

GOVERNMENT RESPONSE TO CONSULTATION ON DRAFT REGULATIONS

**The Pensions Regulator
(Delegation of Powers)
Regulations 2009**

17 July 2009

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Introduction

Between 12 March 2009 and 3 June 2009, the Department for Work and Pensions ('DWP') undertook a consultation exercise on the draft Pensions Regulator (Delegation of Powers) Regulations 2009 ('the draft Regulations'). The draft regulations were made available on the DWP website.

These regulations will allow the Pensions Regulator ('the Regulator') to outsource certain compliance powers, in order to ensure that the compliance regime is delivered in the most efficient and cost-effective way, including making the best use of private sector expertise where appropriate.

DWP received nine responses to the consultation. A list of respondents is included at Annex B. The Department is grateful for the contributions received. The final regulations will be laid before Parliament and will shortly come into force.

This document sets out the main points made by respondents and provides the Government's response. The response should not however be taken as an authoritative interpretation of the law. Such an interpretation can only be provided by a Court.

The final Regulations and accompanying explanatory memorandum will be available on the Office of Public Sector Information's website at:
<http://www.opsi.gov.uk/si/si-2009-index>

This document is available on the DWP website at:
<http://www.dwp.gov.uk/consultations/2009>

A paper copy of this document can be obtained from:

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Responses to the consultation on the draft Pensions Regulator (Delegation of Powers) Regulations 2009 and the Government's response

These regulations were put out alongside the Pensions (Automatic Enrolment) Regulations 2009. There were nine general responses to the draft Regulations (see Annex A for a list of respondents). There were no specific consultation questions. These responses have been considered in six groups:

1. the ability of the Regulator to delegate powers;
2. breadth of the powers that may be delegated;
3. delegating powers to one supplier;
4. restricting who the powers can be delegated to;
5. the accountability of suppliers; and
6. concerns about profit incentives.

1. Why TPR will be able to delegate specific compliance powers

1.1. Stakeholder view

Two stakeholders felt that there was not sufficient explanation of the rationale for giving the Regulator the ability to delegate powers. One of these stakeholders felt that it was not able to fully respond to the consultation without this information.

1.2. Government response

The ability to delegate powers is consistent with the Government's commitment to ensuring value for money when planning and delivering large-scale public sector projects and to using the skills, expertise and capacity of the private sector where appropriate. The Department generally supports enabling outsourcing where possible and has a history of allowing a range of functions to be contracted out. For example, powers to outsource functions, including enforcement, were given to the Child Maintenance and Enforcement Commission (CMEC) in the Child Maintenance and Other Payments Act 2008, and were also provided for in the Welfare Reform Act 2007.

For the Regulator to deliver the new compliance regime effectively and efficiently it needs to be able to outsource aspects of its compliance activity, which these regulations will allow. The Regulator's new objective to maximise compliance with the new employer duties, introduced under the 2008 Act, extends the Regulator's compliance responsibilities considerably. It will, for example, require substantial work to process employer enquiries and information on how employers are meeting the new duties (which will be required from all UK employers). The Regulator will retain accountability for any powers it chooses to delegate.

2. Breadth of the powers that may be delegated

2.1. Stakeholder views

Three stakeholders said that only some of the powers listed in the draft regulation and enabled by s.133 of the Pensions Act 2008 ('the 2008 Act')¹ should be delegated. They argued that delegated powers should be limited to powers given under the 2008 Act, or to those associated with enforcing the new employer duties under Chapter 1 of the 2008 Act. This is because these regulations allow the Regulator to delegate powers that cover other breaches of pensions regulation.

2.2. Government response

All of the powers listed in these regulations will be needed as part of the employer compliance regime. The powers that may be delegated can be grouped as follows:

- Powers required to enforce automatic enrolment and the employment safeguards, for example against inducement to opt out of pension saving. All of the 2008 Act powers listed fall into this group. Also included is the power to require information (s.72 of the 2004 Act), which was amended under the 2008 Act specifically to gather evidence for use in enforcement of the employer duties.
- Powers that can be used to enforce payment of contributions to pension schemes, which the Regulator will only delegate under s.133 for compliance purposes. Ensuring that employers make contributions (after either setting up pension schemes or using their existing provision to meet their 2008 Act duties) will be central to the success of the reforms. Existing pensions regulation powers, which can be used to help secure payment of contributions, have not been changed by the 2008 Act. They will be needed alongside the 2008 Act powers, since one of the ways that they may be used is to enforce compliance. These include s.13, s.14, s.17 and s.101 of the 2004 Act and s.10 of the 1995 Act. The ability to delegate these powers to the same organisation that is delegated the 2008 Act powers will allow for any external provider to take a consistent approach to compliance and for efficiencies in delivering the employer compliance regime.

3. Delegating powers to one supplier

3.1. Stakeholder views

Several stakeholders said that it should not be possible to delegate all the powers listed in the draft regulations to a single body, and specifically that the power under s.43 of the 2008 Act to review a notice should not be able to be delegated to bodies to whom s.2(g)-s.2(l) of the 2008 Act are delegated.

3.2. Government response

The intention of s.43 is to revisit the information and processes used in the issue of a notice and give the recipient an opportunity to provide additional information. This function would be carried out by the Regulator or, if the Regulator chooses to delegate s.43, a supplier. If the Regulator chooses to

¹ Which amends the Pensions Act 2004.

authorise a supplier to carry out a review, it will work with that supplier to ensure that robust processes and protections are established, for example, by ensuring that the review decision is a second opinion not connected to the original decision.

