsection (6)* makes provision for the terms “European Employer” and “host Member State” to be defined in regulations.

Section 288: General authorisation to accept contributions from European employers

1156. An occupational pension scheme intending to commence cross-border activities must first be authorised by the Regulator. This section makes provision for the authorisation process, which will be set out in regulations. The Regulator will have the power to refuse authorisation and it will also have the power, where necessary, to revoke an existing authorisation. *Subsection (1)* provides that trustees or managers of occupational pension scheme applying to the Regulator for authorisation to accept contributions from European employers must do so in a form and manner prescribed in regulations. *Subsection (2)* provides that on receiving the application, the Regulator must, if satisfied that it meets the conditions set out in regulations, give authorisation. Otherwise the Regulation must refuse authorisation. *Subsection (3)* provides a power for provision to be made in regulations for the Regulator to be able to revoke authorisation given under this section and for provision to be made regarding any criteria applicable in the Regulator reaching a decision to revoke authorisation.

Section 289: Approval in relation to particular European employer

1157. Once a pension scheme provider has received general authorisation for cross-border activities, it must identify the specific employer(s) from whom it wishes to receive contributions. At this stage, the trustees or managers of the occupational scheme in question must obtain the approval of the Regulator to accept contributions from the specified employer or employers. The trustees or managers of a scheme that intends to operate cross-border must notify the Regulator of their intention to do so.

1158. *Subsection (1)* provides that the information contained in this ‘notice of intention’ is to include details of the prospective employer (the “specified employer”), the host Member State, the intention (subject to approval under this section) to accept the contributions and any other prescribed information. The prescribed information will include details of the main characteristics of the scheme. Regulations will specify what information will be needed to constitute the scheme’s main characteristics together with the manner in which this information is to be provided to the Regulator.

1159. The process undertaken before commencing cross-border activity is therefore a two stage process, with the first stage being the general authorisation process set out at *section 288* and the second stage being the specific approval process set out at *section 289*. It should be noted, however, that although the overall accreditation process has two stages, a prospective cross-border scheme will have the option to apply simultaneously to the Regulator for both general authorisation and employer-specific approval.

1160. *Subsection (2)* provides that within 3 months of receiving the notice of intention, the Regulator must, if satisfied those giving the notice meet prescribed requirements, inform the appropriate regulatory authority of the Member State in which the prospective employer is located of the notice and its contents and notify those who gave the notice of intention as to whether they are approved or not for the purposes of this section. The Regulator does not have to pass on this information if, in accordance with Article 20(4) of the Directive, it has reason to doubt that aspects of the pension scheme or those operating it will be compatible with the proposed cross-border operation. The decision whether or not to refuse to pass on such information is an integral part of the approval process. Regulations will prescribe the circumstances in which the Regulator will not be required to take this action, in accordance with the provisions of Article 20(4) of the Directive.

1161. The Regulator will be required to inform the scheme’s trustees or managers of what course of action it has taken, whether by passing on the information if it approves the proposal or by notifying the trustees or managers of its refusal to pass on that information. However, *subsection (3)* provides that if the Regulator does fail to notify the scheme of its decision within the period of 3 months after the Regulator received the notice of intention, the scheme can proceed on the basis that it is approved.

1162. *Subsection (4)* provides that regulations can specify the process and criteria the Regulator must follow when revoking an authorisation previously granted under this section.

Section 290: Notification of legal requirements of host Member State outside United Kingdom

1163. Where the Regulator has forwarded details of a notice of intention to the regulatory authority of the Member State in which the prospective employer's employees are located (the 'host Member State'), that host Member State's regulatory authority should, (in accordance with Article 20(5) of the Directive), within two months of receipt, transmit to the Regulator details of the 'social and labour law' relevant to pensions, together with details of any additional investment restrictions under Article 18(7) and information rules under Article 11 of the Directive, which the prospective UK based cross-border will be required to comply with (in addition to relevant UK pensions legislation). In accordance with Article 20(8), the host Member State should inform the Regulator of any significant change in the host Member State's social and labour law requirements, and in any rules under Article 18(7) and Article 11 of the Directive.

1164. This section places a duty on the Regulator to pass any such information received from the regulatory authority in the host Member State on to the trustees or managers of pension schemes as soon as is reasonably practicable.

Section 291: Duty of trustees or managers to act consistently with law of host Member State

1165. *Subsection (1)* places an obligation on the trustees or managers of a UK-based cross-border scheme receiving contributions to the scheme from a European employer to operate in accordance with the relevant social and labour laws of the host Member State in respect of the relevant members.

1166. *Subsection (2)* confers a regulation-making power to allow modification of UK pensions legislation in respect of UK-based cross-border schemes. The intention here is to avoid issues such as unnecessary dual regulation between the Regulator and the regulatory authority of another Member State.

1167. *Subsection (3)* provides that failure to operate in accordance with those laws may lead to the imposition of a civil penalty under section 10 of the Pensions Act (civil penalties). (The Regulator will also have the power to revoke both general authorisation and the specific approval for the pension scheme provider scheme to operate cross-border where it considers that such action is required.) *Subsection (4)* provides a definition of UK pensions legislation for this purpose.

Section 292: Power of Regulator to require ring-fencing of assets

1168. In order to comply with the funding provisions of Article 16(3) and, where appropriate, the investment provisions of Article 18(7) of the Directive, the home Member State may require a cross-border pension scheme to 'ring-fence' some or all of the assets or liabilities (or both) of the scheme. To this end, *subsection (1)* is a regulation-making power enabling the Regulator to direct the trustees or managers of a UK-based cross-border scheme to take, or refrain from taking, specified ring-fencing action. *Subsection (2)* provides that "ring-fencing" has the same meaning as in the Directive.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

1169. *Subsection (3)* provides that failure to act in accordance with the directions in a ring-fencing notice issued by the Regulator may lead to the imposition of a civil penalty under section 10 of the Pensions Act 1995 (civil penalties).

European occupational pension scheme receiving contributions from UK employer

Section 293: Functions of Regulator in relation to institutions administered in other Member States

1170. This section places certain duties on the Regulator where the UK is the host Member State – that is, where a non-UK based pension scheme is accepting contributions from a sponsoring employer located in the UK.

1171. *Subsection (1)* provides that where a UK employer is making, or plans to make, contributions to a European pensions institution, any function which Article 20 of the Directive requires or allows to be exercised by the competent authorities of the host member, is exercisable by the Regulator. *Subsection (2)* requires the Regulator, when it has been notified of the intention of a non-UK based pension scheme to accept contributions from a UK employer, to inform the regulatory authority of the host Member State within 2 months of receipt of the notice, of the relevant UK legal requirements under which the prospective cross-border pension scheme must operate.

1172. *Subsection (3)* places a duty on the Regulator to notify the competent authority of the home Member State, as soon as reasonably practicable, of any significant changes in UK relevant legal requirements.

1173. *Subsection (4)* places a duty on the Regulator to monitor the activities of a pension scheme located in another Member State that is accepting contributions from a UK employer, and to notify the regulatory authority for that scheme of any breaches detected of UK legal requirements.

1174. *Subsections (5) to (7)* enable the Regulator to take action against a UK employer where a non-UK based pension scheme accepting contributions from that UK employer has breached relevant UK legal requirements under which it is obliged to operate. These provisions implement the provisions of Article 20(10) of the Directive, which allow the Regulator to take steps to stop the pension scheme from operating in respect of a sponsoring employer where the regulatory authority of the Member State in which the pension scheme is based has been unable to stop the scheme from breaching the host Member State's social and labour laws. *Subsection (5)* will enable the Regulator to issue a notice to a UK-based employer, requiring the employer to take (or refrain from taking) various steps, as specified in the notice, including directing the UK-based employer to cease to make further contributions to the pension scheme. *Subsection(6)* is regulation making power permitting further provision to be made about the effects of a notice ordering a UK employer to cease making further contributions to a European pensions institution. *Subsection (7)* enables the Regulator to impose a civil penalty under Section 10 of the Pensions Act 1995 for failure to comply with a notice issued under *Subsection (5)*.

1175. *Subsection (8)* defines the terms 'European pensions institution', 'UK employer' and 'relevant legal requirements'.

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which received Royal Assent on 18 November 2004*

Assistance for other European regulators

Section 294: Stopping disposal of assets of institutions administered in other Member States

1176. Article 19(3) of the Directive requires Member States to put in place mechanisms to prohibit, in accordance with the provisions of Article 14, the free disposal of assets held by a depositary or custodian located within its territory at the request of the pension scheme's home Member State.

1177. *Subsection (1)* provides that this section applies where the Regulator is asked by the competent authority of another Member State for help in prohibiting the disposal of UK held assets of a European pensions institution with its main administration in that Member State ("European pension institution" is defined in *section 293(8)*). On an application from the Regulator, *subsection (2)* allows the High Court, or the Court of Session in Scotland (*subsection (7)* refers), to grant a restraining order preventing a depositary or custodian from disposing of, or otherwise dealing with, UK-held assets of a European pensions institution whose main administration is elsewhere within the EU. Where such an order is granted, the Court may also grant subsequent orders enabling the pension scheme's own 'home' regulatory authority to take any appropriate action in respect of the UK-held assets concerned.

1178. *Subsection (4)* ensures that the trustees or managers of a cross-border scheme involved in such proceedings have equal participation rights.

1179. *Subsection (5)* gives the Court discretion to award appropriate costs and/or expenses to any of the parties to proceedings concerned.

PART 8 – STATE PENSIONS

RETIREMENT PENSIONS

Summary

1180. Retirement pension is paid to people who have reached pensionable age (currently 60 for women and 65 for men) provided they have made a claim for it. During their working life, they have to have paid, been treated as paid or have been credited as having paid, National Insurance contributions. The amount of retirement pension depends on the number of contributions they have built up.

1181. People must either:

- have one qualifying year since 6th April 1975 which is derived from the payment of Class 1, 2 or 3 National Insurance contributions or from Class 1 contributions treated as paid; or
- have paid 50 flat-rate contributions at any time before 6th April 1975.

1182. To get a full rate basic retirement pension, people must have qualifying years for about 90% of the years in their working life. To get a minimum basic retirement pension (25% of the full amount), people normally need 10 or 11 qualifying years.

