Department for Work & Pensions

The Occupational Pension Schemes (Power to Amend Schemes to Reflect Abolition of Contracting-out) Regulations 2015

Government response

March 2015

Contents

Chapter One: Introduction

1.1. State Pension currently comprises the basic State Pension and an additional, earnings–related component known as the Additional State Pension. Employers sponsoring defined benefit (DB) occupational pension schemes are able to contract scheme members out of the Additional State Pension in return for providing a workplace pension that meets certain quality standards. These employers, and their employees, pay a lower rate of National Insurance contributions (NICs), the reduction is referred to as the National Insurance (NI) rebate.

1.2. The State Pension is being reformed from April 2016 into a single-tier pension – the "new State Pension" - for future pensioners. The introduction of the new State Pension[1] means that there will no longer be an additional State Pension from which to contract-out. Consequently, contracting-out and the NI rebate will come to an end on 6 April 2016. Employer sponsors of contracted-out DB occupational pension schemes will then pay the standard rate of National Insurance – their NICs and their employees' contributions will increase. Some employers have provisions in their scheme rules to enable them to amend their schemes to recover this additional cost but others will be prevented from making such changes by their scheme rules or the requirement for trustee consent for such changes, or both of these.

1.3. Section 24(2) of the Pensions Act 2014 gives employers sponsoring contracted out salary-related occupational pension schemes a power to amend the scheme rules in order to adjust for the loss of the NI rebate – this is known as the "statutory override". Changes may be made either to increase employee contributions or reduce the future accrual of benefits in respect of the scheme members. The extent to which an employer can amend the scheme rules using the statutory override is limited to that estimated as matching the amount of increase in the employer's NICs.

1.4. On 8 May 2014 the Department for Work and Pensions published a consultation on draft Regulations and an Impact Assessment. The Regulations were:

a. The Occupational Pension Schemes (Power to Amend Schemes to Reflect Abolition of Contracting-out) Regulations.
b. The Occupational Pension Schemes (Schemes that were Contracted-out) Regulations.

1.5. The consultation ended on 2 July 2014. Thirty-four responses were received from pension industry bodies, pension professionals (actuaries, lawyers, and scheme administrators), employers, trade unions and an individual. A list of all those who responded can be found in the Annex. During the development of

[1] Cm 852 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181229/single-tier-pension.pdf

these Regulations and the consultation period DWP officials met with various representative organisations.

1.6. The Department thanks all those who responded for their time and the expertise they provided. The Department has reviewed and analysed the responses. The Government's Response to the issues raised is outlined in this document. Please note that whilst we invited comment on two sets of Regulations, at this stage we are publishing a response only to the Occupational Pension Schemes (Power to Amend Schemes to Reflect Abolition of Contracting-out) Regulations. The consultation response to the Occupational Pension Schemes (Schemes that were Contracted-out) Regulations will be published separately in the summer.

1.7. The Occupational Pension Schemes (Power to Amend Schemes to Reflect Abolition of Contracting-out) Regulations and the Impact Assessment are available on the UK Legislation website:

http://www.legislation.gov.uk/

1.8. This consultation document is available on the GOV.UK website:

https://www.gov.uk/government/consultations/occupational-pension-schemes-abolition-of-defined-benefit-contracting-out

Chapter Two: Government Response to the feedback on the consultation questions

Introduction

2.1 The consultation posed a number of questions concerning the draft Regulations. In this chapter we have summarised the comments received and set out the Government's Response. The Regulation numbers in the headings refer to the final Regulations and are followed by the draft Regulation number in brackets where different.

2.2 When reading these responses you may find it helpful to refer to the original consultation, which provides the context.

Question 1: "Is the "principal employer" definition clear in light of the explanation given above?"

Regulation 2 Interpretation

Respondents' views:

2.3 We received a number of responses asking for clarity in relation to the definition of "principal employer" in regulation 2. Respondents said that we needed to clarify that only one entity can act as a principal employer for the purposes of the statutory override. They said that the draft Regulations appeared to allow for two principal employers - one who is an existing principal employer and the other created for the purposes of the statutory override.

2.4 One respondent asked if we should be enabling one employer to make changes that would affect another employer's employees' benefits; they referenced the Scheme Modification Regulations which provide for obtaining consent to scheme rule changes from all employers participating in the scheme. They suggested that we should provide for employers to give consent to a nominated employer acting on their behalf.

