

REGULATORY ENFORCEMENT AND SANCTIONS ACT 2008

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Regulatory Enforcement and Sanctions Act which received Royal Assent on 21st July 2008 (the Act). They have been prepared by the Department for Business, Enterprise, and Regulatory Reform in order to assist the reader in understanding 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.

SUMMARY AND BACKGROUND

3. The Regulatory Enforcement and Sanctions Act will primarily implement the key recommendations contained in the following reports and papers:
 - The Hampton Review, Reducing Administrative Burdens: Effective Inspection and Enforcement, published in March 2005 (“the Hampton Review”);
 - The Macrory Review, Regulatory Justice: Making Sanctions Effective, published in November 2006 (“the Macrory Review”); and
 - The Government paper Next Steps on Regulatory Reform, published in July 2007.
4. The Hampton Review set out a vision for a risk-based approach to regulation and included a set of principles for regulatory inspection and enforcement, based around risk and proportionality, as well as a major streamlining of regulatory structures. The Government has committed to implementing the Hampton Review agenda and this Act is a further element in delivering on that commitment. The Government’s intention to legislate in this area was heralded in the 2005 Pre-Budget Report.

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5. The Act comprises four key parts: Part 1 provides for the establishment of a statutory corporation known as the Local Better Regulation Office (“LBRO”) and makes provision about its objectives and functions; Part 2 makes provision for more consistent and co-ordinated regulatory enforcement by local authorities; Part 3 provides for the introduction of a new expanded framework for regulatory sanctions by enabling Ministers to confer new civil sanctioning powers on regulators in relation to specific offences; and Part 4 provides for the introduction of a duty on regulators not to impose or maintain unnecessary burdens.
6. The Hampton Review found that the diffuse structure of local authority regulatory enforcement increases uncertainty and administrative burdens for business. Unco-ordinated action means that businesses receive unnecessary inspections and conflicting advice, while a lack of communication amongst local authorities results in duplication of effort. Part 1 intends to address these issues by establishing LBRO with the objective of securing that local authorities exercise their relevant functions in a manner that is effective, does not give rise to unnecessary burdens and that complies with the Better Regulation Commission’s Principles of Good Regulation. Those principles are that regulatory activities should be carried out in a way which is transparent, accountable, proportionate, and consistent and should be targeted only at cases in which action is needed. Part 2 and Schedule 4 of the Act promote co-ordination amongst local authorities by making provision regarding communication between local authorities and conflict resolution by LBRO.
7. The Macrory Review made recommendations aimed at ensuring that regulators have access to a flexible set of sanctioning tools that are consistent with the risk-based approach to enforcement outlined in the Hampton Review. Currently, many regulators are heavily reliant on criminal prosecution as the main sanction should industry or individuals fail to comply with regulatory requirements. Professor Macrory’s recommendations included that:
 - The Government should consider empowering regulators to apply fixed and variable monetary penalties where there has been a regulatory breach;
 - The Government should consider improving current statutory notice regimes and extending them to those regulators that do not currently have them; and
 - The Government should consider introducing enforceable undertakings as an alternative to criminal prosecution whereby the person in breach enters into a legally binding agreement with the regulator to carry out specific activities to rectify its non-compliance.

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8. Part 3 of the Act responds to the Macrory Review recommendations by enabling Ministers to confer on regulators sanctioning powers as follows:
 - Fixed monetary penalties – it is envisaged that such fines will be imposed by a regulator in respect of low-level instances of non-compliance;
 - Discretionary requirements which include:
 - Variable monetary penalties – requiring a person to pay a monetary penalty the value of which will be determined by the regulator;
 - Compliance notices – requiring a non-compliant business to undertake certain actions to bring themselves back into compliance; and
 - Restoration notices – requiring a person to undertake certain actions to restore the position, as far as possible, to the way it would have been had regulatory non-compliance not occurred.
 - Stop notices – requiring a person to cease an activity that is causing serious harm or presents a significant risk of causing serious harm and has given rise, or is likely to give rise to regulatory non-compliance; and
 - Enforcement undertakings – an agreement offered by a person to a regulator to take specific actions related to what the regulator suspects to be an offence.
9. The sanctioning powers may be conferred by Ministers in respect of particular criminal offences on specified regulators or those who enforce offences contained in any enactment listed in Schedule 6 and those who enforce offences in secondary legislation made under enactments listed in Schedule 7. The Act sets out some minimum requirements for implementation of the new sanctions.
10. Part 4 creates a duty that requires regulators to review their functions, not to impose unnecessary burdens, and unless disproportionate or impracticable, to remove burdens that are found to be unnecessary. Regulators that are subject to the duty must report on progress annually. The duty applies to five regulators listed in section 73. Ministers can apply the duty to other regulatory functions by order.
11. Part 5 of the Act contains supplemental and general provisions.

TERRITORIAL EXTENT

12. The Act extends to England and Wales, Scotland and Northern Ireland.

TERRITORIAL APPLICATION: WALES

13. All Parts of the Act apply in Wales in respect of both reserved and devolved matters.
14. Part 1 gives powers to the Welsh Ministers in areas where they have functions that are broadly comparable to those granted to UK Ministers with regard to LBRO's operations. Any extension of LBRO's scope, by adding enactments to Schedule 3 or adding matters to section 4(3), will require the consent of the Welsh Ministers if the extension relates to local authorities in Wales in respect of a Welsh ministerial matter (section 4(6) and (7)). Section 7 ensures that, where LBRO gives directions to a local authority in Wales with regard to Welsh ministerial matters, it will need to have the consent of the Welsh Ministers. Under section 10, LBRO may give advice or make proposals to Welsh Ministers regarding the way in which local authorities in Wales exercise their regulatory functions in relation to any Welsh ministerial matter. Section 11(1)(b) allows LBRO to issue a list of enforcement priorities for Welsh local authorities subject to approval by the Welsh Ministers. Section 16 of the Act provides that Welsh Ministers may give LBRO guidance and directions as to the exercise of its functions in relation to any matter in respect of which the Welsh Ministers exercise functions. Any orders made by the Secretary of State under sections 28 and 29 are subject to the consent of the Welsh Ministers. Schedule 1 requires the Secretary of State to consult the Welsh Ministers before making LBRO board appointments; it also allows the Welsh Ministers to make grants to LBRO of such amounts as they think fit.
15. Under Part 3, section 36 provides that the powers given to Ministers of the Crown in the Act can also be used by the Welsh Ministers where the provision in question relates to a Welsh Ministerial matter. Under section 59, Ministers of the Crown must consult with Welsh Ministers before making an order under the Act that will affect the sanctioning of an offence that applies in or relates to Wales. They must obtain their consent before making an order, which relates to a Welsh Ministerial matter.
16. Under Part 4, section 73 provides that where the regulatory functions included in subsection (2) are exercisable in Wales, they shall not include Welsh Ministerial matters and powers given to Ministers of the Crown in this Part can also be used by Welsh Ministers for regulatory functions which relate to a Welsh Ministerial matter.

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TERRITORIAL APPLICATION: SCOTLAND

17. LBRO's functions under Part 1 of the Act do not apply in Scotland. Parts 2 to 4 apply in Scotland but only in respect of reserved matters.