1183. Prior to April 2000, employees started paying National Insurance contributions once their earnings reached the Lower Earnings Limit. From April 2000, a new employees'

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primary threshold was introduced as the point from which employees start to pay contributions. This is set at a higher amount than the Lower Earnings Limit. As a result, employees who earn between the Lower Earnings Limit and the employees' primary threshold no longer pay National Insurance contributions but will be treated as if they have paid them. This means they will continue to build up entitlement to contributory benefits such as retirement pensions, even though they are not paying National Insurance contributions.

Working life

1184. A person's working life is the period over which they have to meet the contribution conditions for basic retirement pension. A working life is normally:

- 49 years for men;
- 44 years for women born on or before 5/10/1950;
- 45 years for women born on 6/10/1950 or any subsequent day through to and including 5/10/1951;
- 46 years for women born on 6/10/1951 or any subsequent day through to and including 5/10/1952;
- 47 years for women born on 6/10/1952 or any subsequent day through to and including 5/10/1953;
- 48 years for women born on 6/10/1953 or any subsequent day through to and including 5/10/1954;
- 49 years for women born on 6/10/1954 or later.

1185. A working life is counted from the start of the tax year in which a person reaches the age of 16 to the end of the tax year before the one in which they reach pensionable age.

Qualifying year

1186. A qualifying year for basic retirement pension is a tax year in which a person receives (or is treated as having received) qualifying earnings of at least 52 times the Lower Earnings Limit for that year.

Qualifying earnings

Earnings from Class 1 employment

1187. Earnings on which full-rate Class 1 contributions have been paid or are treated as having been paid count as qualifying earnings. Earnings of married women and widows with reduced liability do not count as qualifying earnings.

Class 2 and Class 3 contributions

1188. Each Class 2 or Class 3 contribution counts as one week's earnings at the Lower Earnings Limit.

Credit of earnings

1189. In certain circumstances a person may be credited with earnings to help them get a retirement pension if they do not have enough earnings in a tax year to reach the level needed

to make it a qualifying year. Men with no liability to pay Class 1 or Class 2 contributions may be credited automatically for the tax years in which they reach 60 and the four succeeding years. From 6th April 2010 this arrangement will be extended to women. Young people can get credits for the tax year in which they reach age 16 and the two following years. There are conditions attached to the receipt of credits and the availability of a credit does not mean a person does not have to pay National Insurance contributions if their earnings exceed the employees' primary threshold. Earnings are not credited to married women who have a reduced contribution liability.

Flat-rate contributions paid or credited before 6th April 1975

1190. Any flat-rate contributions paid by or credited before 6th April 1975 are converted into a number of qualifying years by dividing the total number by 50 and rounding up what is left over to the next whole number. However, the number of qualifying years calculated in this way cannot be more than the number of years in a working life up to April 1975.

Classes of National Insurance contributions

1191. There are six classes of National Insurance contributions – only three count towards qualifying years for retirement pensions:

- *Class 1* – paid by employed earners and their employers. Employees pay these if they work for an employer and earn more than the employees' primary threshold. The employer also pays National Insurance contributions for the employee if they earn more than the employers' primary threshold. There is no upper limit on the employer's National Insurance contributions. Some married women and widows can still pay their National Insurance contributions at a reduced rate.
- *Class 2* – paid by self-employed people. Paid at a flat-rate.
- *Class 3* – voluntary contributions which may be paid to protect a person's National Insurance record in some circumstances. Paid at a flat rate. Class 3 contributions can be paid for previous years to enable someone either to qualify for a basic retirement pension at the minimum rate or to increase the rate of the basic retirement pension for which they have qualified. Any arrears of contributions paid after pensionable age cannot normally count for payment of retirement pension from a date earlier than the day on which the contributions were paid. Married women and widows cannot pay Class 3 contributions for any tax year in which they had reduced rate liability for the whole year.

Categories of contributory retirement pension

1192. There are two categories of contributory retirement pension (either or both of which may be payable):

- Category A; and
- Category B.

Category A pensions

1193. A Category A retirement pension consists of two parts:

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- basic retirement pension – dependent on the number of qualifying years in a person’s working life;
- additional retirement pension – dependent on a person’s earnings, or deemed earnings in their working life, since April 1978.

1194. It is paid to:

- anyone who can satisfy the entitlement conditions;
- anyone reaching pensionable age after 5th April 1979 by using qualifying years of their former spouse for a basic retirement pension only;
- a woman who reached pensionable age before 6th April 1979 by using the qualifying years of her former husband for a basic retirement pension only;
- a widow or widower entitled to long-term incapacity benefit under prescribed circumstances.

1195. In order to receive a Category A pension, a person has to have:

- reached pensionable age;
- satisfied the conditions for basic retirement pension (or additional retirement pension) or both; and
- made a claim for retirement pension.

Category B pensions

1196. A Category B retirement pension can consist of a basic retirement pension; or an additional retirement pension; or both. It is payable by virtue of a spouse’s qualifying years and earnings. It is paid to: married women; widows; widowers. In the case of a married woman a Category B pension consists of 60% of the spouse’s basic retirement pension. In the case of a widow or widower, a Category B pension may consist of a basic retirement pension of up to 100% of the spouse’s retirement pension (it may be combined with any Category A pension of the person’s own entitlement up to 100% of a full retirement pension payable to a single person). It may, with certain exceptions, also consist of half of a deceased spouse’s additional retirement pension.

Entitlement to more than one pension

Section 296: Persons entitled to more than one Category B retirement pension

1197. This section allows people who are entitled to more than one retirement pension (whether of the same category or not) to notify the Secretary of State in writing as to which one of those retirement pensions they wish to receive. Where such notification is received, that person shall be entitled to the retirement pension he has said he wishes to receive in respect of any week commencing after the date of the notice. In default of such notification, that person shall be entitled to whichever retirement pension is from time to time the most favourable to him.

1198. Upon Royal Assent, this section amended section 43(3) of the Social Security Contributions and Benefits Act 1992 (which concerns persons entitled to more than one retirement pension). Contributory benefits legislation was consolidated by that Act and

although section 43 enabled a person to choose when there is entitlement to two retirement pensions of a different category, it did not do so where a person is entitled to more than one retirement pension of the same category. This mainly affects widows already entitled to a Category B retirement pension who then remarry. The amendment provides that where a person is entitled to more than one Category B retirement pension they can notify the Secretary of State in writing as to which of the Category B retirement pensions they wish to receive. In the event of no such notice, they will be entitled to the one which is most favourable to them. The Department for Work and Pensions made extra-statutory payments in these cases in line with the policy intention.

Deferral of state pension

Section 297: Deferral of retirement pensions and shared additional pensions

The current position

1199. A person is entitled to retirement pension from age 60 for a woman and age 65 for a man, providing he makes a claim for it. If a person does not claim his pension from that date he will not receive any pension for the period between pension age and the date of claim. He will instead qualify for an increase to his weekly pension from the point at which he does claim.

1200. A person may also be eligible for increments through electing to cancel his entitlement to retirement pension. For example, having drawn his pension at age 65, a man may choose to cancel his entitlement at age 66. A person may cancel his entitlement in this way once only. This means there are in effect two possible opportunities to earn increments – the first, by not claiming on reaching pensionable age; the second, by electing to cancel entitlement after claiming.

1201. The amount of the increase is calculated using a formula which results in an increase, or “increment”, of $\frac{1}{7}$ th of 1% of the weekly pension as at the date of claim, for each “incremental period” (equivalent to a week) in the deferment period. Increments of less than 1% cannot be awarded; therefore to qualify for an increase a person must defer claiming for at least seven weeks. The incremental rate is currently equivalent to approximately 7.4% of the weekly rate for each full year deferred. For example:

- total number of weeks deferred = 52
- weekly pension (basic plus additional) at date of claim = £90
- amount of increase = $\frac{1}{7} \times \frac{90}{100} \times 52 = £6.69$
- total weekly pension = £96.69

1202. Increments may normally be earned for a maximum of five years, and may be accrued on all components of the contributory state retirement pension i.e. Category A and B pensions and Graduated Retirement Benefit (the predecessor to the present earnings-related additional

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pension component of the state pension scheme). Increments may also be earned by deferring the shared additional pension,² and Guaranteed Minimum Pension³.

1203. It is not possible to defer only part of the pension, for example, a person cannot decide to claim just his basic pension while deferring his additional pension (i.e. the pension derived from the State Earnings Related Pension Scheme (SERPS) or the State Second Pension).

Married couples

1204. If a married man defers his Category A pension, his wife cannot claim a Category B pension based on his contributions until such time as he claims his pension. However, increments will accrue on both. Similarly, if he claims his pension but later decides to give it up to earn increments, his wife's entitlement to Category B pension will also be cancelled for the same period (subject to her consent) and increments earned on it.

1205. If a woman is entitled to her own Category A pension, she can claim or defer it without reference to whether her spouse is claiming his pension. However, in cases where her Category A pension could be increased by virtue of her husband's contributions and that increase is deferred because he is not claiming his pension, no increments would be payable unless she deferred her own pension as well as the increase.

1206. A woman who has attained state pension age and claimed her pension will be entitled to increments earned by her deceased husband provided they were married at the time he died, and she does not remarry before reaching state pension age. The inheritable proportion depends on which pension component the increments relate to. Broadly, she will inherit 100% of increments earned on the basic Category A pension, and between 50% and 100% of increments on the additional (earnings-related) pension component, depending on what percentage of the additional pension itself she is entitled to. In addition, one-half of increments on Graduated Retirement Benefit are inheritable.

1207. Until April 2010, when equalisation of state pension age for men and women begins to be phased in, only a widowed man is able to qualify for a Category B retirement pension on the basis of his late wife's contributions. Similarly, a widower may only inherit increments earned by his late wife where he himself was over pension age at the time of her death.

Changes to deferment provisions introduced by the Pensions Act 1995

1208. The 1995 Act removed the five-year limit on deferral and changed the weekly rate of increment accrual from $\frac{1}{7}$ th of 1% to $\frac{1}{5}$ th of 1% with effect from April 2010. The new incremental rate, equivalent to an annual incremental rate of 10.4%, effectively reduces the minimum qualification period to five weeks through the "one per cent" rule.

² Since December 2000, it has been possible for the additional pension component of the state pension scheme to be shared as part of a divorce settlement. "Shared additional pension" is the term used for the weekly pension derived from the cash equivalent transfer value of a former spouse's state additional pension.

³ Before 1997, salary-related occupational pension schemes could contract their members out of the State Earnings Related Pension Schemes (SERPS) by underpinning their benefits with a Guaranteed Minimum Pension which broadly reflected the pension which they would otherwise have built up in SERPS.