2.5 Another respondent thought that the Regulations should require a special, separately nominated employer to act in relation to the override.

Government Response

2.6 We have revised the definition of "principal employer". The new definition provides that that anyone nominated to act on behalf of the employers participating in a multi-employer scheme to agree scheme funding matters with the trustees would be able to use the statutory override power on behalf of the employers.

2.7 Where there is no person nominated by the employers to agree decisions about scheme funding with the trustees, the employers will have to nominate someone to act on their behalf.

2.8 As to the suggestion that consent to using the amendment power should be sought from all employers in a scheme, we have attempted to find a pragmatic balance between making the statutory override power workable for multi-employer schemes and protecting the position of individual employers. We believe allowing anyone nominated to act on behalf of the scheme for scheme funding matters to use the power, but otherwise requiring employers to decide who would act, strikes a reasonable balance.

2.9 As to the suggestion about having a specially nominated employer we do not think this is necessary as we have developed a solution based around existing scheme funding arrangements.

Consultation Questions 2 to 8

2.10 **Questions 2 to 8 concern draft Regulations 4 to 8 which relate to the calculation framework for the statutory override.**

Question 2: What issues, if any, do you foresee with the framework?

Respondents' views

2.11 Respondents identified a number of technical points, including, in particular, the adjustment of assumptions to a best estimate basis and the use of the cash equivalent transfer value (CETV) basis by an employer-appointed actuary.

Government response

2.12 We address these issues with the framework in our responses to Question 3 and elsewhere in this document.

Question 3: Are there ways in which the draft calculation framework Regulations could be clearer as to how the calculations are to be performed and the data to be used for this task?

Regulation 4 Total annual employee contributions of the relevant members

Relevant members

Respondents' views

2.13 Respondents thought that a clearer distinction could be made between 'relevant member', as used in regulation 4(1), (relevant members at the calculation date), and 'relevant member' as at the time of implementation of the amendments, and that generally regulation 4 needed to be clearer in terms of adjustments not being required for leavers and new entrants.

Government response

2.14 We consider that the suggested changes are unnecessary. Overall, most stakeholders understood that the calculations are based on taking a snapshot of the scheme membership at the calculation date and using this membership data to project, over 12 months from that date, the value of the NI rebate to the employer and the value of any scheme amendment(s) over the same period, to assess that the value of the amendments is no more than the value of the NI rebate. Amendments are then made to scheme rules. The amendments come into force at the amendment date (no earlier than 6 April 2016).

2.15 The amended scheme rules will apply to the membership as at the amendment date and any new members joining after that date by virtue of section 24(3) of the Pensions Act 2014.

Regulation 5

Earnings of relevant members:

Respondents' views

2.16 We received a number of comments asking for clarification of how "the relevant part of the earnings of relevant members" is to be calculated, and in particular where the calculation date is after April 2016.

Government response:

2.17 We have made some changes to this regulation to refer to earnings between the Lower Earnings Limit (LEL) and the Upper Accrual Point (UAP), as well as providing a full definition of each to make this clearer.

2.18 The LEL will be the limit (or limits) that apply in the year after the calculation date. There could be two limits to be applied if an employer chooses a

calculation date midway through the tax year since the LEL is set for each tax year.

2.19 The LEL and UAP will continue to be set in legislation after April 2016. So the actuary will use the actual limits in the same way whether the calculation date is before or after April 2016.

Pensionable pay

Respondents' views

2.20 Consultees commented that some scheme rules provide for benefit accrual to be based on pensionable pay averaged over a longer period than the draft Regulations allow for in terms of the earnings data to be used for the calculations, and that the regulations should be amended to reflect this.

Government response

2.21 We are aware that some schemes average pensionable pay over a period longer than one year (or three years). The Regulations do not specify explicitly every detail of each calculation that needs to be carried out as part of the use of the override. It would be possible for the actuary to base their calculations initially on earnings data over the year (or three years) to the calculation date, but as part of the valuation of the member's benefits, include an adjustment (approximate or otherwise) for the effect of the longer averaging period where needed.

Regulation 7 Earnings data

Earnings data "significantly abnormal":

Respondents' views

2.22 It was suggested that referring to earnings data in regulation 7 as "significantly abnormal" was too vague and that earnings data over a 3 year period should be the standard requirement.

Government response

2.23 Regulation 7 requires calculations to be based on earnings data for one year prior to the calculation date but if it is agreed that this period would be "significantly abnormal", use of earnings data over a 3 year period is allowed.