TERRITORIAL APPLICATION: NORTHERN IRELAND

18. LBRO's functions under Part 1 of the Act do not apply in Northern Ireland. Parts 2 to 4 apply in Northern Ireland but not in respect of transferred matters.

COMMENTARY ON SECTIONS

PART 1: LOCAL BETTER REGULATION OFFICE

Establishment of LBRO

Section 1: LBRO

19. Section 1 establishes the corporate body to be known as the LBRO.
20. Subsection (3) gives effect to Schedule 1, which makes further provision about LBRO's constitution as well as other matters relating to its proceedings, accounts etc.

Section 2: Dissolution of the LBRO company

21. There is a non-departmental public body named the Local Better Regulation Office (the "LBRO company"), constituted as a private company limited by guarantee. When Part 1 comes into force, section 2 will effect the dissolution of the LBRO company, and the transfer of the functions, staff and property of the LBRO company to a new statutory corporation. Subsection (3) gives effect to Schedule 2, which provides for the automatic transfer of staff, property, rights, and liabilities from the LBRO company to LBRO. The transfers of property and staff take place immediately before the dissolution of the LBRO company.
22. Paragraphs 1 and 2 of Schedule 2 provide that the transfer of staff, property, rights and liabilities from the LBRO company to LBRO should be treated as if it were a transfer of an undertaking to which the Transfer of Undertakings (Protection and Employment) Regulations 2006 (TUPE) apply. Paragraphs 4 to 6 ensure continuity, so that things done by the LBRO company immediately before it is dissolved have effect as if done by LBRO. For example, if the LBRO company were to initiate a consultation with persons who are affected

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by a particular type of trading standards regulations with a view to improving the effectiveness of enforcement, the consultation would be deemed to have satisfied the requirements of section 6(4), which requires LBRO to consult before giving guidance to local authorities.

Definitions

Section 3: “Local Authority”

23. Section 3 defines “local authority” for the purposes of Part 1 of the Act.

Section 4: “Relevant function”

24. Section 4 defines “relevant function” for the purposes of Part 1 of the Act by reference to the list of enactments at Schedule 3, the instruments made under those enactments, and the enactments made under section 2(2) of the European Communities Act 1972 that relate to the matters listed in subsection (3), being:

- a) Agricultural produce (quality standards and labelling);
- b) Animal health and welfare;
- c) Animal feed;
- d) Consumer protection;
- e) Environmental protection;
- f) Food hygiene and standards;
- g) Public health and safety;
- h) Weights and measures (including measuring instruments).

25. Subsection (4) enables the Secretary of State to amend the list of enactments in Schedule 3 and the list of matters in subsection (3), subject to affirmative resolution procedure in Parliament (see section 20). Under subsection (6), where such amendments include matters which are Welsh ministerial matters, this will be subject to the consent of the Welsh Ministers.

26. Under subsection (7), the Secretary of State may, by order, determine whether an enactment made under section 2(2) of the European Communities Act 1972 is made with respect to any of the matters listed in subsection (3). Under subsection (8) the Welsh Ministers must consent to any order made under subsection (7).

General functions of LBRO

Section 5: Objective relating to general functions

27. Section 5 sets out LBRO’s objective. This is that LBRO must, when carrying out its general functions under section 6 to 10, seek to secure that local authorities exercise their relevant functions effectively, in a way that does not

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give rise to unnecessary burdens and in a way which conforms to the principles set out in subsection (2). These principles are the Better Regulation Commission's Principles of Good Regulation.

Section 6: Guidance to local authorities

28. Under section 6, LBRO has the function of giving guidance to local authorities as to how they should exercise their relevant functions. Guidance issued under section 6 may be given to one or more local authorities and may relate to one or more relevant functions. This means that LBRO could, for example, give guidance to a single local authority about how often it should be carrying out inspections of premises of a certain type, or more general guidance relevant to all authorities on how to enforce specific pieces of legislation, or in respect of areas of regulation.
29. LBRO may also issue guidance relating to the way in which a local authority exercises its functions in a particular case. This means that LBRO could, for example, issue guidance to a local authority about the way in which it is enforcing trading standards rules in respect of a particular business. Local authorities are required to have regard to guidance issued by LBRO under this section. Under subsection (6), LBRO may vary or revoke any guidance issued under this section by issuing further guidance under this section.
30. Before giving guidance, LBRO must consult: those persons whose activities are regulated by the exercise of the function, or persons representative of such persons (businesses and trade associations for example); local authorities in England and Wales, or such persons representative of local authorities in England and Wales (for example, the Local Government Association and LACORS (Local Authority Co-ordinators of Regulatory Services) as LBRO considers appropriate. LBRO must also consult any other persons it considers appropriate. These are likely to include businesses and other bodies that are subject to regulation, any relevant regulators, and relevant representative bodies such as the Trading Standards Institute or the Chartered Institute of Environmental Health.

Section 7: Guidance to local authorities: enforcement

31. Section 7 allows LBRO to give directions to a local authority to comply with any guidance that has been issued by it under section 6, or guidance issued by another body (such as a national regulator), which relates to the exercise of a relevant function.

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32. Before issuing a direction under section 7, LBRO must consult the local authorities to whom the direction is being given; any relevant regulator; and any other persons that LBRO considers appropriate. Subsection (6) defines a relevant regulator as ‘a person (other than a local authority in England and Wales) with regulatory functions which relate to the matter to which the direction relates’.
33. Subsection (2) requires LBRO to obtain the consent of the Secretary of State before issuing any direction under this section. Any such direction to one or more local authorities in Wales in relation to a Welsh ministerial function is subject to the consent of the Welsh Ministers. Where LBRO issues a direction to two or more local authorities in England and Wales, consent by the Secretary of State or Welsh Ministers must be made by order, subject to the negative resolution procedure (see section 20(2)).
34. Subsection (7) requires LBRO to publish any directions that it issues under this section. Under subsection (8) LBRO may vary or revoke any guidance issued under this section by issuing further guidance under this section.

Section 8: Financial support and assistance to local authorities

35. Section 8 allows LBRO to provide financial support to local authorities in relation to the exercise of their relevant functions and to any other person for the purpose of assisting local authorities in the exercise of their relevant functions. It is expected that LBRO will use this function to support and promote best practice by local authority regulatory services.

Section 9: Advice to Ministers of the Crown

36. Under subsection (1) LBRO can provide advice or make proposals to a Minister of the Crown in respect of the following matters: the way that local authorities exercise their relevant functions; the effectiveness of legislation or proposed legislation relating to the exercise of those functions; whether it would be appropriate for any other regulatory functions to be exercised by local authorities; and any other matter that relates to the way in which local authorities exercise their relevant functions. If a Minister requests advice or proposals on these matters from LBRO, then LBRO is obliged to provide such advice or make such proposals.

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Section 10: Advice to Welsh Ministers

37. Section 10 confers an equivalent power and equivalent requirements on LBRO to those in section 9 with regard to advising Welsh Ministers in relation to Welsh ministerial matters.