New provisions

1209. In Chapter 6 of the 2002 Green Paper: *Simplicity, security and choice: Working and saving for retirement (Cm 5677)* the Government included proposals for amending the arrangements for those who defer their state pension, by:

- bringing forward to 2006 the changes due to be introduced in 2010 (increasing the incremental rate, and abolishing the time limits); and
- introducing the choice of a taxable lump sum payment as an alternative to weekly increments for life.

1210. There is no change planned to the rule on electing to cancel entitlement – as now, a person will be able to do this once only.

1211. The intention is now to advance the commencement date of the deferral changes to April 2005.

Increments and removal of time limits

1212. *Section 297* amends the Pensions Act 1995 to bring forward the commencement date of the 2010 changes to April 2005. No other substantive changes to the structure or calculation of increments are made.

The lump sum – general conditions

1213. The lump sum will be an option only after a person has deferred for at least 12 months (in contrast to increments, which, following the change in accrual rate, will be payable after five weeks' deferment). However, as with increments, there will be no upper limit on the length of time a person may defer and accrue a lump sum.

Calculation

1214. The lump sum will be based on the pension a person would have been entitled to had they not deferred, plus a rate of return that will be applied weekly and compounded. The pension forgone will be calculated at the rate that would have been applicable in each week (or "accrual period") for which the person defers.

Married couples and provisions for widows/ widowers

1215. Both members of a married couple may defer their pension entitlement, either by deferring their own individual Category A pension, or as a consequence of the spouse, from whose contributions the other partner's pension is derived, deferring his. Each member of the couple will have the choice of either increments or (providing the deferment period is at least 12 months) a lump sum, in respect of their deferred pension. So, for example, a woman may prefer an increase to her weekly pension, while her husband elects to receive a lump sum.

1216. If a deferrer dies before claiming it is intended that his surviving spouse will be able to choose to "inherit" either a lump sum or increments based on the deceased's deferred entitlement (subject to provisions which restrict this right in respect of deferred pension based on the survivor's own contributions). This choice will only be available if the person had deferred for at least 12 months. In all other respects, the conditions for "inheriting" a lump sum will be the same as for inheriting increments, that is, that the survivor was married to the

deceased at the time of death, has attained state pension age and has claimed their own pension (and has not remarried before claiming their pension).

1217. Should the death occur before the spouse has attained state pension age, the lump sum as nominally accrued at the date of the deferrer's death will be increased annually in order to broadly maintain its value in line with prices up to the point at which the surviving spouse claims his or her pension. The value of increments earned by a deceased partner is currently protected in a similar way.

1218. The calculation of the lump sum for survivors will reflect the proportion of increments that can be inherited; that is, 100% of the lump sum derived from the basic Category A pension, a proportion of the lump sum derived from the additional pension and one-half from deferred Graduated Retirement benefit.

1219. In order to maintain consistency with the existing rule relating to the inheritability of increments, before April 2010 a widower's entitlement to an inheritable lump sum will be restricted to cases where the widower is himself over pension age at the time his wife dies.

Provisions of section 297

1220. *Subsection (1)* substitutes section 55 of the Social Security Contributions and Benefits Act 1992 to reflect the introduction of the choice between a lump sum and increments in Schedule 5.

1221. The substituted section 55(3) replicates the current section 55(2) and defines when a person's entitlement to their Category A or B pension is deemed to be deferred, that is,

- if they have not made a claim for their pension (but otherwise would meet the entitlement conditions, i.e. they have attained pensionable age, satisfied the relevant contribution conditions etc), or
- where entitlement to a Category B pension is derived from the spouse's contributions, if the spouse has not made a claim for his pension, or
- where the person has chosen to cancel their entitlement under section 54 of the Contributions and Benefits Act.

1222. *Subsection (2)* substitutes section 55C of that Act, which makes provision for increments where shared additional pension is deferred. The new section 55C(1) and (2) introduce a new Schedule 5A which provides for increments or a lump sum to be accrued on deferred shared additional pension (see commentary on *Schedule 11* to this Act for the detailed explanation of these provisions).

1223. Section 55C(3) replicates the current wording of section 55C(1) which defines when entitlement to a shared additional pension is deferred (that is, where entitlement to Category A or B retirement pension is deferred and the person is not entitled to shared additional pension only because they have not made a claim for it).

1224. *Subsection (3)* amends Schedule 4 to the Pensions Act 1995 so as to bring forward from 2010 to 2005 the operative date for the increase in the rate at which increments accrue where a person defers their entitlement to a state retirement pension or a shared additional pension. This subsection also removes the time limits which currently operate to restrict the period over which a person may accrue increments by deferring their retirement pension.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

1225. *Subsection (4)* introduces Schedule 11 to this Act which amends Schedule 5 to the Contributions and Benefits Act 1992 and related enactments and makes transitional provisions.

Schedule 11: Deferral of retirement pensions and shared additional pensions

1226. *Paragraph 4* inserts a new paragraph A1 at the beginning of Schedule 5 to the Social Security Contributions and Benefits Act 1992. This requires a person who has deferred their Category A or B pension for at least 12 months to choose between increments or a lump sum when they claim their pension. As this choice is not available for those who defer for shorter periods, this provision also effectively sets a minimum qualification period of 12 months for the lump sum.

1227. Regulations made under this paragraph will prescribe how the election is to be made and the period within which it must be made. If no choice is made within the prescribed period however, a person will be deemed to have chosen the lump sum (paragraph A1(2)). In other areas of social security legislation where potential entitlement to more than one benefit exists, the Secretary of State has the power to make the decision which is most advantageous for the claimant. In this instance, the Department recognise that for many people, a weekly increase to their pension would, over time, be financially more beneficial; however the lump sum is the “safe” alternative, as it carries no actuarial risk.

1228. Regulations made under paragraph A1(3) may provide for a limited "cooling-off" period, during which a person may change their original election, or deemed election.

1229. Paragraph A1(4) provides that where a person's deferred pension includes an increase under paragraphs 5 to 6 of Schedule 5 in respect of increments inherited from a deceased spouse who had deferred a Guaranteed Minimum Pension (GMP), he or she is unable to choose between increments and a lump sum for that component of their deferred pension. The intention is that only increments for that element may be awarded, because pension schemes will not be required to change their rules to offer lump sums as an alternative to increments for deferred GMPs.

1230. *Paragraph 5* substitutes paragraph 1 of Schedule 5. The new paragraph 1(1) provides that increments will be added to the pension where the person has either deferred for less than 12 months or has deferred for longer but has chosen increments rather than the lump sum.

1231. The new paragraph 1(2) carries forward the existing wording of the current paragraph 1. In conjunction with the increase in the incremental rate to $\frac{1}{5}$ th of 1% for each incremental period provided for in paragraph 2(3) of Schedule 5 (see in relation to *section 297(3)* above), this sub-paragraph provides a minimum deferral period of five weeks for increments by providing that no increase is payable if the increment would be less than 1%.

1232. *Paragraph 6* corrects an omission in the current legislation. For the purposes of calculating increments, the intention is that additions to the pension for a dependent husband or wife under sections 83 and 84 of the Contributions and Benefits Act are excluded. As drafted, however, paragraph 2(5)(b) of Schedule 5 only excludes additions under section 83 (paid to a husband for his wife). From April 2010, both sections are replaced by section 83A which equalises the provision of additions for dependent spouses. Paragraph 6(1) therefore substitutes a reference to section 83 with a reference to section 83A; paragraph 6(2) provides

that until section 83A comes into effect in 2010, it is to be read as a reference to sections 83 and 84.

1233. *Paragraph 7* inserts a new paragraph 2A into Schedule 5 to provide for the calculation of the increase to the weekly pension that will be applicable where a person has elected a lump sum but their deferred pension includes an increase for inheritable GMP increments (see note to paragraph A1(4) above). The increment is to be calculated on that component of the deferred weekly pension alone (the rest being converted to a lump sum).

1234. *Paragraph 8(1)* inserts new paragraphs 3A and 3B into Schedule 5.

1235. Paragraph 3A provides that a person is entitled to a lump sum if they have both deferred entitlement to their state retirement pension and have elected to receive a lump sum under paragraph A1(1)(b) (or are treated as having made such an election) having deferred their entitlement to their pension for at least 12 months.

1236. Paragraph 3B sets out how the lump sum is to be calculated. This is modelled on the same principle as an interest-earning savings account: interest will be applied each week to the amount “saved”, and compounded.

1237. The weekly amount to which the rate of return will be applied is the amount of pension that the person would have been entitled to had they not deferred (subject to paragraph 3B(5), see below). Retirement pension is payable weekly in advance from the first benefit payday that coincides with, or follows, the date the person is first entitled to the pension. So for example, if a person reaches pensionable age on, say, a Thursday and their pension payday is a Monday, they will not be entitled to any payment for the days preceding that first Monday. At the other end of the claim however, if they cease to be entitled to the pension on for example, a Wednesday, their pension continues in payment to the end of that benefit week.

1238. In order to capture accurately the amount of state retirement pension forgone therefore, the definition of “accrual period” will mirror the provisions which determine what constitutes a person’s benefit week, and effectively provide that each benefit week which begins in the deferment period will be a week that counts for the lump sum calculation. This means that days in the period of deferment preceding the first notional payday will be excluded, but days which fall between the end of the deferment period (i.e. the date the pension claim is actually made) and the first date for which weekly pension becomes due will be included.

1239. For the purposes of the calculation, the amount of weekly pension forgone includes an invalidity addition⁴ but excludes increases for a dependent adult or child or any Graduated Retirement Benefit (see below in relation to paragraph 17 of the Schedule). It also includes any increments inherited by the deferrer from a deceased spouse. This corresponds to the definition of “weekly benefit” as used as the basis for the calculation of increments.

⁴ An invalidity addition is an increase added to a person’s Category A pension where they were entitled to an age-related addition to their Incapacity Benefit on any day within the eight week period before they reach state pension age. The addition may be extinguished under certain circumstances: paragraph 3B(5) provides that these circumstances are to be ignored for the purposes of the lump sum calculation.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

1240. However, where the deceased spouse has been entitled to increments from deferring their GMP, the increase awarded in respect of those increments (and uprating of those increments) under paragraphs 5 to 6 of Schedule 5 will not form part of the weekly pension forgone for the purpose of the lump sum calculation, but will instead continue to be included as an increase to the weekly pension (cf. note to new paragraph 2A, above).