2.24 The Department decided not to make 3 years' data the standard measure. This is based on the fact that the term "significantly abnormal" is used in other contexts, for example the Reference Scheme Test, and, as far as we are aware, interpretation of the term has never been raised as an issue. Further, where the most recent year's data is representative, there are advantages in using the most up-to-date data.

Average earnings:

Respondents' views

2.25 It was suggested that we amend regulation 7(2) to add the word "average" where it specifies that three years' earnings data is to be used.

Government response

2.26 We are confident that actuaries know how to use data appropriately and it is not necessary to specify every detail of every calculation in Regulations.

Interpretation

Respondents' views

2.27 Respondents raised how broadly the words "earnings data" in regulation 7 are to be interpreted. If too narrowly, it could restrict the use of other data such as the rate of the state pension or the lower earnings limit.

Government response

2.28 We understand that the term "earnings data" is generally understood by actuaries and so we have decided not to make any changes.

Regulation 8 General Calculation requirements

Regulation 8(4)(b) "Any other assumptions":

Respondents' views

2.29 Regulation 8(4)(b) provides for "any other assumptions" which the actuary considers necessary to be consistent with other assumptions. A respondent asked us to give an example of when other assumptions might be needed.

Government response

2.30 An example might be if an employer decided they wanted to move pension increases from RPI to CPI. If there were previously no CPI-linked benefits in the scheme, then there may not have been a specified assumption for CPI increases for funding purposes.

Best estimate basis and prudence Regulation 8(5) and (6)

Respondents' views

2.31 Regulation 8(5) provides for an actuary to take a best estimate approach to the assumptions needed to perform the calculations where the employer instructs the actuary to do so in writing. Assumptions may be adjusted to remove any margin for prudence.

2.32 Some stakeholders suggested that we prescribe the CETV basis as the best estimate basis. One respondent said that the best estimate basis should be the default on the grounds that this was easier to communicate to employees and there would be no need to explain why prudence is removed.

2.33 Another comment was that our approach to removing margins for prudence in Regulations was "all or nothing": that is draft Regulations require either all or none of the prudence to be removed. The respondent thought that an employer should be able to specify the removal of margins from particular assumptions. Another suggestion was that the Regulations should state explicitly that the actuary could reduce, rather than remove entirely, the prudence in one or more assumptions.

Government response

2.34 We considered the possibilities of using a best estimate basis as the default approach or prescribing the CETV basis to be used when the calculation framework was being developed. Following extensive discussions with stakeholders, we decided against these approaches for a number of reasons. Principal amongst these is that the CETV basis does not include all the assumptions needed for the actuarial calculations. Further, the scheme funding basis provides a more robust, documented framework from which to derive assumptions for the purposes of the override.

2.35 If the employer chooses to make amendments without removing prudence from assumptions, it will reduce the impact on members.

2.36 Following feedback and discussion with representatives from actuarial bodies, we have decided to allow employers to choose which assumptions they require prudence to be removed from. We have taken technical advice on this point, and providing for this will make the removal of prudence more workable in practice.

2.37 Where the employer wishes the actuary to remove margins for prudence in the assumptions, the employer must write to the actuary and instruct which assumptions this will apply to.

2.38 As to the point about reducing, rather than removing, prudence in particular assumptions, we were not convinced that this was appropriate. We believe that actuaries should have sufficient information to be able to remove margins for prudence where the employer requests this. The policy intention is to enable employers to use a best estimate basis where they wish to do so.

Removing margins for prudence:

Respondents' views

2.39 Regulation 8(6) provides that the principal employer or employer may write to the actuary instructing them to adjust assumptions to remove any margin for prudence. Some respondents were concerned about how the margin for prudence can be removed by an actuary who is not the scheme actuary and who is unfamiliar with how the trustees and scheme actuary allowed for prudence.

2.40 A stakeholder asked whether, in relation to draft regulation 8(5), if the actuary is not the scheme actuary, can he be satisfied that adjustments are consistent with the underlying principles of the trustees? Would a preferable form of words be "the adjustments are not inconsistent with the CETV basis?"

2.41 Also raised was how an actuary will remove prudence from assumptions not included in the CETV basis.

Government response

2.42 We have discussed these points with representatives from the actuarial profession. The scheme actuary is unlikely to be able to advise the employer on the type of amendments being made because that could create a conflict of interest.