Function relating to enforcement priorities

Section 11: Enforcement priorities

38. Subsections (1) and (2) require LBRO to prepare and publish a list specifying the matters in relation to which local authorities in England or Wales should give priority when allocating resources. In essence, LBRO is required to review and revise the list of national enforcement priorities for local authority regulatory service published in the Rogers Review in March 2007. Examples of the matters which LBRO might include in its list of priorities might be: (i) air quality and the regulation of pollution from factories and homes; (ii) alcohol, entertainment and enforcement of late night licensing; and (iii) trade description, trade marking and doorstep selling. Local authorities in England or Wales are required to have regard to the list of priorities when deciding what level of resources to allocate to which relevant function.
39. Subsections (3) and (4) require that LBRO should consult such persons as it considers appropriate before publishing the list and that it should publish details of any representations made to it as a result of consultation undertaken prior to publishing the list.
40. Subsection (5) requires LBRO to secure the consent of the Secretary of State before publishing a list of those matters to which local authorities in England should give priority. Subsection (6) requires LBRO to consult the Secretary of State and secure the consent of the Welsh Ministers before publishing a list of those matters to which local authorities in Wales should give priority.
41. Under subsection (7), LBRO must review the list published under this section from time to time, or if requested to do so by the Secretary of State, or in the case of a list specifying matters to which Welsh local authorities should give priority, if requested to do so by Welsh Ministers.

Matters relating to the exercise of LBRO's functions

Section 12: Relationship with other regulators

42. Section 12 requires LBRO and five named regulators to enter into memoranda of understanding with each other as a basis for co-operation and co-ordinating their work together. Subsection (2) lists the regulators with whom LBRO must enter into a memorandum of understanding, namely: the Environment Agency,

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the Food Standards Agency, the Gambling Commission, the Health and Safety Executive, and the Office of Fair Trading. It is deemed particularly important that LBRO enter into memoranda of understanding with these five regulators as they all have functions that overlap with areas in which LBRO has functions.

Section 13: Duty not to impose burdens etc

43. Subsection (1) requires LBRO to secure that the exercise of its functions does not impose burdens, which are unnecessary or maintain burdens that have become unnecessary. Subsection (2) specifies that unnecessary burdens need not be removed where to do so would be impracticable or disproportionate.
44. Subsection (3) requires LBRO to secure that it exercises its functions in a way that is transparent, accountable, proportionate, and consistent, and that it targets its activities only at cases where action is needed. These are the Better Regulation Commission's Principles of Good Regulation.

Section 14: Ancillary powers

45. Section 14 confers on LBRO the power to do anything that it thinks necessary or expedient for the purpose of, or in connection with, the exercise of its functions.

Ministerial powers in relation to LBRO

Section 15: Guidance or directions by the Secretary of State

46. Subsection (1) confers on the Secretary of State the power to give LBRO guidance or directions as to the exercise of its functions. Subsection (4) requires LBRO to have regard to the guidance and to comply with any directions made under this section.
47. Before giving guidance or directions, the Secretary of State must consult LBRO and such other persons as are likely to be affected by the guidance or directions, or persons representative of such persons. Guidance or directions must be published and a copy laid before Parliament.
48. Subsection (7) prohibits the Secretary of State from issuing a direction to LBRO requiring it to direct two or more local authorities to comply with guidance it has given under section 6 or guidance issued by another national body (such as a national regulator).

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Section 16: Guidance or directions by Welsh Ministers

49. Section 16 creates an equivalent power to that set out in section 15 for Welsh Ministers in relation to Welsh ministerial matters. Under subsection (3), a copy of the guidance or directions must be laid before the National Assembly for Wales.

Supplementary and general

Section 17: Review of LBRO

50. Section 17 requires the Secretary of State to review LBRO's discharge of its functions as soon as is practicable after the end of the period of three years beginning on the day on which this section enters into force.
51. Subsection (3) requires that the review consider whether LBRO is discharging its functions effectively and efficiently and the extent to which, in discharging its functions in sections 6 to 10, it has achieved the objective in section 5.
52. The Secretary of State must, in conducting a review under this section, consult with the Welsh Ministers and such other persons as he considers to be appropriate.
53. Under subsection (5), the Secretary of State must publish the results of any review carried out under this section. Under subsection (6) the Secretary of State must lay a copy of any review carried out under this section before Parliament and the National Assembly for Wales.

Section 18: Power to dissolve LBRO

54. Section 18 confers on the Secretary of State a power to provide for the dissolution of LBRO. The section specifies that the order may, among other things, provide for the transfer of functions, property, rights, or liabilities of LBRO to another person.
55. It is intended that LBRO will be dissolved when it is deemed to have achieved its objective. Before making an order to this effect the Secretary of State must consult, the Welsh Ministers and such persons as will be substantially affected by the dissolution of LBRO. An order under this section, in order to provide for the dissolution of LBRO, may repeal, revoke, or amend any enactment.

Section 19: Dissolution of LBRO: tax

56. Section 19 confers on the Treasury a power to make regulations varying the way in which income tax, corporate tax, capital gains tax, stamp duty or stamp duty reserve tax has effect when an order made under section 18 makes

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provision regarding the transfer of the property, rights or liabilities of LBRO to another person.

Section 20: Orders under Part 1

57. Section 20 specifies that an order or regulation made under Part 1 must be made by statutory instrument.
58. Where an order is made under sections 4(7), 7(4) or 15(7), the order will be subject to the negative resolution procedure. A statutory instrument containing regulations made by the Treasury under section 19 is also subject to the negative resolution procedure.
59. Where an order is made under sections 4(4) or 18, the order will be subject to the affirmative resolution procedure.
60. Where an order is made under sections 7(4) or 16(7) by the Welsh Ministers, the order will be subject to the negative resolution procedure of the National Assembly for Wales.

PART 2: CO-ORDINATION OF REGULATORY ENFORCEMENT

Introduction

Section 22: Scope of Part 2

61. Section 22 defines the scope of Part 2 of the Act. Part 2 applies where a regulated person carries on an activity in the area of two or more local authorities, and each of those authorities has the same relevant function in relation to that activity. For example, Part 2 will apply where a business sells a product in two different local authorities and is subject to regulatory enforcement by trading standards in both those authorities.

Section 23: “Local Authority”

62. Section 23 defines “local authority” for the purposes of Part 2. Subsection (2) gives the definition of local authority in England and Wales, subsection (3) the definition of local authority in Scotland and subsection (4) the definition of local authority in Northern Ireland.

Section 24: “Relevant function”

63. Section 24 defines “relevant function” for this part of the Act. Under subsection (1)(a) “relevant function” has the same meaning in relation to a local authority in England and Wales as for Part 1 (set out in section 4).
64. For local authorities in Scotland and Northern Ireland, “relevant function” means a regulatory function, which is exercised by an authority under an enactment to be specified in an order made by the Secretary of State.
65. Subsections (3) and (4) prevent the Secretary of State specifying in an order a regulatory function in Scotland that is not reserved and in Northern Ireland that is transferred.

Primary Authorities

Section 25: Primary authorities

66. This section allows LBRO to nominate a local authority to act as the “primary authority” for the exercise of a relevant function in relation to a particular regulated person as defined at section 22.
67. The functions of primary authorities are set out in sections 27 to 30.