1241. Regulations made under paragraph 3B(5)(b)(iii) will provide for the amount of lump sum to be adjusted to take account of circumstances in which pension would have been reduced or not payable had the person been claiming at the time (for example, if another benefit which overlaps with retirement pension had been in payment, or the person had been serving a prison sentence).

1242. The percentage rate that is to apply will be the rate which is 2% higher than the Bank of England base rate, or such higher rate as may be prescribed by affirmative regulations (see *paragraph 19* of the Schedule). The formula at paragraph 3B(3) applies the 52nd root of this figure to the amount accrued in each “accrual period”, to provide a compounded rate which at the end of a period of 52 weeks will equal this percentage rate.

1243. The following example demonstrates how the formula is intended to be applied. The weekly pension rates and rate of return shown here are to be read as illustrative only.

Assume Miss Smith would have been entitled to retirement pension of £100 per week from April 2005 had she claimed at that point, and that the prescribed interest rate at the start of the period of deferment is 6.00%. This is equivalent to a weekly increase factor of $\sqrt[52]{1.06} = 1.001121$, where 1.06 refers to a prescribed interest rate of 6.00%.

At the end of the first accrual period, the amount accrued would be:

$$(\pounds 0.00 + \pounds 100) \times \sqrt[52]{1.06} = \pounds 100.11$$

(note that in the first week, there is no “accrued amount” to bring forward from the previous week, therefore this is shown as zero).

At the end of the second accrual period the amount accrued would increase to:

$$(\pounds 100.11 + \pounds 100) \times \sqrt[52]{1.06} = \pounds 200.34$$

At the end of the third accrual period, the amount accrued would increase to:

$$(\pounds 200.34 + \pounds 100) \times \sqrt[52]{1.06} = \pounds 300.67$$

After 52 weeks, Miss Smith would have accrued a lump sum of £5,357.49.

Assume Miss Smith continues to defer and her retirement pension entitlement increases to £103 with effect from April 2006. The lump sum will continue to be calculated in the same

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manner as above, except that £100 changes to £103. At the end of the first accrual period using the new rate the lump sum would be:

$$(\pounds 5357.49 + \pounds 103) \times \sqrt[52]{1.06} = \pounds 5,466.61$$

At the end of the second accrual period using the new rate the lump sum would be:

$$(\pounds 5466.61 + \pounds 103) \times \sqrt[52]{1.06} = \pounds 5,678.85$$

If Miss Smith chose to defer for two years altogether, at the end of March 2007 she would be entitled to a lump sum of £11,197.15.

1244. Except where the rate has been set by regulations to give a higher rate than the norm, a change to the Bank of England base rate will automatically trigger a corresponding change in the lump sum rate of return in order to maintain the 2 percentage points differential. It is intended to apply any such new lump sum rate from the start of the first accrual period following a base rate change (paragraph 3B(4)). However, as a contingency, a regulation-making power has been taken to allow for a longer lead-in, in case it proves not to be technically feasible to implement the new rate as quickly as envisaged. Should this arise, these regulations would effectively maintain the legal status of the former rate until the new rate could become operative. This is to avoid the risk of incorrect awards being made in the interval between a new rate being announced and the adjustment being made to the computer systems calculating the lump sum.

1245. *Paragraph 8(2)* makes the same provision regarding the exclusion of dependency additions under sections 83 and 84 of the Contributions and Benefits Act before April 2010 for the purposes of calculating the lump sum as made by paragraph 6 above in respect of increments.

1246. *Paragraph 9* inserts a new paragraph 3C into Schedule 5. This allows the surviving spouse of a deferrer who has died whilst deferring his pension (having deferred for at least 12 months) to be able to choose between “inheriting” increments or a lump sum in respect of his deferment. This choice is only to be exercised when the widow/er is claiming his or her own pension (and has not remarried before reaching state pension age): if the deferrer dies when the spouse is still under state pension age, the amount of increments or lump sum which would have been awarded had the spouse been entitled to his or her pension at the time the deferrer died will be increased annually, broadly to reflect price increases in the period between the deferrer’s death and the date the survivor claims his or her pension. (This provision already exists for increments; the equivalent provision for lump sums is made by new paragraph 7B(7) as inserted by paragraph 11 of this Schedule, and by the amendment to section 150 of the Social Security Administration Act 1992, as inserted by *paragraphs 20 to 22* of this Schedule).

1247. Paragraph 3C(3) and (4) make provisions corresponding to those at paragraph A1(2) and (3) deeming the lump sum to be the surviving spouse’s choice if no election is made within the prescribed time limit, and enabling the regulations to allow the election to be changed within a “cooling-off” period to be specified in regulations.

1248. Paragraph 3C(5) provides that where the deceased was, or would have been, entitled to increments from deferred GMP, the surviving spouse will “inherit” an increase to the weekly pension in respect of that element, regardless of what election is made in relation to the rest of the deceased’s deferred entitlement.

1249. *Paragraph 10* amends the existing paragraph 4 of Schedule 5 to provide that a surviving spouse who has not remarried before reaching state pension age will be entitled to inherit increments, either where increments were already in payment to the deceased when he died, or where this is the widow/er’s preferred option, or where the deceased had deferred for less than 12 months. The provisions relating to the actual amount of increments the surviving spouse inherits are not amended by this Act and are therefore not described here.

1250. *Paragraph 11* inserts new paragraphs 7A and 7B into Schedule 5 which largely replicate paragraphs 3A and 3B in respect of the calculation of the lump sum for a widowed person.

1251. The only difference between the two calculations is that the amount of additional pension forgone will be adjusted to reflect the proportion of that pension component which the surviving spouse is entitled to inherit as part of her weekly pension. Paragraph 7B(3) shows the proportion as one-half. This would be modified in respect of additional pension that is derived from SERPS, by the Inherited SERPS regulations⁵, made under section 52(2) of the Welfare Reform and Pensions Act 1999. Paragraph 25 of this Schedule amends section 52(2) so that those regulations may be amended to include references to the lump sum. This will enable the reduction in the inheritable proportion of the additional pension component of the lump sum to be phased in by October 2010, in line with the corresponding changes to inheritable SERPS itself.

1252. New paragraph 7C, inserted by *paragraph 12*, provides that the final amount of the lump sum will be rounded to the nearest whole penny. Sub-paragraph (2) provides that when exercising the power to prescribe an interest rate higher than 2% above the Bank of England base rate, the Secretary of State must have regard to the national economic situation and to any other matters which he considers relevant.

1253. *Paragraph 14* makes consequential amendments to paragraph 8 of Schedule 5 to include references to the lump sum calculation. In particular, new sub-paragraphs (4) to (6) substitute the existing paragraph 8(4) which prevents increments being inheritable by a surviving spouse in respect of deferred pension that was either wholly or partly based on the survivor’s own contributions (i.e. it was either a Category B pension or a Category A pension that was increased by virtue of the spouse’s contributory record). This provision is now extended to refer to the calculation of lump sums.

1254. *Paragraph 15* inserts a new Schedule 5A into the Contributions and Benefits Act to provide the choice between a lump sum or pension increase where a person has deferred their shared additional pension and how that lump sum or increase is to be calculated.

⁵ The Social Security (Inherited SERPS) Regulations 2001 (S.I.2001/1085)

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1255. Paragraphs 1, 2, 4 and 5 of the new Schedule 5A largely replicate the provisions made under paragraphs A1, 1, 3A and 3B of the amended Schedule 5 with respect to elections between increments and a lump sum, and the calculation of the lump sum. Paragraph 3 replaces the existing provisions in section 55C of that Act relating to the calculation of increments where shared additional pension is deferred, incorporating the changes to those provisions made under section 50(2) of the Welfare Reform and Pensions Act 1999 to take effect from 2010 and now brought forward.

1256. The only significant difference between the lump sum for Category A or B pension and the lump sum for shared additional pension is that, in line with the current provisions on shared additional pension increments, if the person entitled to that pension has subsequently remarried and dies leaving a widow or widower, the surviving partner will not be entitled to inherit the lump sum.

1257. *Paragraph 17* amends section 62(1) of the Contributions and Benefits Act so that where entitlement to Graduated Retirement Benefit has been deferred, regulations may provide for the choice between a lump sum or increments for the deferment period.

1258. *Paragraph 18* amends section 122(1) of that Act to include a definition of “Bank of England base rate” for the purposes of the lump sum calculation. It also extends the definition of “deferred” and “period of deferment” for the purposes of that Act to cover deferment of shared additional pensions.

1259. *Paragraph 19* amends section 176 of that Act to provide that regulations prescribing the percentage rate applicable to the lump sum calculation shall be made by the affirmative procedure.

1260. *Paragraphs 20 to 22* allow a lump sum to be uprated where a surviving spouse has not attained pensionable age when his or her spouse died and is therefore not yet entitled to their own state retirement pension (cf. notes to paragraph 9, above).

1261. *Paragraph 24* omits section 50(2) of the Welfare Reform and Pensions Act 1999 which increased the rate at which increments accrue and removed the time limits for accrual in shared additional pension from 2010: these changes are now subsumed within the new Schedule 5A, as enacted by this Schedule.

1262. *Paragraph 25* enables the modifications to the Inherited SERPS provisions to be extended to the calculation of the lump sum for surviving spouses (see under paragraph 11, above).

1263. *Paragraph 26* restricts a widower from inheriting a lump sum or increments where he attains pensionable age before 6th April 2010 unless he himself was over that age when his wife died. This re-enacts and extends the corresponding provision made by paragraph 21(14) of Schedule 4 to the Pensions Act 1995 which applied in relation to entitlement to increments under the previous version of paragraph 4(1) of Schedule 5 to the Contributions and Benefits Act, and which is now substituted by paragraph 10(2) of this Schedule.

1264. *Paragraph 27* provides a power to make regulations detailing the transitional arrangements that will apply in cases where a period of deferment spans 6 April 2005, the commencement date of these changes.

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1265. In particular, it is intended that regulations made under this power will provide that any period of deferment that wholly precedes the commencement date will be subject to existing rules. That is, in respect of any such period, only increments at the current rate may be awarded. For the period beginning on the commencement date, the new provisions will apply so that, providing the part of the deferment period starting on the commencement date lasts for at least 12 months, the deferrer will have the choice of a lump sum or increments at the new rate. Corresponding provisions will be made in respect of a surviving spouse's entitlement to inheritable increments or a lump sum.