2.43 Regulations require the trustees to provide information requested by the employer. This includes information that may be required by the employer's actuary for this purpose. We understand that the data needed to remove margins for prudence would be data which the employer would be likely to have already from discussions with the trustees on scheme funding. If the employer does not possess the required data, then this can be included in the request for information from the trustees under regulation 12 (information).

2.44 As to the suggested change to wording relating to draft regulation 8(5), we have not received comments that support this suggestion from actuarial organisations, and have therefore decided not to accept the suggestion.

2.45 Our view is that if prudence is being removed from an assumption that is not included in the CETV basis, the actuary is required to adjust the assumptions in a way that is consistent with the underlying principles applied to the assumptions that are included in the CETV basis. The documentation in support of the calculation of the technical provisions should also indicate whether any margin for prudence has been included in that particular assumption.

Pension professionals and advisers:

Respondents' views

2.46 There was a concern that the framework is vague, and would result in professional advisers adopting an overly cautious approach, so elements of prudence could remain. The respondent suggested that adding an overarching objective to regulation 8(4)(b) would raise confidence that the Regulations will be fit for purpose.

Government response

2.47 The primary legislation is clear that the objective of the policy is to enable employers to amend scheme rules in order to recoup their lost NI rebate. Regulations are clear that this can be done on a best estimate basis where required by the employer. Therefore, we do not consider it to be necessary to add an explicit overarching objective as suggested.

New schemes:

Respondents' views

2.48 A respondent asked if we needed to provide specifically for schemes that do not have a CETV basis or a valuation because they are new schemes.

Government response

2.49 As far as we are aware, only new DB schemes may not have had a valuation. We are not aware from our feedback that this would create major problems in using the override. Extensive stakeholder engagement has not uncovered any schemes without a CETV basis. On that basis, we do not consider it necessary to provide for either of these scenarios.

Question 4: Is there anything else that would assist the calculation process if provided for in regulations?

2.50 Generally, there were no issues raised in the responses to this question that are not dealt with elsewhere in the Government's Responses to questions 2 to 8.

Question 5: Recorded in the demographic assumptions in the Statement of Funding Principles is the assumption concerning when the member is expected to leave pensionable service that the actuary will refer to where needed in making calculations. Does this need be separated out and more clearly defined?

2.51 The feedback from technical stakeholders on this question was that it is not necessary to clarify in regulations the assumption concerning when the member is expected to leave pensionable service.

Question 6: There are benefits that don't accrue, for example ill-health retirement benefits. We would not expect amendments to benefits that don't accrue. Do we need to specify this in Regulations?

Regulation 6 Scheme liabilities in respect of the benefits that accrue annually for, or in respect of, the relevant member

Respondents' views

2.52 Stakeholder feedback was that the draft Regulations could be clearer on what benefits are considered to be "accrued" for this purpose. This is because there is a potential issue where an enhancement adds a number of years of service to a member's benefits. For example ill-health benefits often provide an enhancement that adds a number of years of service to the member's entitlement at the same accrual rate as normal retirement benefits.

Government response

2.53 We considered the responses carefully and what could be done, but concluded that, due to the variations in scheme design, we could not be more specific. However, we believe that the Regulations should work as intended.

Question 7: Do the Regulations setting out the calculation requirements work for hybrid schemes?

Respondents' views

2.54 Some respondents queried why regulation 6(3) excludes money purchase benefits from being taken into account when considering the scheme's liabilities in respect of the relevant members. Stakeholders queried whether the override would be able to be applied appropriately for schemes that provide DC benefits with a DB underpin. Another stakeholder's concern was that the statutory

override may be used to re-design a scheme in a way that would place it on a DC footing for future accruals.

Government response

2.55 The amendment power can only be used for those members who are contracted-out and who are therefore accruing benefits on a DB basis. We have retained the requirement for money purchase benefits to be excluded (regulation 6(3)) so that employers may not use the amendment power to redesign DB schemes to provide money purchase benefits instead.

2.56 Our view is that it is highly unlikely that the actuary would be able to provide certification where an employer proposed to alter the scheme's benefits from a DB to a DC footing. Schedule 14, paragraph 2(2)(b) specifies that the amount of the scheme's accruing liabilities cannot decrease by more than the annual increase in the employer's NICs in respect of relevant members; money purchase benefits are excluded by regulation 6(3). If an employer tried to change the scheme's accrual basis from DB to DC using the amendment power, the actuary would have to assume that the amount of the scheme's liabilities accruing in the future would reduce to zero. A certificate could therefore not be issued.