Section 26: Nomination of primary authorities

68. Section 26 sets out the procedure for nomination of a local authority as a primary authority. Where an authority has agreed in writing to act as a primary authority for a particular regulated person, LBRO may nominate that local authority as a primary authority. Where a regulated person has been unable to agree with a local authority that it will act as its primary authority, LBRO may nominate a local authority to act as a primary authority for the regulated person.
69. Subsection (2) provides guidance to LBRO regarding which authorities might be suitable candidates to be primary authorities in respect of a relevant function for a regulated person. For example, where a business has its head office in one local authority area and operational premises in a number of different local authority areas, LBRO may choose to nominate as a primary authority either the authority in whose area the most significant operational premises are located, or the authority in whose area the head office is located. It may be that LBRO nominates one local authority as the primary authority in respect of one relevant function for the business in question, for example trading standards matters, and a different authority in respect of another relevant function, for example environmental health matters. Subsection (3) requires LBRO to consult with the regulated person making the application and the authority that it proposes to nominate as the primary authority, before nominating a local authority.
70. Subsection (4) requires LBRO to pay particular regard to any representations made by the proposed primary authority regarding the resources available to it.
71. Subsection (6) requires LBRO to maintain a register of any such nominations. Registration can be revoked under subsection (5) where LBRO considers that the authority is no longer suitable for nomination, or that it is appropriate to do so for any other reason.

Functions of primary authorities

Section 27: Advice and guidance

72. This section charges the primary authority with the task of giving advice and guidance both to the regulated person in respect of the relevant function, and to other local authorities regarding how they should exercise the relevant function in relation to the regulated person. The primary authority and regulated person may make such arrangements as they see fit in order to manage their relationship. This might include entering into an agreement or memorandum of understanding which sets out the rights and obligations of each party. Such agreement or memorandum might supplement any inspection plan approved by LBRO under section 30.

Section 28: Enforcement action

Schedule 4

73. This section requires any local authority other than the primary authority to notify the relevant primary authority before taking enforcement action against a regulated person that has a primary authority partnership.
74. Under subsection (2), where an enforcing authority notifies the primary authority of a proposed enforcement action, the primary authority must determine within the relevant period (that being five working days or a longer period as directed by LBRO under the provisions of subsection (9)) whether the proposed enforcement action is inconsistent with advice or guidance it has previously given. If the primary authority determines that the proposed enforcement action is inconsistent with its advice or guidance, it may direct the enforcing authority not to take the proposed enforcement action.
75. Under subsection (3), where a primary authority does not direct an enforcing authority not to take the proposed enforcement action *and* the enforcing authority chooses to proceed with the proposed enforcement action, the enforcing authority must notify the regulated person of this.
76. Under subsection (4), an enforcing authority cannot proceed with a proposed enforcement action:
- a) at any time during the relevant period; or,
 - b) if directed not to do so by the primary authority.
77. “Enforcement action” is defined at subsection (5). Under subsection (6) the Secretary of State may specify by order action which is or is not to be regarded as enforcement action. This is intended to allow for development of detailed guidance specifying the types of action that should not count as enforcement action for the purposes of this Part. An order under subsection (6) may, for example, specify that informal advice given to a business by a local authority should not be considered to be enforcement action.
78. Subsection (7) gives effect to Schedule 4, which makes provision for:
- a) an enforcing authority to refer a proposed enforcement action to LBRO if the primary authority has directed it not to take the proposed enforcement action (paragraph 1 of Schedule 4);
 - b) a regulated person to refer a proposed enforcement action to LBRO if the primary authority *does not* direct the enforcing authority not to take the proposed enforcement action (paragraph 2 of Schedule 4); and

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- c) the primary authority to refer a proposed enforcement action to LBRO instead of determining itself whether or not a proposed enforcing action is inconsistent with advice or guidance that it has previously given (paragraph 3 of Schedule 4).
79. Where a proposed enforcement action is referred to LBRO, LBRO must satisfy itself as to whether:
- a) the proposed enforcement action is inconsistent with advice or guidance previously given by the primary authority;
 - b) the advice or guidance given by the primary authority was correct; and
 - c) the advice or guidance was properly given by the primary authority (paragraphs 1(3), 2(3) and 3(3)).
80. If the proposed enforcement action has been referred to LBRO by an enforcing authority, LBRO must confirm the direction given by the primary authority to the enforcing authority not to take the proposed enforcement action if it is satisfied as to all the points at paragraph 80 above. In any other case, LBRO must revoke the direction given by the primary authority.
81. If the proposed enforcement action has been referred to LBRO by the regulated person, LBRO must direct the enforcing authority not to take the proposed enforcement action if it is satisfied as to all the points at paragraph 80 above. In any other case it must consent to the proposed enforcement action.
82. If the proposed enforcement action has been referred to LBRO by the primary authority, LBRO must direct the enforcing authority not to take the proposed enforcement action if it is satisfied as to all the points at paragraph 80 above. In any other case it must consent to the action.
83. Where LBRO confirms the direction of the primary authority under paragraph 1(2)(a) of Schedule 4, or directs an enforcing authority not to take the proposed enforcement action under paragraph 2(2)(a) or 3(2)(a) of Schedule 4, it may direct the enforcing authority to take some other enforcement action under the provisions in paragraphs 1(4), 2(5) and 3(5) of Schedule 4.

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84. Under paragraph 5 of Schedule 4, LBRO must, before determining any matter referred to it, consult any relevant regulator, and may consult such other persons as it thinks fit.
85. Paragraph 6(1) of Schedule 4 requires LBRO to make a determination within 28 days of the date on which the reference is made. Paragraph 6(2) allows the Secretary of State to make further provision regarding the procedure to be followed under Schedule 4. This might include, for instance, time limits within which referrals may be made.
86. Paragraph 7 of Schedule 4 enables LBRO to give guidance or directions to any one or more local authorities about any enforcement actions referred to it under Schedule 4.
87. Paragraph 8 of Schedule 4 allows LBRO to require the primary authority, the enforcing authority, or the regulated person, to provide it with information that it may specify.
88. Subsection (8) of section 28 provides that where an enactment specifies a time limit within which enforcement action can be taken, any time during which the authority is prohibited from proceeding with the enforcement action under this section of Schedule 4 does not count when calculating that time period.

Section 29: Enforcement action: exclusions

89. Subsection (1) allows the Secretary of State to prescribe by order the circumstances in which the procedure set out at section 28(1) to (4), requiring consultation before taking an enforcement action, shall not apply.
90. Under subsection (2), where an enforcing authority takes enforcement action against a regulated person where the provisions of an order made under subsection (1) apply, the enforcing authority must inform the relevant primary authority of the enforcement action as soon as it reasonably can.
91. Subsection (3) requires the Secretary of State to include in any order made under subsection (1) exclusions where:
 - a) the enforcement action is urgently required to avoid a significant risk of serious harm to human health or the environment (including the health of animals or plants) or the financial interest of consumers;
 - b) the application of section 27(1) to (4) would be wholly disproportionate.

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92. An order under subsection (1) may also, for example, specify that consultation with a primary authority is not required where:
- a) the regulatory provisions in question are deliberately local in character;
 - b) it would be impractical to contact the primary authority.