1266. These sections and schedule, which make further provision in respect of deferred retirement pension or deferred shared additional pension and, in particular, introduce the option of a lump sum, involved consideration of Article 1 of Protocol 1 and Article 14 ECHR. Insofar as these Articles may be engaged it is considered that the further provisions for deferral are justifiable.

Miscellaneous

Section 298: Disclosure of state pension information

1267. This section amends section 42 of the Child Support, Pensions and Social Security Act 2000 to allow state pension information to be disclosed to agents, third party administrators and others providing certain services to trustees, managers and employers in relation to pension schemes as well as to the trustees, managers or employers themselves. State pension information may be disclosed by the Secretary of State to such persons if the procedures set out in section 42(4)(b) and (5) and the regulations made under them are followed.

1268. Section 42(3A) as inserted will more easily allow scheme members to be given a combined pension forecast where advice or forecasts are provided by third parties to the pension scheme managers or trustees rather than being produced by pension scheme managers or trustees themselves. The lack of reference to such third parties in the existing legislation has limited the number of pension schemes able to provide combined pension forecasts because it has prevented the supply of state pension information by the Secretary of State. (See also Part 4 of this Act).

1269. *Subsection (4)* inserts a reference in section 42(7) to projections of any lump sum to which a person may be entitled. *Subsection (5)* amends section 42(11) to include lump sums in the definition of state pension information and to include shared additional pension and graduated retirement benefit in the definition of additional retirement pension.

Section 299: Claims for certain benefits following termination of reciprocal agreement with Australia

1270. This section is needed following the termination of the Social Security Agreement between the United Kingdom and Australia with effect from 1st March 2001. The Agreement is set out in Schedule 1 to the Social Security (Australia) Order 1992. The Agreement provided that, where people living permanently in the United Kingdom had previously lived in Australia, their Australian residence counted as periods for which Class 3 National Insurance contributions had been paid for the purpose of determining their entitlement to certain UK benefits. For example, such periods of residence in Australia could help a person

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to qualify for a basic retirement pension or enhance the rate of basic retirement pension to which they were entitled. The Agreement made reciprocal provision for people living permanently in Australia who had previously lived in the United Kingdom.

1271. The Agreement protected the position of those people who were receiving benefits on the basis of the Agreement on 28th February 2001 or who had made a claim for benefits on or before that date on that basis where entitlement began on or before that date (*subsection (8)*). However, the Agreement did not protect the position of those people who had lived in Australia but who had not made a claim for benefits by 1st March 2001, or who had made a claim for benefits before that date but entitlement started on or after that date. The Department for Work and Pensions, with Treasury approval and having notified Parliament, protected the position of these people by paying certain benefits to them on an extra-statutory basis.

1272. Upon Royal Assent this section provides that, for the purposes of claims for basic retirement pension, widow's benefits and bereavement benefits made after the termination of the Agreement, certain provisions of the Agreement are treated as continuing in force with modifications. Any week of residence in Australia before 6th April 2001 (and forming part of a period of residence beginning before 1st March 2001) continues to be treated as a week of residence in the United Kingdom during which a voluntary Class 3 National Insurance contribution has been paid. This regularises the statutory basis for the payments which have been made under the extra-statutory scheme (*subsection (7)*).

1273. Where reciprocal agreements are modified to take account of changes in UK legislation, there is a power to modify UK legislation as it applies to cases affected by the reciprocal agreements (under the Social Security Administration Act 1992 and the Northern Ireland equivalent). *Subsection (4)* enables this power to be exercised in relation to the provisions of the Agreement with Australia which are continued in force by this section.

PART 9 – MISCELLANEOUS AND SUPPLEMENTARY

Dissolution of existing bodies

Section 300: Dissolution of OPRA

1274. This section dissolves the Occupational Pensions Regulatory Authority and provides for Opra's outstanding functions, property, rights and liabilities. This section enables the Secretary of State to make provision by order for these to be taken over by the Regulator or the Secretary of State or, in the case of functions to be exercised, the Department for Social Development in Northern Ireland.

1275. *Subsection (3) to (5)* make provision in respect of information which was held by Opra and which is passed to the Regulator by virtue of the Regulator taking over Opra's functions, property, rights or liabilities. Such information is, in the hands of the Regulator, to be subject to the same restrictions on use and disclosure as if it had been obtained directly by the Regulator, from the persons from whom Opra obtained it, in the exercise of the Regulator's own functions.

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Section 301: Transfer of employees from Opra to the Regulator

1276. *Subsection (1)* of this section provides that the terms and conditions of employment of staff who transfer from Opra to the Regulator will be protected by the transfer expressly being made subject to the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794). However, as those Regulations do not protect occupational pension rights, *subsection (2)* expressly allows for such rights relating to such staff to be protected.

Section 302: Dissolution of the Pensions Compensation Board

1277. This section dissolves the Pensions Compensation Board (PCB) and provides for the PCB's outstanding functions, property, rights and liabilities. This section enables the Secretary of State to make provision by order for these to be taken over by the Board of the Pension Protection Fund or the Secretary of State or, in the case of functions to be exercised, the Department for Social Development in Northern Ireland.

1278. *Subsections (3) to (5)* make provision in respect of information which was held by the PCB and which is passed to the Board of the Pension Protection Fund by virtue of the Board taking over the PCB's functions, property, rights or liabilities. Such information is, in the hands of the Board of the Pension Protection Fund, to be subject to the same restrictions on use and disclosure as if it had been obtained directly by the Board, from the persons from whom the PCB obtained it, in the exercise of the Board's own functions.

Service of notifications etc and electronic working

Sections 303, 304, 305: Service of notifications and other documents; Notification and documents in electronic form; Timing and location of things done electronically

1279. *Section 303* makes general provision for the giving of any notification or the sending of documents authorised or required by this Act and in particular in relation to the manner in which such notifications or documents may be sent. *Section 304* makes provision for the service of notifications and other documents in electronic form. Before any document or notification is transmitted electronically, the potential recipient must have indicated that he is willing to accept transmissions in the format in question.

1280. *Subsection (2)* provides that transmission by electronic and other similar means has effect for the purposes of the Act only if the conditions specified in the section are fulfilled. In particular *subsections (3) and (5)* specify that recipient must have indicated his willingness to receive the notification or document in question by such means.

1281. *Subsections (1) and (2)* of *section 305* enable the Secretary of State by order to make provision about the time and location at which an electronic transmission is deemed to have taken place. *Subsection (3)* also enables the Secretary of State by order to make provision about the manner of proving for the purposes of legal proceedings certain matters relating to the use of electronic communications for the purposes of the Act and enactments made under it.

General

Section 306: Overriding requirements

1282. *Subsection (1)* provides for certain provisions of the Act (set out in *subsection (3)*) and legislation made under those provisions, to override conflicting provisions of an occupational or personal pension scheme. It also provides for the scheme to be modified accordingly by operation of law (so without further intervention by trustees or employer) in such a case.

1283. *Subsection (4)* makes similar provision in respect of the memorandum and articles of a company which is a trustee of an occupational pension scheme which has no other trustees, or has only corporate trustees. Where the memorandum and articles conflict with requirements under *sections 242 and 243* (which deal with the involvement of scheme members in the nomination of directors of corporate trustees) then those requirements override the memorandum and articles which are then modified accordingly.

Section 307: Modification of this Act in relation to certain categories of schemes

1284. *Subsection (1)* states that the provisions mentioned in *subsection (2)* may be modified by regulations in relation to hybrid and multi-employer schemes and in relation to any case where a partnership is the employer, or one of the employers, in relation to an occupational pension scheme. *Subsection (2)* sets out the provisions that may be modified. *Subsection (3)* provides a power for the Secretary of State to modify by regulations Part 2 of the Act in relation to an eligible scheme that has a guarantee provided by a relevant public authority (defined in *subsection (4)*) in relation to some or all of the benefits or liabilities of the scheme.

1285. *Subsection (4)* sets out the meaning of the terms “hybrid scheme”, “multi-employer scheme”, “eligible scheme” and “relevant public authority”. “Hybrid scheme” is an occupational pension scheme which is not a money purchase scheme, but where some of the benefits that may be provided are money purchase benefits attributable to voluntary contributions of the members, or other money purchase benefits. “Multi-employer scheme” means an occupational pension scheme in relation to which there is more than one employer. “Eligible scheme” has the meaning given in *section 126*. “Relevant public authority” means a Minister of the Crown, a government department or the Scottish Ministers.

Section 308: Modification of pensions legislation that refers to employers

1286. The new definition of occupational pension scheme introduced by *section 239*, which amends section 1 of the Pension Schemes Act 1993, includes schemes which are not sponsored by a person who employs the scheme members. Certain references in pensions legislation to the ‘employer’ may not be appropriate for such schemes.

1287. *Subsection (1)* is a regulation-making power to modify any provision of pensions legislation (as defined in *subsection (3)*) for the purpose of ensuring, in the light of the fact that self-employed people do not have employers (but only clients etc), that the legislation does not inappropriately refer to the employer of a self-employed person.

1288. *Subsection (2)* also provides a regulation making power to modify provisions of pensions legislation provisions that refer to an employer. The power is available to deal, for example, with cases where an employer’s employees are members of a scheme but the employer has no involvement with the scheme and cases where an employer may have

arranged for employees to join a scheme but does not make contributions. The power can be used to ensure that the employer in such a case is not caught by provisions that are not appropriate for an employer who is a non-participant, or limited participant.

Section 309: Offences by bodies corporate and partnerships

1289. *Subsection (1)* provides that where an offence under the Act has been committed by a body corporate or Scottish partnership, any officer of the body or partnership which consented to or connived in the commission of the offence, or to whose neglect it was attributable, is also guilty of the offence and liable to be proceeded against and punished accordingly.

1290. *Subsection (2)* makes similar provision in relation to the members of a body corporate the affairs of which are managed by its members. *Subsection (3)* makes similar provision in relation to the partners in a Scottish partnership.

Section 310: Admissibility of statements

1291. *Subsection (1)* provides that any statement made by a person in response to a requirement (under the provisions of the Act listed in *subsection (4)*) to provide information is admissible in evidence in any proceedings, provided that it otherwise complies with any requirements governing its admissibility.