2.57 Sponsors of schemes providing DC benefits with a DB underpin (so the member receives a "better of" outcome) will therefore not be able to use the employer's amendment power to reduce DC benefits. We gave careful consideration to respondents' views on this, but on balance, decided that the provision in regulation 6(3) should remain. This is because our analysis suggests that the prevalence of such underpin schemes is relatively limited, and we have to balance sponsors' ability to amend DC benefits in such schemes against the wider risk of the amendment powers being used inappropriately for all DB schemes.

2.58 As at January 2015, the maximum number of schemes that are money purchase with a DB underpin is 220, and the maximum number of members actively accruing benefits in these schemes on this basis is 24,000. This represents approximately 8 per cent of schemes and a maximum of 2 per cent of active members.

Question 8: The employer may choose any calculation date after 31 December 2011.This is to allow the employer to use the scheme's last triennial valuation as a base for the required calculations. However there is some flexibility here because we have not required the employer to use the scheme's last valuation date. Do you foresee any issues with our approach to the calculation date?

Regulation 8 General calculation requirements

Respondents' views

2.59 A particular concern was the reference to the Statement of Funding Principles (SoFP) in regulation 8(4) - specifically that it was not clear which SoFP will apply at the calculation date. Sub-paragraph 8(4) provided that calculations must be made using the methods and assumptions used to calculate the scheme's technical provisions as recorded in the SoFP applicable at the calculation date. The difficulty, respondents pointed out, is that the SoFP is drawn up and formally adopted later in the scheme valuation process. So, if an employer chooses as the calculation date the scheme valuation date, at that date the "old" SoFP agreed for the previous valuation will be in force.

2.60 Some consultees were concerned that giving employers the flexibility to choose a calculation date other than a scheme valuation date could result in an employer choosing a date to maximise the amendments they could make and yet remain within the constraints of the value of amendments being no more than the lost NI rebate.

Government response

2.61 By way of clarification, the draft Regulations referred to the SoFP because this statutory document sets out the methods and assumptions used to calculate the technical provisions.

2.62 We have modified regulation 8(4)(a) to make it clear which methods and assumptions are to be used. If the calculation date is the same date as a scheme valuation date, then the methods and assumptions used for that valuation are used for the calculations required for the override. If the calculation date is not a valuation date, then the methods and assumptions from the previous valuation should be used but updated to take account of changes in market conditions. We have removed the reference to the SoFP, to make it clearer for the actuary which valuation the methods and assumptions should be linked to.

2.63 Turning to the issue about the choice of calculation date, we consider that, on balance, the risks are limited, relative to the benefits of the proposed approach, and propose not to restrict employers to any specific date.

Question 9: Is our understanding of how salary sacrifice arrangements work correct? Is there a need to make provision in Regulations for this arrangement?

2.64 Question 9 invited respondents to comment on whether our understanding of salary sacrifice (that this was a contractual agreement) was correct. The majority of respondents agreed, and so no explicit provision has been made for salary sacrifice arrangements in the Regulations.

Question 10: Our intention is for employers sponsoring shared cost schemes to be able to make use of the override to recoup their increase in NI costs due to abolition of contracting-out. Our expectation is that any amendments made would be proportionate and limited to the minimum needed to recoup the additional costs. For example it would not be appropriate for sponsors of these schemes to use the override power to make scheme rule changes that, in effect, convert a shared cost scheme into a scheme with a more conventional funding arrangement. Do we need to make further provision in Regulations to prevent scheme amendments of this magnitude?

Draft regulation 10 – further restrictions on the use of the power by shared cost schemes (removed from final Regulations)

Respondents' views

2.65 Several respondents thought that regulation 10 was unnecessary or not effective.

Government response

2.66 On further consideration and taking account of the feedback we received, we have removed this provision.

Question 11: Are there any other funding arrangements that may require specific provision in these Regulations to allow employers to use the override as intended?

2.67 Respondents did not identify other sorts of funding arrangements requiring specific provisions.

2.68 Questions 12 to 18 in the consultation document relate to the role of the actuary and information requirements (draft Regulations 11 to 13).

Question 12: It is for the employer to appoint an actuary. The actuary may be employed by the employer already or an independent or, with the approval of the trustee, the scheme actuary. Are Regulations clear that it is for the employer to appoint the actuary or do we need to clarify this?