Section 30: Inspection plans

93. This section makes provision for primary authorities that exercise the function of inspection to draw up inspection plans in respect of the regulated person with whom they have a relationship. These inspection plans are intended to act as a guide for other local authorities who also carry out inspections in relation to that person.
94. Subsection (3) provides examples as to what can be set out in an inspection plan. These include the frequency at which inspection should be carried out, the circumstances under which an inspection should take place and what an inspection should consist of. It is intended that an inspection plan can also include other information such as risk assessments detailing the risk of non-compliance and the potential consequences of non-compliance, and improvement plans detailing intended actions that will ensure compliance with regulatory requirements.
95. Under subsection (4) the primary authority must consult with the regulated person before drawing up an inspection plan.
96. Under subsection (5) a primary authority is required to take into account any relevant recommendations and guidance relating to inspections when drawing up an inspection plan.
97. Under subsection (6) a primary authority is required to bring any inspection plan to the notice of other local authorities. Before doing so, the primary authority must obtain the consent of LBRO.
98. Subsection (7) requires a local authority to have regard to an inspection plan that has been brought to its attention when proposing to inspect the regulated person to which the plan refers. Under subsections (8) and (9), a local authority other than the primary authority must notify the primary authority before it exercises a function of inspection in relation to a regulated person in a manner that departs from the recommendations in an inspection plan and specify their reasons for this departure.

*These notes refer to the Regulatory Enforcement and Sanctions Act 2008 (c.13)
which received Royal Assent on 21 July 2008*

Primary authorities: supplementary

Section 31: Power to charge

99. Section 31 allows the primary authority to charge the regulated persons reasonable fees in respect of the functions it performs under this Part. Any such charges may be subject to guidance from LBRO, as described at section 33.

Section 32: LBRO support

100. Section 32 confers powers on LBRO to do anything it considers appropriate, including making grants, to support a primary authority in the exercise of its functions under this Part. Any such grants would be subject to the usual rules associated with local government finance.

General

Section 33: LBRO guidance

101. Section 33 permits LBRO to give guidance to local authorities about the operation of Part 2. Local authorities must have regard to guidance issued under this section. Where this guidance affects the power to charge under section 31, it is subject to consent by the Secretary of State, and consultation with the Welsh Ministers.

Section 34: Orders under Part 2

102. This section specifies that orders made under Part 2 must be made by statutory instrument subject to the negative resolution procedure.

Section 35: Interpretation of Part 2

103. This section sets out definitions used in this Part. Subsection (1) sets out the meanings to be given to “LBRO”, “local authority”, “the regulated person” and “relevant function” in this Part.

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which received Royal Assent on 21 July 2008*

PART THREE: CIVIL SANCTIONS

Section 36: Power to make orders providing for civil sanctions

104. Section 36 allows a Minister of the Crown or Welsh Minister (referred to in this part of the notes as “a Minister”) to make an order providing for the new alternative civil sanctioning powers. This order must be made by statutory instrument and will be subject to the affirmative resolution procedure (by virtue of section 61).

Section 37: “Regulator”

Section 38: “Relevant Offence”

Schedule 5: Designated regulators

Schedule 6: Enactments specified for the purposes of orders under Part 3

105. Section 37 defines the terms “regulator” and “designated regulator”, while section 38 defines “relevant offence”. The Act confers powers to enable regulators to have access to the new sanctions for certain relevant offences.
106. A “regulator” is a body that is listed at Schedule 5 to the Act or is a body who exercises an enforcement function in relation to an offence under enactments listed at Schedule 6. It does not include police or prosecution authorities. Regulators will be allowed to use the new sanctions contained in Part 3 once the Minister with responsibility for that particular policy area has passed secondary legislation to grant them the relevant powers. The Minister will decide which relevant offences should be covered.
107. The first group of regulators are those listed at Schedule 5 (“designated regulators”). For these regulators, “relevant offence” (as defined in section 38(2)) means an offence in an Act in relation to which the regulator has an enforcement function (defined in section 71), such as investigating an incident of regulatory non-compliance.
108. The second group of regulators are those bodies with an enforcement function in relation to an offence contained in any enactment listed at Schedule 6. This group will largely consist of local authorities and Ministers. For these regulators, “relevant offence” means an offence which is contained in the enactments listed at Schedule 6 in relation to which the regulator has an enforcement function. The enactments at Schedule 6 cover regulatory areas such as agriculture, animals, the environment, food safety, consumer protection, transport and health and safety.

*These notes refer to the Regulatory Enforcement and Sanctions Act 2008 (c.13)
which received Royal Assent on 21 July 2008*

109. Orders under Part 3 only confer powers in relation to offences in existing Acts. Those are offences in existing Acts enforced by those regulators listed in Schedule 5; and offences in the enactments listed in Schedule 6. It is intended that in future Acts which create regulatory offences will themselves create whatever civil sanctions are necessary.
110. Offences in subordinate legislation are dealt with in section 62 and Schedule 7 (see later).

Section 39: Fixed monetary penalties

111. This section enables a Minister to grant a regulator the power to issue a fixed monetary penalty on a person in relation to a regulatory offence.
112. Regulators may only impose a fixed monetary penalty when satisfied beyond reasonable doubt that the person has committed the relevant offence.
113. The amount of a fixed monetary penalty will be specified by the order made by the Minister. The regulator will not be able to exercise discretion in determining the amount of the fixed monetary penalty in any individual case.
114. Subsection (4) caps the level of fixed monetary penalty for offences triable summarily, and punishable by a fine on conviction, at the maximum fine applicable to that offence (which is usually £5,000).

Section 40: Fixed monetary penalties: procedure

115. Section 40 specifies certain minimum requirements that the order implementing fixed monetary penalties must include. In particular, before the regulator can impose a penalty it must first issue a 'notice of intent'. The person subject to this notice will then have the opportunity to make written representations and objections against the penalty. Alternatively, the person could choose to discharge their liability for the penalty by paying a discharge payment, the level of which will be set out in the order and must be no more than the penalty. Any representations or discharge payment must be made within 28 days of receipt of the notice, or such shorter period as prescribed by the notice of intent. If a discharge payment is made, no further action will be taken against that person.
116. After this period, if the regulator chooses to impose the penalty, it must issue a 'final notice' setting out certain specified information such as the grounds for imposing the penalty and how payment may be made. Subsection (4) provides that a regulator must not impose the penalty if it is satisfied that a person would not be liable to conviction for the relevant offence because of a defence. It also provides the power for the Minister to set out further circumstances in which a regulator may not impose a penalty, for example, by creating new

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defences to the offence. Section 40 also sets out the right of appeal against the sanctioning decision and the minimum grounds for that.

Section 41: Fixed monetary penalties: criminal proceedings and conviction

117. Imposition of a fixed monetary penalty removes the person's liability to criminal prosecution for the relevant offence in respect of the act of regulatory non-compliance in question. Section 41 requires the order implementing fixed monetary penalties to secure this. Similarly, if a person is served with a notice of intent under the provisions in section 40, no criminal proceedings may be taken against them within the 28 day opportunity for the discharge payment (or other shorter period as specified in the notice) following receipt of the notice. Where a person pays a discharge payment, no criminal proceedings can be taken against him in relation to the commission of the relevant offence.
118. An order under Part 3 may allow a regulator to recover any fixed monetary penalty issued, and any additional late payment charges that are relevant, as a civil debt recoverable through the courts or as if payable under a court order (by virtue of section 52).

Section 42: Discretionary requirements

119. This section enables a Minister to grant a regulator the power to impose, by notice, one or more requirements ("discretionary requirements") on a person. These requirements are:
- The payment of a monetary penalty of an amount that the regulator will determine, though where the relevant offence is triable only summarily and punishable by a fine, then the penalty is capped at the level of this fine;
 - To take steps within a time period as may be specified that ensure that the incident of non-compliance does not continue or recur;
 - To take steps within a time period as may be specified that restore the position, as far as possible, to what it would have been had the non-compliance not taken place.
120. The regulator must be satisfied beyond reasonable doubt that a person has committed a relevant offence before imposing such a requirement.
121. Section 42 also prohibits a regulator from imposing discretionary requirements on a person on more than one occasion in relation to the same act or omission.