1292. But *subsections (2)* and *(3)* provide that where a person who has made such a statement is subject to criminal proceedings in which that person is charged with a “relevant offence” (defined in *subsection (4)*), or to the proceedings specified in *subsection (3)* as a result of which that person may be required to pay a civil penalty, no evidence or question relating to the statement may be adduced or asked by or on behalf of the prosecution, or as the case may be the Regulator, unless evidence or a question relating to it is first raised by or on behalf of the person who made the statement.

Section 311: Protected items

1293. This section protects from production, disclosure or inspection under the Act items comprising, or connected with, communications between a lawyer and client of a kind described in *subsection (3)*, unless they are held with the intention of furthering a criminal purpose.

Section 312: Liens

1294. This section provides that where a document is subject to a lien (a type of charge over a document) its production under any provision of the Act does not affect the lien.

Section 313: Crown Application

1295. This section deals with the application of the Act to the Crown, specifying in particular which provisions apply to the Crown.

1296. *Subsections (2), (3) and (4)* provide for certain parts of the Act to apply to pension schemes managed by or on behalf of the Crown as they apply to other pension schemes and to Crown servants as if they were in employment with a private person. *Subsection (5)* provides however for nothing in the provisions which so apply to apply to Her Majesty in her private capacity.

Regulations and orders

Section 314: Breach of regulations

1297. This section enables regulations made under this Act to provide that breach of such regulations gives rise to liability to a civil penalty, or to be an offence, by virtue of section 10(3) to (9) (power to impose civil penalties for contravention of regulations) or section 116 (power to provide for contravention of regulations to be a criminal offence) of the Pensions Act 1995 respectively.

Section 315: Subordinate legislation (general provisions)

1298. This section makes provision in relation to subordinate legislation made under the Act. (Any order made by the Regulator is not to be made by statutory instrument, but is subordinate legislation for the purposes of the Act). This section makes further provision for the manner in which, and purposes for which, powers conferred by the Act may be exercised, including provision for sub-delegation, and incidental, consequential and transitional provision. It includes (at *subsection (6)*) a power to make, in connection with the coming into force of any provision of the Act, provision by regulations of a kind which could be included in a commencement order under *section 322(5)*.

Section 316: Parliamentary control of subordinate legislation

1299. *Subsection (2)* provides that regulations made under the provisions specified in *subsection (2)* attract the affirmative resolution procedure of Parliamentary control. This means that such regulations may not come into force until they have been approved by both Houses of Parliament.

1300. The powers listed in *subsection (3)*, which are powers to appoint commencement dates, are not subject to any parliamentary procedure. The exercise of the remaining powers under the Act will attract the negative resolution procedure. This means that regulations and orders (apart from commencement orders) made under those powers may come into force subject to annulment pursuant of a resolution of either House of Parliament.

Section 317: Consultations about regulations

1301. This section requires the Secretary of State to consult such persons as he considers appropriate before making any regulations under this Act, subject to certain exemptions specified in *subsection (2)*.

Interpretation

Section 318: General interpretation

1302. This section defines terms used throughout the Act and confers power to extend the meaning of 'employer' in certain circumstances, and to make provision for the persons who are to be regarded as members or prospective members of pension schemes.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

Miscellaneous and supplementary

Section 319: Minor and consequential amendments

1303. This section introduces *Schedule 12* which makes minor and consequential amendments in connection with the Act. It also confers power on the Secretary of State to make by order amendments consequential on the Act in primary and subordinate legislation.

Section 320: Repeals and revocations

1304. This section introduces *Schedule 13* which specifies provisions of legislation which will be revoked or repealed as a result of the Act.

Section 321: Pre-consolidation amendments

1305. This section allows the Secretary of State to modify by order the pensions legislation specified in *subsection (1)*, where the modification in his opinion facilitates or is desirable in connection with the consolidation of that legislation. Such an order may not be made unless a Bill has been introduced for the purposes of such a consolidation and may not come into force until immediately before the commencement of the consolidating Act.

Section 322: Commencement

1306. This section provides for the coming into force of the provisions of the Act. Provisions specified in *subsection (2)* come into force on Royal Assent; provisions specified in *subsection (3)* come fully into force on 6th April 2005, as do repeals specified in *subsection (4)*. The remaining provisions of the Act come into force in accordance with orders made by the Secretary of State under *subsection (1)*, which may (by virtue of *subsection (5)*) include transitional provision and savings, including transitional adaptation and modification of the legislation specified in *subsection (5)(a)(i) and (ii)*.

Section 323: Extent

1307. This section sets out which provisions of the Act apply in England, Wales, Scotland and Northern Ireland. Apart from *section 106* (legal assistance scheme) which extends only to England and Wales, the whole Act extends to England, Wales and Scotland. The legal assistance scheme is very similar to the legal aid scheme which is a devolved responsibility of the Scottish Parliament. *Subsection (2)* specifies the provisions which extend also to Northern Ireland. *Subsection (4)* provides that amendments and repeals have the same extent as the provisions amended or repealed.

Section 324: Northern Ireland

1308. This section provides that an Order in Council made for Northern Ireland under paragraph 1(1) of the Schedule of the Northern Ireland Act 2000, which states that it is made only for purposes corresponding to those contained in the Act, is not to be subject to the affirmative procedure of Parliamentary scrutiny, but is instead to be subject to the negative procedure. It is anticipated that such an Order in Council will include provision corresponding with that in *section 161* of, and *Schedule 6* to, this Act (which are concerned with the transfer of the property, rights and liabilities of certain pension schemes to the Board of the Pension Protection Fund). In that event, *subsection (2)* confers power on the Secretary of State to make regulations so that provision in the Order of Council for such a transfer in Northern Ireland is recognised in Great Britain. Some pension schemes in Northern Ireland

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

have assets in Great Britain, and provision will be required to ensure that transfers under the Northern Ireland provisions can be enforced as necessary in relation to the schemes' property in Great Britain.

Section 325: Short title

1309. This section provides for the short title of this Act to be the Pensions Act 2004.

COMMENCEMENT DATES

1310. *Section 322* gives detail of the dates for commencement of the provisions within the Act. Those listed in *subsection (2)* came into force at Royal Assent. *Subsections (3) and (4)* list those sections that come into force fully on the 6th April 2005. The remaining provisions of the Act come into force in accordance with orders made by the Secretary of State which may include transitional provisions and savings.

HANSARD REFERENCES

Stage	Date	Hansard reference
<i>House of Commons</i>		
Introduction	11 February 2004	Vol. 417 Col. 1443
Second Reading	2 March 2004	Vol. 418 Cols. 761 - 871
Committee	9, 11, 16, 18, 23, 25, 30 March, 1, 20, 22, 27 April 2004	Hansard Standing Committee B
Report and Third Reading	18, 19, 20 May 2004	Vol. 421 Cols. 837 – 953, 979 – 1069, 1118 – 1195
Lords Amendments	16, 17 November 2004	Vol. 426 Cols. 1189 – 1256, 1430 – 1441
<i>House of Lords</i>		
Introduction	21 May 2004	Vol. 661 Col. 1027
Second Reading	10 June 2004	Vol. 662 Cols. 383 – 445
Grand Committee	6, 8, 13, 15, 19 July 18 7, 9, 13, 14 September 13, 18 October 2004	Vol. 663 Cols. GC101 – GC362 Vol. 664 Cols. GC1 – GC62, GC129 – GC403 Vol. 665 Cols. GC57 – GC210

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

Report	1, 4, 8 November 2004	Vol. 666 Cols. 12 – 90, 106 – 136, 432 – 462, 476 – 542, 615 – 637, 649 – 673, 706 – 744
Third Reading	15 November 2004	Vol. 666 Cols. 1195 – 1259
Commons Amendments	17, 18 November 2004	Vol. 666 Cols. 1530 – 1553, 1634 – 1644

Royal Assent – 18 November 2004 House of Lords Hansard Vol. 666 Col. 1659
House of Commons Hansard Vol. 426 Col. 1518

GLOSSARY OF SELECTED TERMS FOR THE PURPOSES OF THIS ACT

Accrual rate

The rate at which, under the admissible rules, rights to the benefits accrue over time by reference to periods of pensionable service.

Accrued benefits

The benefits for service up to a given point in time, whether vested rights (i.e. rights which give rise to a pension) or not. They may be calculated in relation to current earnings or projected earnings.

Allowance may also be made for revaluation and/or pension increases required by the scheme rules or legislation.

Accrued rights

The benefits to which a member is entitled, as of right, under an occupational pension scheme. These include accrued benefits. Depending on the context, accrued rights for an active member can be based on benefits as if the member had left service or could include a right to have benefits linked to future salary changes.

The term is given various specific definitions in the Pension Schemes Act 1993 for the purpose of preservation, contracting out and the Disclosure Regulations. It is also given a specific meaning in the Pensions Act 1995 e.g. in relation to scheme amendments.

Active member

A member of a pension scheme who is building up rights on the basis of current contributions.

Additional (retirement) pension

The additional earnings-related element of state retirement pension earned through the State Earnings-Related Pension Scheme (SERPS) and/or the State Second Pension. The right to an additional pension does not depend on the right to a basic pension. It is an unfunded pay-as-you-go benefit, paid from the National Insurance Fund.

Administration levy

The levy on pension schemes to fund the cost of administering the Pension Protection Fund.

Administrator

This term is used to include all organisations and their staff, whether in-house or outsourced, providing services to trustees that relate to any administrative service. This includes those providing record-keeping services, including record keeping relating to financial transactions, those processing data, dealing with correspondence with members and others on behalf of the trustees, those providing trustee secretariat services and those providing other similar services.

Admissible rules

Scheme rules, disregarding all recent rule changes, if the combined effect of those changes and any recent discretionary increases is that the protected liabilities of the scheme

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immediately before the assessment date are greater than they would have been in the absence of those changes and increases. (To prevent abuse of the Pension Protection Fund).

Adoption leave

Period of leave from work taken by an adopter when a child is newly placed for adoption or following a child's entry into Great Britain in connection with adoption.

Annuity

A contract of insurance that provides an income in retirement for most members of money-purchase occupational pension schemes and personal pension schemes.

Anti-franking

Legislation preventing the practice in schemes whereby statutory increases in the GMP were offset against other scheme benefits, rather than increasing entitlement.

Application for reconsideration

In relation to determining whether the scheme is required to be wound up, an application must be accompanied by protected liabilities quotation in the prescribed form and an auditors valuation of the scheme as at the reconsideration date.

Appropriate Personal Pension (APP)

Contracted-out personal pension.

Assessment date

Relevant to the Pension Protection Fund. Date of the first insolvency trigger.