In addition, a person issued with a penalty notice would have the ability to seek an independent appeal (known as a 'reference') to the Pensions Regulator Tribunal. If a person issued with a notice is unhappy with the outcome of a review under s.43, or a review has not been conducted after that person applied for it, they then have the option of making a reference to the Pensions Regulator Tribunal.

4. Restricting who the powers can be delegated to

4.1. Stakeholder views

Several stakeholders said that there should be restrictions on the types of person to whom the Regulator can delegate these powers. One stakeholder proposed that delegation should only be made to a fit person bound by a code of ethics. Another respondent asked when and to whom the powers would be delegated.

4.2. Government response

The enabling power under which these regulations were made² was drafted specifically to give the Regulator the ability to delegate powers to people as it sees appropriate, without seeking further approval of the Secretary of State. These regulations have been drafted to reflect the enabling power and it is not within that power to set out in the regulations themselves which people the powers may be delegated to. The Regulator will have the ability to delegate to other government departments or private suppliers as appropriate at whichever time it wishes. We believe it is important to allow delegation in this way in order to maximise efficiency in delivering the new compliance regime.

The Regulator recognises that it is privy to commercially sensitive information and ensures that all staff and any other contracted parties are aware of the potential for conflict of interest, and are bound to declare any conflict of interest. This principle will be applied to the procurement of services where these compliance powers are delegated, and the eventual supplier. In the event that a conflict of interest should arise, the contractor will be obliged to demonstrate, to the Regulator's satisfaction, that the appropriate safeguards are put in place to maintain a separation of the contractor's activities to prevent the opportunity for conflict to occur.

5. Monitoring suppliers

Several stakeholders gave feedback on how arrangements with suppliers should be put in place and how the work undertaken by suppliers should be monitored, expressing concern that specific safeguards are not contained within the regulations.

² Paragraph 21(e) of Schedule 1 of the 2004 Act, updated by the 2008 Act.

5.1. Stakeholder views on specifying the nature of contracts

One stakeholder said that regulations should require the Regulator to put in place business rules with the supplier prior to giving effect to delegation. Another stakeholder responded that regulations must provide for 'watertight contracts' that include 'data security controls and duties, rights, responsibilities and accountability'.

5.2. Government response on specifying the nature of contracts

As noted above, the policy intention of the enabling power and these regulations is to give the Regulator operational flexibility by enabling it to delegate powers as it sees fit. The Regulator will, however, still be bound by EU procurement directives and UK Government procurement rules for contract content and ongoing contract management processes. To ensure any supplier uses the powers delegated to it in an appropriate and proportionate way, the Regulator will put in place a system of clearly defined business rules. There will be an initial presumption of tight controls. The business rules will be in place prior to the supplier using any powers that are delegated to it.

While a supplier may be authorised to determine whether to issue a penalty, and to issue that penalty, decisions will be taken within defined parameters and the most complex cases will be escalated to the Regulator. Suppliers will not have discretion to change penalty levels, which will be set in regulations to be consulted on in Autumn 2009.

With respect to data security, the same legal safeguards that apply to the Regulator extend to their contractors. These include the Data Protection Act 1998, and the criminal offence of unlawful disclosure of restricted information (with sentences up to and including two years' imprisonment if convicted on indictment) in s. 82 of the Pensions Act 2004. In addition, the Regulator will be guided by the relevant Office of Government Commerce model contract, which specifies detailed information security requirements and requires the contractor to develop, implement and maintain a security plan that ensures that all the necessary safeguards are in place to protect data that it holds.

5.3. Stakeholder view on safeguards

Several stakeholders were concerned that consultation on the delegation of the Regulator's powers was carried out before consultation on many of powers that are to be delegated, and that the safeguards that will be in place around the use of these powers are not yet apparent.

5.4. Government response on safeguards

TPR requires certainty on what powers can be delegated so that prospective suppliers are clear that they can legally be authorised on take on any of the specified powers that the Regulator chooses to delegate.

Consultation on enforcement powers is to be undertaken in Autumn 2009, and all interested parties will have an opportunity to have input at that point. In line with Better Regulation guidelines the Regulator also intends to publish

and consult specifically on its enforcement approach, explaining how it will use its powers.

5.5. Stakeholder concern about the visibility of delegated responsibilities

One stakeholder pointed out that employers contacted by an organisation operating under delegated powers will need to know that the organisation is operating legitimately.

5.6. Government response on visibility of delegated responsibilities

Whatever a contractor does under delegated powers will remain the responsibility of the Regulator and will be done in the Regulator's name, not in the name of the contractor.

6. Concerns about profit incentives

6.1. Stakeholder views

Several stakeholders were concerned that suppliers could be influenced to impose penalties by the wish to increase profits and felt that for this reason the Regulator's compliance powers should not be outsourced. One respondent made reference to local authority parking schemes.

6.2. Government response

The supplier will be paid to deliver a range of services but there will be no financial incentive for the supplier to impose penalties. All penalties will be paid by the Regulator into the HM Treasury's Consolidated Fund. Neither the supplier nor the Regulator has a financial interest in the penalties collected.

Annex A – Respondents to the consultation

Association of Consulting Actuaries

Association of Pension Lawyers

Arc Benefits Ltd

Bluefin

Civil Service Pensions (NI)

Hewitt Associates Limited

The Institute of Chartered Accountants in England and Wales

Mercer

Society of Pension Consultants