Section 43: Discretionary requirements: procedure

122. Section 43 specifies certain minimum requirements that the order implementing discretionary requirements must include. In particular, the order must require the regulator to serve a notice on the person of its intention to impose discretionary requirements on that person and the time within which he can make representations and objections (which cannot be less than 28 days from receipt of the notice) against the proposed sanction.
123. The order must also permit the person the opportunity to offer an undertaking to benefit any person affected by the offence and for the regulator to take that into account when making its determination. For example, if a regulator was minded to issue a variable monetary penalty, the person could offer to pay compensation to a third party affected by their actions. The regulator could then adjust the level of the variable monetary penalty to take account of this. The regulator can, however, reject an offered undertaking.
124. After the end of the time for making representations and objections, and offering undertakings, the regulator can then decide whether to impose, withdraw or vary the discretionary requirement or replace it with a different requirement.
125. Where the regulator decides to impose a discretionary requirement, this must be done by way of a notice. The notice must contain the information set out in subsection (6) of this section, including the person's right of appeal against the sanction.
126. Subsection (7) of this section sets out the minimum grounds for appeal against the discretionary requirement that must be available.

Section 44: Discretionary requirements: criminal proceedings and conviction

127. Section 44 provides that where the person has been required to pay a variable monetary penalty (whether alone or in combination with non-monetary discretionary requirements or undertakings), the order made by the Minister must provide that the person may not be later prosecuted for the same incident of regulatory non-compliance. (This does not extend to a case where non-monetary discretionary requirements are imposed or an undertaking is accepted without the imposition of a variable monetary penalty. In this case, if the person subject to the sanction fails to comply with it, the person may be prosecuted at a later date for the original offence.)

Section 45: Discretionary requirement: enforcement

128. By virtue of this section, the order may also allow a regulator to issue a monetary penalty for the failure to comply with the discretionary requirement (a “non-compliance penalty”). Non-compliance penalties are not available for failure to pay a variable monetary penalty. Failure to pay any monetary penalty can lead to the regulator recovering the amount due through civil debt procedures or as if payable under court order (see section 52).
129. Section 45 also sets out the minimum grounds for appeal against the non-compliance penalty that must be available.

Section 46: Stop notices

130. This section enables a Minister, by order, to confer on a regulator the power to serve on a person a notice prohibiting that person from carrying on an activity specified in the notice (a “stop notice”). For example, that activity might include a manufacturing process, use of a particular piece of equipment or sale of a particular product. The stop notice will remain in place until the person has taken steps specified in the notice.

Section 47: Stop notices: procedure

131. This section sets out certain procedural requirements that the order must include when granting a regulator the power to serve stop notices. In particular, a notice must contain the grounds for issuing the notice, the person’s rights of appeal and the consequences of non-compliance. Where, after service of the notice, the regulator is satisfied that the person has taken steps specified in the stop notice, the order must require a regulator to issue a “completion certificate”. The person will also have a right of appeal against a regulator’s refusal to issue such a certificate.
132. Section 47 also sets out the minimum grounds for appeal against both the imposition of the stop notice and the regulator’s refusal to issue a completion certificate.

Section 48: Stop notices: compensation

133. This section provides that the Minister making the order must make provision for a compensation scheme. The Minister must also provide a right of appeal to a tribunal against a decision by the regulator not to award compensation or against the level of compensation awarded by the regulator.

Section 49: Stop notices: enforcement

134. Section 49 provides that a person who fails to comply with a stop notice is guilty of a criminal offence, which is triable either way. Where the offence is tried summarily in Scotland, a person is liable to 12 months imprisonment. Where the offence is tried summarily in Northern Ireland, a person is liable to 6 months imprisonment. Where the offence is tried summarily in England and Wales, a person is liable to 6 months imprisonment until section 154(1) of the Criminal Justice Act 2003 comes into force; a person committing an offence after the commencement of that section, which is tried summarily, is liable to 12 months imprisonment.

Section 50: Enforcement undertakings

135. Section 50 enables a Minister to make an order allowing a regulator to accept “enforcement undertakings” offered by a person. An enforcement undertaking is an undertaking or promise by a person to take certain actions. A regulator will not be able to impose enforcement undertakings.
136. The regulator may only accept enforcement undertakings when it has reasonable grounds for suspecting that an act or omission of the person constitutes a relevant offence. Once that enforcement undertaking is accepted, the person may not be prosecuted for the act or omission or have a fixed monetary penalty or discretionary requirement imposed on them, unless they fail, or are deemed to have failed, to comply with the undertakings. Where there is such non-compliance, the regulator will be able to prosecute the person for the original offence or impose a fixed monetary penalty or discretionary requirement.
137. A person may offer the following type of action as part of its undertakings:
- Actions that ensure that the person does not repeat or continue their non-compliant actions. For example, the person may undertake to fix faulty equipment that breaches safety standards;
 - Actions that restore the position, as far as possible, to what it would have been had the non-compliant action not taken place. For example, the person may undertake to clean up an area that has been contaminated by its non-compliant actions;
 - Actions that benefit any person affected by the non-compliant actions of the person (including payment of money). For example, the person may set up a compensation scheme for victims of its non-compliance; and
 - Other action that may be prescribed by the Minister in the order.

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138. Subsection (5) of this section enables the Minister to include further provision in the order such as the procedure for entering into the enforcement undertaking, certification by the regulator that the undertaking has been complied with and the consequences for a person providing misleading or inaccurate information.
139. There is no right of appeal against the enforcement undertaking itself, as the undertaking is volunteered by the person and is not imposed by the regulator. There may be, however, a right of appeal against a regulator's refusal to certify that the undertaking has been completed, where the Minister provides for such right in the order.

Section 51: Combination of sanctions

140. This section provides that a regulator cannot be granted power to impose -
- both a fixed monetary penalty and a discretionary requirement; or
 - both a fixed monetary penalty and a stop notice;
- in relation to the same offence.

Section 52: Monetary penalties

141. This section allows an order made by the Minister under this Part of the Act to make provision for discounts for early payment of a monetary penalty and for the payment of interest or a financial penalty for late payment of the original penalty. The total amount of any late payment penalty must not exceed the total amount of the penalty imposed.
142. Section 52 provides for the enforcement of unpaid penalties (and any interest or late payment charges) through the civil courts. It also allows the order to create a more streamlined process of recovery by treating the penalty as if it were payable under a court order.

Section 53: Costs recovery

143. This section enables a Minister to include provision for a regulator to recover its costs, by notice, from a person on whom a discretionary requirement or a stop notice is imposed. This provision does not extend to fixed monetary penalties and enforcement undertakings. The costs are those incurred by the regulator in relation to the imposition of the sanction, up to the point of imposition, and include investigation costs, administration costs and the costs of obtaining expert (including legal) advice. The person is not required to pay any costs he can show have been unnecessarily incurred. Section 53 requires that where a costs notice is served, the person subject to the notice has a right

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of appeal against both the regulator's decision to impose the costs notice and the amount of the costs.