Assets

The amount of money usually held in shares or bonds or other investments, which a scheme sets aside to pay for its liabilities.

Basic (retirement) pension

The basic element of state retirement pension.

Bereavement Benefits

Bereavement benefits are: bereavement payment; widowed parent's allowance; or bereavement allowance.

Category A (state retirement) pension

Category A pensions are contributory and consist of two parts, either or both of which are payable:

Basic pension – dependent on the number of qualifying years a person has in their working life; and

Additional pension – dependent on a person's earnings since April 1978.

Two contribution conditions for the basic pension must be met – a person must have: at least one qualifying year from National Insurance contributions actually paid; and qualifying years

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which received Royal Assent on 18 November 2004*

for about 90% of the years in their working life for the full rate basic pension. To get any retirement pension at all someone must have 25% of qualifying years.

Category B (state retirement) pension

Category B pensions are contributory and consist of two parts, either or both of which are payable:

Basic pension – dependent on the number of qualifying years; and

Additional pension – dependent on earnings since April 1978.

It is payable by virtue of the spouse's qualifying years or earnings.

Those who can get a Category B pension are: married women; widows; and widowers.

Commutation

Conversion of pension rights into a lump sum payment.

Contracted-out deduction (CoD)

The amount deducted from a person's entitlement to state retirement pension (and certain other benefits) for the period they were members of the contracted out pension scheme.

Contracted-out Mixed Benefit Schemes (COMBS)

A contracted-out scheme that has separate defined benefit and defined contribution sections.

Contracted-out Money-Purchase Pension Scheme (COMP)

A contracted-out scheme where the benefits provided are dependent on the contributions paid and the investment return. (Also called defined contribution).

Contracted-out Salary-Related Pension Scheme (COSR)

A contracted-out scheme where the rules define the level of benefits on offer. These benefits are not directly related to the investments of the scheme. (Also called defined benefit).

Contracting out

A scheme is contracted out when it provides benefits in place of the earnings related state system. The employer and the employee pay reduced levels of National Insurance contributions.

Contributions

Contributions payable towards the scheme by or on behalf of the employer or the active members of the scheme. In relation to an eligible scheme, contributions payable in accordance with the schedule of contributions maintained in respect of the scheme.

Credit of earnings

Relevant to state retirement pension. In some circumstances people may be credited with earnings to help them to get retirement pension if they do not have earnings in a tax year which reach the level needed to make it a qualifying year. For example, in a tax year a person may have been: incapable of work through illness or disability; unemployed and available for,

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and actively seeking work; in receipt of certain benefits; on a course of approved training; doing jury service; serving a prison sentence for a conviction which is subsequently quashed.

Men with no liability to pay Class 1 or Class 2 National Insurance contributions may be credited automatically for the tax year in which they reach 60 and the four following years. From 6 April 2010 this arrangement will be extended to women.

Young people can get credits for the tax year in which they reach age 16 and the two following years.

There are certain conditions attached to the receipt of credits and the availability of a credit does not mean that people do not have to pay National Insurance contributions if their earnings exceed the employee's earnings threshold.

Earnings are not credited to married women who have a reduced liability.

Deferral

Not claiming or giving up a state retirement pension to earn increments.

Defined benefit occupational pension

Common term for a scheme where the rules define the level of benefits on offer. These benefits are not directly related to the investments of the scheme. Also called salary-related.

Defined contribution occupational pension

A common term for a money-purchase occupational pension.

Direct payment arrangements

See "Personal Pension".

Eligible scheme

An occupational pension scheme which is accepted as eligible to be taken over by the Pension Protection Fund. This excludes money purchase schemes and schemes that are currently exempted from the application of the Minimum Funding Requirement in Section 56 of the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996 (Regulation 28).

Employees' primary threshold

The point from which employees start to pay National Insurance contributions.

Equalisation (of pensionable age)

Pensionable age with respect to state retirement pensions will be equalised at 65 for both men and women from 6 April 2020. The change from current pensionable ages will be phased in over a ten-year period from 2010 to 2020. This phased change will affect women born on or after 6th April 1950. Women born on or after 6th April 1955 will have a pensionable age of 65.

Equivalent Pension Benefits (EPB)

The benefit paid by the employer where a scheme was contracted out of Graduated Retirement Benefit. A precursor of the Guaranteed Minimum Pension.

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which received Royal Assent on 18 November 2004*

Final salary scheme

Common term for a defined benefit scheme where the benefit is calculated by reference to the final pensionable earnings of the member, usually also based on pensionable service.

Financial Services Authority

The independent regulator for financial services business, including some private pensions. Empowered under the Financial Services and Markets Act 2000.

Flat rate contributions

National Insurance contributions paid before 6 April 1975.

Fund Manager

An individual or company appointed by the trustees of an occupational pension scheme to manage the scheme's investments.

Graduated Retirement Benefit (GRB).

Based on the amount of graduated National Insurance contributions paid when the GRB scheme existed between 3rd April 1961 and 5th April 1975. Paid as an additional amount to the state retirement pension. Also known as Graduated Pension, or Grad.

Group company

Relevant to the Pension Protection Fund. A company which at the time of the action or failure is in the same group as the employer.

Group Personal Pension (GPP)

An arrangement made by an employer for employees to participate in a personal pension arrangement. Each employee has an individual contract with the pension provider.

Graduated Minimum Pension (GMP)

The minimum pension which a defined benefit occupational pension scheme had to provide as one of the conditions of contracting out for the period April 1978 to March 1997.

Increments

An increase in state retirement pension or Graduated Retirement Benefit which can be earned by entirely giving up entitlement to or not claiming state retirement pension, shared additional pension or Graduated Retirement Benefit for at least seven weeks.

Indexation

Annual increase to pensions in payment to take account of increase in the Retail Prices Index.

Initial period (relating to PPF levies)

The first period following introduction of the PPF when the Secretary of State determines the amount of the levy.

Insolvency arrangement

Means a voluntary arrangement as per Part 1 or 8 of the Insolvency Act 1986.

An arrangement which has effect under section 425 of the Companies Act 1985;

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A deed of arrangement registered in accordance with the Deeds of Arrangement Act 1914.

Insolvency date

In relation to an insolvency event, is the date on which the event occurs.

Insolvency event

This occurs in relation to an individual where:

- he is adjudged bankrupt or sequestration of his estate has been awarded;
- he makes a proposal for a voluntary arrangement;
- a deed of arrangement made by or in respect of the affairs of the individual;
- he has died and an administration order is made in respect of his estate.

This occurs in relation to a company where:

- the directors make a proposal for a voluntary arrangement;
- a court orders a meeting of creditors or members of the company;
- an administrative receiver is appointed;
- the employer enters administration;
- a resolution is passed for a voluntary winding up of the employer; or
- an order for the winding up of the company is made by the court.

Insolvency Practitioner

A person who is acting as the insolvency practitioner in relation to the employer in relation to an occupational pension scheme.

Level of earnings

The general level of earnings obtaining in Great Britain.

Levy ceiling

The maximum amount by which the Board of the Pension Protection Fund may increase the Pension Protection Fund levies.

Levy factors

Those factors relating to the calculation of the Pension Protection Levies (see scheme factors and risk factors below).

Liabilities

The total amount of a pension scheme's current and future obligations, including pension liabilities in respect of its members. Liabilities in respect of members cannot be known accurately in advance and so a scheme will employ an actuary to calculate estimates of liabilities.

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which received Royal Assent on 18 November 2004*

Limited Price Indexation (LPI)

The requirement to increase occupational pensions based on rights accrued from 5th April 1997 by RPI capped at 5%.

Lower Earnings Limit (LEL)

The level of earnings at which people begin to accrue entitlement to contributory state benefits.

Members' interests

The security of scheme assets and members' benefits. A breach that could immediately or potentially pose a significant risk to the security of scheme assets or have a significant detrimental impact on members' benefits poses a significant risk to members' interests.

Minimum Funding Requirement

A requirement introduced by the Pensions Act 1995 by which most defined benefit occupational pension schemes are required to hold a minimum level of assets to meet their pension liabilities, as assessed on a prescribed basis.

Money-purchase occupational pension

A scheme where the benefits provided are dependent on the contributions paid and the investment return. Also called defined contribution.

National Insurance contributions (NICs)

Contributions paid by individuals to the state in order to build up entitlement to the basic state retirement pension and other contributory state benefits.

Three classes of NICs count towards qualifying years for a state retirement pension.

Class 1 – Paid for by employed earners and their employers. Employees pay these if they work for an employer and earn more than the employee's primary threshold. The employer also pays NICs for the employee if they earn more than the employees' primary threshold. Some married women and widows can still pay their NICs at a reduced liability.

Class 2 – Paid by self-employed people. Paid at a flat-rate.

Class 3 – Voluntary NICs that may be paid to protect a National Insurance record in some circumstances. Paid at a flat-rate.

Class 3 NICs can be paid for previous years to enable someone either to qualify for a basic state retirement pension at the minimum rate or to increase the rate of the basic state retirement pension for which they have qualified.

Any arrears of NICs paid after pensionable age cannot normally count for payment of state retirement pension from a date earlier than the day on which the NICs were paid.

Married women and widows cannot pay Class 3 NICs for any tax year in which they have a reduced liability for the whole year.

National Insurance Fund

The fund into which National Insurance contributions are paid.

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Non-statutory reporter

Any trustee or professional adviser or person involved in the administration of the scheme. A person involved in the administration of the scheme includes anyone who carries out administrative activities related to the scheme. It is not restricted to those who carry out the principal record keeping and calculation activities for the scheme.

Normal Benefit Age

Relevant to pension-sharing on divorce, the earliest age at which a pension credit member can receive a pension derived from their pension credit rights in occupational pension schemes. Normal Benefit Age must be between 60 and 65.

Normal Pension Age

In relation to the scheme and any pension or lump sum under it, means the age specified in the admissible rules as the earliest age at which the pension or lump sum becomes payable without actuarial adjustment (disregarding any admissible rule making special provision as to early payment on the grounds of ill health).

Occupational pension scheme

A scheme, normally one established by an employer, to provide retirement benefits for employees (but see also the new definition to be inserted by *section 239*).

Occupational Pensions Regulatory Authority (Opra)

A statutory body, created by the Pensions Act 1995, responsible for ensuring that occupational pension schemes comply with the requirements of the relevant legislation. It has powers of investigation and can impose penalties ranging from prohibition from acting as a trustee, imposition of fines to criminal prosecution.