Section 54: Appeals

144. This section requires that appeals under Part 3 of the Act must be heard by either the First-tier Tribunal (created by section 3 of the Tribunals, Courts and Enforcement Act 2007) or another statutory tribunal specified by the Minister in the order made under this Part. This exception is to cater for tribunals that will not form part of the First-tier Tribunal, such as the employment tribunals, which currently hear some health and safety appeals and may be an appropriate venue for hearing certain appeals under this Part.
145. Subsection (3)(a) of this section allows the Minister when setting out this power to make provision for the suspension of the effect of a fixed penalty or other requirement during an appeal. This might include provision such as:
- During appeal, a person may apply for the effect of the stop notice to be suspended pending the result of the appeal. If this application is unsuccessful then the notice will remain in force during the appeal; or
 - Should the person appeal, the effect of the stop notice may be automatically suspended until the result of the appeal is known.
146. In particular, subsection (3)(b) enables the Minister to make provision about the powers of an appellate body. Examples of the possible powers an appellate body might have are set out in subsection (4) of this section. The appellate body may have power to withdraw or confirm a sanction, power to take such other steps which a regulator could take (e.g. impose another sanction upon the person), and a power to remit the sanctioning decision back to the regulator for further consideration.

Section 55: Other provision

147. This section enables an order made under Part 3 to make consequential and other supplementary provisions.
148. Subsection (2) gives examples of what consequential provision might be made. Paragraph (a) may, for example, be used to allow the civil sanctions to be regarded as previous convictions for the purposes of other enactments. The power in paragraph (b) could be used to extend existing provisions in other legislation to apply to these civil sanctions. For example, the power could extend a provision that a convicted person must pay the clean up costs of the regulator, such as that under 33B Environmental Protection Act 1990, to apply to these civil sanctions as well.

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149. Subsection (3) gives examples of how the supplementary power under subsection (1) might be used. The power might be used to grant a regulator powers to require information or extend a regulator's existing information gathering powers in order to allow a regulator to investigate a matter that might lead to the use of the alternative sanctioning powers under this Act. The power may also be used in a similar way in relation to a regulator's powers of entry, search, or seizure. Where the legislation setting out the relevant offence contains an authorisation to use certain evidence in criminal proceedings, e.g. an exception to the prohibition of collateral use of information, the power under subsection (1) might be used to allow that authorisation to also apply to the imposition of civil sanctions for that offence. This can only be done in relation to authorisations that exist currently. The power can be used in these ways only for the purpose of facilitating the use of the alternative sanctioning powers contained in this Act. It would be for the Minister to determine whether the use of the power in subsection (1) would, in any given case, be compatible with ECHR rights.

Section 56: Excluded provision: Scotland

Section 57: Excluded provision: Northern Ireland

150. Section 56 prohibits (save for consequential purposes) an order made under Part 3 of the Act from making any provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament. This would prevent the order being used to grant regulators the alternative sanctioning powers under this Act for offences that relate to matters that have been devolved to the Scottish regulators, such as environmental health. There is no prohibition on using the powers in the Act for matters that have been reserved to the UK Parliament, such as consumer protection.

151. Section 57 makes similar provision for Northern Ireland.

Section 58: Consultation and consent: Scotland

152. If a Minister proposes to make an order that affects the prosecution of any offence in Scotland, he is required to obtain the agreement of the Lord Advocate.
153. If a Minister proposes to make an order that affects the powers of a regulator that is a local authority in Scotland, then he will be required to consult with Scottish Ministers because they will have an interest in the functions of local authorities in Scotland.

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Section 59: Consultation and consent: Wales

154. The powers contained within this Part of the Act given to a Minister of the Crown can also be used by Welsh Ministers in relation to matters that affect Wales, and which are the responsibility of Welsh Ministers.
155. Under subsection (1), a Minister of the Crown must consult with Welsh Ministers before making an order under Part 3 that will affect the sanctioning of an offence that applies in or in relation to Wales.
156. Subsection (2) requires a Minister of the Crown, after consulting with Welsh Ministers on the provisions of an order under Part 3, to also seek the agreement of Welsh Ministers if the order affects the sanctioning of an offence which applies in or in relation to Wales and relates to functions that are exercised by Welsh Ministers.
157. Subsection (3) requires the Welsh Ministers to consult the Secretary of State for the particular policy area before making an order under Part 3.

Section 60: Consultation: general

158. This section requires a “relevant authority” (a Minister of the Crown or the Welsh Ministers) proposing to make an order under Part 3 to consult with the regulator that will be the recipient of the powers to be granted by the order and such other persons the relevant authority considers appropriate. The relevant authority will also be required to consult with relevant organisations that it considers represents the interests of persons substantially affected by the proposals.
159. If as a result of this consultation exercise there are substantial changes to any part of the proposals, the authority will be required to undertake further consultation on the revised proposals as it considers appropriate.

Section 61: Parliamentary and Assembly procedure

160. Section 61 requires that any order made by a Minister under this Part of the Act must be made by statutory instrument and will be subject to the affirmative resolution procedure.
161. A statutory instrument made under this Part of the Act by Welsh Ministers requires the approval of the National Assembly for Wales.

Section 62: Offences under subordinate legislation

Schedule 7: Enactments specified for the purpose of section 62

162. This section extends any power of a Minister of the Crown or Welsh Minister to create criminal offences in secondary legislation to include the powers to create alternative civil sanctions under this Part of this Act. This applies only to those powers contained in enactments listed in Schedule 7. This would allow, for example, the Minister when amending or consolidating criminal offences contained in secondary legislation made under a listed enactment, to make provision for fixed monetary penalties. These provisions only apply in relation to existing powers to create criminal offences. Any such power created in future will need to make its own provision. There is no power to amend Schedule 7 to this Act.
163. The enactments listed at Schedule 7 generally cover the same regulatory subject matter as covered by Schedules 5 and 6. Section 2(2) of the European Communities Act 1972 is not listed in Schedule 7 as it is considered that this power is sufficiently wide to allow for the creation of civil sanctions.
164. Subsection (3) requires that any statutory instrument conferring the power to impose any of these civil sanctions made under the enactments listed at Schedule 7 must be subject to the affirmative resolution procedure. The power may be used to make any provision which could be made under Part 3 of the Act, and thus any substantive restrictions on the sanctions will apply when the extended power is used, for example, in relation to devolution.

Section 63: Guidance as to use of civil sanctions

165. A Minister may not make an order that gives a regulator the powers under this Act unless the order requires the regulator to publish guidance in relation to the imposition of a sanction and the acceptance of enforcement undertakings (“Penalty Guidance”). The order must also require that the regulator consult persons specified in the order (for example, persons affected by the new sanctioning powers) before publishing or revising the Penalty Guidance. The Penalty Guidance must also be revised by the regulator where appropriate, for example, where there has been a change in the rules. The order must also stipulate that the regulator must have regard to the Penalty Guidance when exercising its functions.
166. The Penalty Guidance must contain information about the circumstances in which a sanction is likely to be imposed or undertakings accepted, the defences available to the person, and the person’s rights of appeal. For particular sanctions under this Act, there are further specific requirements for the Penalty Guidance set out in subsections (3) to (5).

Section 64: Guidance as to enforcement of relevant offences

167. This section requires that, where a Minister grants a regulator any alternative sanctioning power under this Act, the regulator should prepare and publish guidance about how the offence to which the power relates is enforced (“Enforcement Policy”). For each offence, the Enforcement Policy must set out the relevant sanctions to which a person may be liable. The Enforcement Policy must also set out the action which the regulator may take to enforce the offence. For example, it might state that a particular offence will usually be enforced by way of a fixed monetary penalty rather than criminal prosecution. The Enforcement Policy must set out the circumstances in which the regulator is likely to take such action. For example, the policy might say that criminal prosecution may be more likely where the person has a history of regulatory non-compliance. The Enforcement Policy, in contrast to Penalty Guidance, is focussed on how particular offences are enforced.
168. A regulator will be able to revise its guidance periodically. The regulator will be required to consult with all persons it considers appropriate before publishing or revising its guidance.

Section 65: Publication of enforcement action

169. This section requires that an order granting a regulator any alternative civil sanctioning power under this Part ensures that a regulator must publish, from time to time, reports specifying the cases in which one of the new civil sanctions under Part 3 of the Act has been imposed, where a person has discharged their liability to a fixed monetary penalty under section 40 or where an undertaking is accepted under section 43. The reports should not list those cases where civil sanctions have been overturned on appeal. Further, the reports may not need to list certain cases where the Minister thinks it inappropriate for such cases to be publicised, for example, for data protection reasons.

Section 66: Compliance with regulatory principles

170. Before making an order under or by virtue of Part 3 and allowing a regulator access to the new sanctions, section 66 provides that the relevant Minister must be satisfied that the regulator will exercise the new powers in accordance with the Principles of Good Regulation, as set out in section 5(2).

Section 67: Review

171. Section 67 places a duty on a Minister making an order under Part 3 of the Act conferring a power on a regulator to impose fixed monetary penalties or discretionary requirements, serve a stop notice or accept an enforcement undertaking, to conduct a post-implementation review of the order. The review must take place three years after the order was made and must consider whether the order has implemented its objectives efficiently and effectively.
172. In conducting such a review, the Minister must consult such persons, as he considers appropriate. The Minister must also publish the results of the review and lay a copy of the review before Parliament (or National Assembly for Wales if the review is conducted by Welsh Ministers).

Section 68: Suspension

173. Section 68 enables the Minister making the order conferring the sanctioning powers on a regulator to be able to direct the regulator not to issue any further notices imposing one of the new sanctions or to accept enforcement undertakings. The Minister will only be able to do so if satisfied that the regulator has failed on more than one occasion to comply with any duty imposed on it under this Part of the Act, to act in accordance with its published Penalty Guidance or Enforcement Guidance, or to act in accordance with regulatory principles (as set out in section 5(2)) or other principles of regulatory best practice. This provision is a safeguard against persistent misuse of the new sanctioning powers by a regulator.
174. The Minister may revoke the original direction given to the regulator if it is satisfied that the regulator has taken appropriate steps to remedy the identified failures.
175. Before making any direction under this section (including revocation of a direction), the Minister must consult the regulator and other persons he considers appropriate. The Minister must lay a copy of the decision before Parliament (or the National Assembly for Wales if the direction is given by Welsh Ministers). The regulator must publish the direction and take other steps to inform affected persons of it.

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Section 69: Payment of penalties into Consolidated Fund etc

176. Section 69 provides that any monetary penalty, including any additional late payment or interest charges, or any discharge payment made under section 40 received by the regulator must be paid into the Consolidated Fund. This section requires the payment of such monies to the Consolidated Funds for Scotland, Northern Ireland and Wales, where appropriate.

Section 70: Disclosure of information

177. This section permits the Crown Prosecution Service or the police to disclose information to a regulator that has had the new sanctioning powers conferred on it. Information may only be disclosed where the regulator has an enforcement function in relation to a criminal offence and for the purposes of the regulator exercising one of the new powers. The police will not have access to the new sanctioning powers but if, for example, they have begun a criminal investigation but think that it no longer merits a criminal prosecution, this section would allow them to pass information to the regulator to determine whether to issue an alternative sanction.

Section 71: Interpretation of Part 3

178. Section 71 defines various terms used in Part 3.

PART 4: REGULATORY BURDENS

Section 72: Duty not to impose or maintain unnecessary burdens

179. This section creates a duty to keep regulatory functions under review and, when carrying out those functions, not to impose unnecessary burdens, and where proportionate and practicable, to remove unnecessary burdens. It is the person that is exercising the regulatory functions that decides whether or not a burden is unnecessary. In deciding whether the removal of an unnecessary burden would be disproportionate or impracticable, all relevant circumstances should be taken into account.
180. Subsections (3) - (6) provide that the person to whom the duty has been applied must publish a statement setting out what they propose to do pursuant to the duty. The statement must explain what has been done in respect of the duty since the previous statement, except if it is the first statement that has been published. Where a burden that is unnecessary has not been removed, the statement must explain why its removal would be disproportionate or impracticable. The first statement must be published as soon as reasonably practicable after application of the duty in relation to the specified functions and is to be for a period of twelve months. Subsequent statements must be published during the twelve-month period or as soon as is reasonably practicable thereafter and should be for a period of twelve months. The statement is intended to provide transparency and the regulated persons can discharge the requirement in the manner that is most appropriate to them, for example, in annual reports.
181. A person to whom the duty has been applied is required, under subsection (7) to have regard to any statement produced pursuant to the duty.

Section 73: Functions to which section 72 applies

182. This section applies the duty in section 72 to those functions carried out by regulators listed in subsection (2). Subsection (1)(b) confers on a Minister of the Crown the power to specify regulatory functions in respect of which the duty in section 72 should apply. Subsections (3), (4) and (5) set out the arrangements in respect of Scotland, Northern Ireland and Wales.
183. Subsection (6) requires that the Minister consult the person whose regulatory functions are to be specified in the order and such other persons as are considered appropriate before making an order. An order may make such consequential amendments as are necessary. Subsections (7) – (9) specify the procedural requirements that apply in respect of the order-making power in this section.

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PART 5: GENERAL

Section 75: Commencement

184. Section 75 specifies how and when the powers contained within the Act will commence. Parts 1 to 4 will commence by way of order of the Secretary of State.

HANSARD REFERENCES

The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

Stage	Date	Hansard reference
<i>House of Lords</i>		
Introduction	8 November 2007	Vol. 696 Col 139
Second Reading	28 November 2007	Vol. 696 Col 1237 - 1282
Committee	21 January 2008	Vol. 698 Col GC1 – 56
	23 January 2008	Vol. 698 Col GC103 – 156
	28 January 2008	Vol. 698 Col GC215 – 274
	30 January 2008 and 06 February 2008	Vol. 698 Col GC328 – 378 Vol. 698 Col GC561 - 614
Report	19 March 2008 and 31 March 2008	Vol. 700 Col 278 – 322 and 338 – 358 Vol. 700 Col 795 - 846
Third Reading	28 April 2008	Vol. 701 Col 12 - 40
<i>House of Commons</i>		
Introduction	29 April 2008	No Debate
Second Reading	21 May 2008	Vol. 476 Col 325- 370
Committee	17 June 2008	Regulatory Enforcement & Sanctions Bill [Lords] Public Bill Committee
	17 June 2008	
	19 June 2008	
	19 June 2008	
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