Paternity leave

Period of leave from work for the purpose of caring for the child and/or supporting the mother or adopter. Taken by birth fathers, or the spouse/ partner of the mother or the partner or spouse of the adopter following the birth or placement for adoption of a child or a child's entry into Great Britain in connection with adoption.

Pensionable age

The age people must be before they can receive a state retirement pension. Currently, it is 65 for men and 60 for women (but see equalisation (of pensionable age) above).

Pensionable earnings

The earnings by reference to which the benefits are calculated under the admissible rules.

Pensionable service

Service in any description of category of employment to which the scheme applies which qualifies the member (on the assumption that it continues for the appropriate period) for benefits under the scheme; any service attributable to transfer credits; and service which under the admissible rules of the scheme is attributable to voluntary contributions paid by the member.

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which received Royal Assent on 18 November 2004*

Pension credit

Relevant to pension-sharing on divorce. A credit under section 29(1)(b) of the Welfare Reform and Pensions Act 1999 (c.30) or under corresponding Northern Ireland legislation. Not to be confused with the State Pension Credit introduced in October 2003.

Pension credit member

Relevant to pension-sharing on divorce. In relation to the scheme, this means a person who has rights under the scheme which are attributable (directly or indirectly) to a pension credit.

Pensioner member

A person who is entitled to the current payment of pension or other benefits as a result of pensionable service completed under an occupational pension scheme and who is not an active member of the scheme.

Pension obligations

Refers to trustees or managers of an eligible scheme which are:

- obliged to provide benefits to or in respect of members (including GMPs); and
- obliged to administer the scheme in accordance with the scheme rule.

Pension protection levies

The levies on pension schemes to help fund the cost of the compensation payable to members of eligible schemes.

Pensions Compensation Board

The Board administers the pensions compensation scheme for occupational pension schemes. It is able to provide compensation when an employer becomes insolvent and scheme assets have been dishonestly removed. It decides whether compensation can be paid and how much. Its functions will be taken on by the Pension Protection Fund.

Personal pension

An arrangement between an individual who is self-employed, in non-pensionable employment or who is not a member of an employer's scheme and a pension provider (such as an insurance company) which enables the individual to make provision for a pension on a money-purchase basis (but see also the new definition to be inserted by *section 239*). The employer may or may not make a contribution on behalf of the employee. The employer may also pay the employee's contributions direct from his salary through direct payment arrangements.

Postponed pensioner

In relation to the scheme means:

- a person is entitled to present payment of a pension under the admissible rules of the scheme;
- payment of that pension is postponed; and
- he has attained normal pension age in relation to the pension.

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which received Royal Assent on 18 November 2004*

Professional adviser

Specified advisers in section 47 of the Pensions Act 1995 (the scheme auditor, scheme actuary, legal adviser, fund manager or any person they appoint to exercise specific functions in relation to the scheme) appointed by the trustees of an occupational pension scheme.

Protected benefits

A quotation for one or more annuities from one or more insurers, being companies willing to accept payment in respect of the members from the trustees or managers of the scheme, which would provide benefits to or in respect of the members of the scheme corresponding to the compensation which would be payable in accordance with the pension compensation provisions if the Pension Protection Fund Board assumed responsibility for the scheme.

Protected liabilities

In relation to an eligible scheme, at a particular time are:

- the cost of securing benefits for members of the scheme equivalent to the compensation which would be payable, in relation to the scheme;
- liabilities of the scheme which are not liabilities to, or in respect of, its members, and
- the estimated cost of winding up the scheme.

Protected notional pension

Pension Protection Fund calculation used to work out entitlement where scheme pension rate does not apply.

Protected pension rate

Annual rate of the pension, under the admissible rules, immediately before the assessment date for Pension Protection Fund purposes.

Protected rights

Benefits from a scheme contracted out on a money purchase basis (whether occupational or personal) that derive mainly from the National Insurance contribution rebate and its investment return.

Qualifying earnings

Relevant to state pensions.

Earnings from Class 1 employment – earnings on which full rate Class 1 National Insurance contributions have been paid or are treated as having been paid count as qualifying earnings. Earnings of married women and widows with reduced liability do not count as qualifying earnings.

Class 2 and Class 3 contributions – for both the National Insurance contribution conditions, each Class 2 or Class 3 National Insurance contribution counts as one week's earnings at the Lower Earnings Limit.

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which received Royal Assent on 18 November 2004*

Qualifying year

Relevant to state pensions. A qualifying year for the basic state retirement pension is a tax year in which a person has received (or are treated as having received) qualifying earnings of at least 52 times the Lower Earnings Limit for that year.

Between 6 April 1975 and 5 April 1978, the qualifying earnings needed in a tax year for it to be a qualifying year were 50 times the Lower Earnings Limit for that year.

Rebate

The amount of National Insurance Contributions paid back to employers and employees when they contract out. Currently £11 billion a year.

Recent discretionary increase

Relevant to the Pension Protection Fund. An increase in the rate of any pension in payment or postponed under the scheme which were made or took effect in the period of three years ending with the assessment date.

Recent rule changes

Relevant to the Pension Protection Fund. Changes which were made or took effect in the period of three years ending with the assessment date.

Reduced liability

Relevant to state pensions. Before the present National Insurance contribution arrangements started, married women and widows who worked could choose to have reduced liability. Women having reduced liability, pay reduced Class 1 National Insurance contributions when they work for an employer but no Class 2 National Insurance contributions when they are self-employed. Reduced-rate contributions do not count for any contributory benefit.

Reference Scheme Test (RST)

The replacement for the Guaranteed Minimum Pension, it came into operation from April 1997. A test of scheme quality, rather than ensuring a specific level of benefit.

Relevant time

Relevant to the Pension Protection Fund. The time immediately before the qualifying insolvency event occurs.

Retail Prices Index (RPI)

- the general index of retail prices (for all items) published by the Office for National Statistics; or
- where that index is not published for a month, any substituted index or figures published by that Office.

Retirement Pension

The legal definition of the pension paid by the Government. Can include either or both basic pension and additional pension.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

Revaluation

Annual increases to deferred pensions to take account of increases in the Retail Price Index over the period between the member leaving pensionable service and reaching pension age.

Review period (in relation to PPF levies)

In relation to the current year means the period of 12 months ending with the prescribed date in the previous financial year.

Risk factors

Those factors used to assess the PPF levy relating to the risk of a sponsoring employer becoming insolvent.

Salary-related scheme

Also referred to as defined benefit scheme. An occupational pension scheme where the benefits are calculated by reference to the employee's salary at or near the time of retirement or on leaving service, and length of pensionable service.

Scheme actuary

The named actuary appointed by the trustees or managers of a defined-benefit or hybrid scheme under section 47(1)(b) of the Pensions Act to carry out specific duties set out in the Pensions Act.

Scheme factors

Those factors used to assess the Pension Protection Fund levy relating to scheme size.

Scheme lump sum

Describes a lump sum to which a person is entitled under the admissible rules of the scheme.

Scheme rescue

Occurs when an insolvency practitioner in relation to the employer is able to confirm the pension scheme has or has not been rescued and therefore will or will not enter the Pension Protection Fund.

Serious ill-health commutation

The facility for people with severely reduced life expectancy to withdraw the full value of their pension fund, minus any entitlement to a survivors' benefit; as a cash lump sum.

Shared Additional Pension

Relevant to state pensions. Since December 2000, it has been possible for the additional pension component of the state retirement pension to be shared as part of a divorce settlement. Shared additional pension is the weekly pension derived from the cash equivalent transfer value of a former spouse's additional pension.

Stakeholder pension

A type of personal pension scheme which meets set criteria, including a ceiling on charges and flexibility.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

State Earnings-Related Pension Scheme (SERPS)

The additional pension from 1978 to 2002. The amount of additional pension a person can get from SERPS depends on their:

- earnings in each year since 1978; and
- National Insurance record.

Was reformed by State Second Pension in April 2002.

State Pension

See 'Retirement Pension'.

State Pension Age

See 'Pensionable Age'.

State Second Pension

The additional pension from 6th April 2002. Compared to the State Earnings-Related Pension Scheme which it reformed, it is more beneficial to those on low or moderate earnings and to certain carers and disabled people who are not working.

Tax year

The year starting on 6th April in one year and ending on 5th April the following year.

Transfer credits

Rights allowed to a member under the admissible rules of the scheme by reference to a transfer to that scheme of his accrued rights from another scheme (including any transfer credits allowed by that scheme).

Transfer of Undertakings (Protection of Employment)(TUPE) Regulations 1981

The legal framework which governs the continued employment rights of employees in business undertakings which are transferred from one employer to another as a going concern. The transferee takes over the employment contracts of all those employed in the undertaking immediately before the transfer and all rights and obligations arising from those contracts, except occupational pension rights. Some rights associated with retirement, such as the right to retire early, may be recovered by TUPE.

Transitional period (relating to PPF levies)

The period of time following the "initial period" when the Board of the Pension Protection Fund may modify the structure of the PPF levies.

Trivial commutation

The facility for people to convert small aggregate pension funds into a cash lump sum.

Widow's benefits

Widow's benefits are: widow's payment, widowed mother's allowance or widow's pension.

*These notes refer to the Pensions Act 2004 (c.35)
which received Royal Assent on 18 November 2004*

Withdrawal notice

Relevant to the Pension Protection Fund. A notice issued by the Board to the scheme trustees informing them of the termination of the involvement of the PPF.

ABBREVIATIONS AND ACRONYMS

APP	Appropriate Personal Pension
COD	Contracted-out Deduction
COMBS	Contracted-out Mixed Benefit Scheme
COMP	Contracted-out Money-Purchase Pension Scheme
COSR	Contracted-out Salary Related Pension Scheme
EPB	Equivalent Pension Benefits
GMP	Guaranteed Minimum Pension
GPP	Group Personal Pension
GRAD	Graduated Retirement Benefit
GRB	Graduated Retirement Benefit
LEL	Lower Earnings Limit
LPI	Limited Price Index
NDPB	Non-Departmental Public Body
NICs	National Insurance contributions
OPRA	Occupational Pensions Regulatory Authority
PPF	Pension Protection Fund
PPF Ombudsman	Ombudsman for the Board of the Pension Protection Fund
RPI	Retail Prices Index
RST	Reference Scheme Test
SERPS	State Earnings-Related Pension Scheme
TUPE	Transfer of Undertaking (Protection of Employment)

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