Regulation 10 (draft regulation 11) Actuary

Respondents' views

2.69 Most respondents thought it was not clear in Regulations that it will be for the employer to appoint an actuary. However, one respondent thought that the scheme actuary should be able to be appointed by the employer for the purposes of the amendment power.

Government response

2.70 We have modified regulation 10 to clarify that an employer (or principal employer) must appoint an actuary. If the scheme actuary was appointed by the employer, this would result in a conflict of interest on the actuary's part. Where a conflict of interest potentially exists, generally, actuaries would be disallowed (by published professional guidance) from carrying out that work.

Question 13: Is four weeks an achievable and reasonable timeframe for trustees to provide the information or is longer needed – if longer needed, how much longer?

Regulation 12 (draft regulation 13) Information

Time limits: respondents' views

2.71 The draft Regulation provided that trustees or managers of a scheme must provide any information requested by the employer or principal employer within four weeks. Many stakeholders were concerned that four weeks is too short a timeframe within which to provide information.

Government response

2.72 We have made changes to the timescales for information requests so that information must be provided within such reasonable period as agreed with the principal employer or employer. We have not defined "reasonable", which has its usual meaning. As an indication, where the calculation date is the same as a

triennial funding valuation date, and that valuation has already been completed, all relevant information should be able to be provided within eight weeks, whereas the trustees might need longer if the valuation is still in progress or if the calculation date is not a triennial funding valuation date.

Question 14: By "information" we mean individual membership data as well as scheme data, such as the scheme's benefit structure. Is this clear in draft Regulations or do we need to be more specific about the type of data trustees will be obliged to provide? If so, what data should be specified?

Regulation 12 (draft regulation 13) Information

Respondents' views

2.73 Respondents felt that it would not be helpful to be more specific about the type of data trustees will be obliged to provide since there would be a risk of missing some necessary data, but were concerned that as drafted the Regulation was too broad and would allow employers to ask for any information.

2.74 Some respondents were also concerned about data protection requirements and asked that we confirm in Regulations that data can be shared and used for the purposes of the statutory override without breaching the data protection requirements.

Government response

2.75 We have added "reasonably" to regulation 12(1) so the trustees or managers of a scheme must provide information that is reasonably requested by the employer or principal employer. We would not expect employers to request any information that is not required for the use of the amendment power.

2.76 The Regulations impose a legal obligation on the trustees of a scheme to share the required data with the employer. This includes information that may be required by the employer's actuary. Our understanding is that the membership data needed would mostly be data which the employer would be likely to have already. If the employer does not possess the required data, then this can be included in the request for information from the trustees under regulation 12 (information). Trustees will not breach any data protection requirements by sharing this data.

2.77 Further, our understanding is that most pension schemes have fairly general provisions about collecting and using data in relation to administering the scheme, and it could be anticipated by the data subject that their information might be used in order to make changes to the scheme, even though it may not have been anticipated that the data might be used for this specific employer amendment power.

2.78 We are aware that the Institute and Faculty of Actuaries General Counsel recently published guidance for actuaries and firms dealing with personal data.

http://www.actuaries.org.uk/research-and-resources/documents/data-controller-responsibilities-guidance-material-actuaries-and--1

Question 15: Is there any scheme information that trustees do not have access to and that the employer is likely to need to be able to make amendments to scheme rules?

Regulation 12 (draft regulation 13) Information

Respondents' views

2.79 Respondents said that trustees will not have access to some of the earnings data which will be required for the purposes of regulation 5(1) of the statutory override regulations. They said where there is a single employer (or single employer section), this should not be a problem as the employer should hold that information, but in a multiple employer scheme the "principal employer" will not necessarily have access to that information in respect of each employer. They suggested it may be necessary to include an obligation on each employer to provide such information if requested by the principal employer.

Government response

2.80 Regulation 12 does not require the trustees or managers to provide any information which they do not already hold. Where the principal employer requires information from other participating employers, they will need to obtain that data from the other employers. The relevant circumstances will depend on the specific scheme and employers, and we do not believe it is necessary to include provision for this in the regulations.

Question 16: Can you foresee any problems with providing information to the principal employer for associated employer schemes?

Regulation 12 (draft regulation 13) Information

Respondents' views

2.81 Respondents thought there could be data protection issues for trustees and suggested that regulations should confirm that data can be shared without breaching data protection requirements. Scheme records may not indicate which employer a member works for, so some work may be needed to allocate members between employers and remove data not relevant to that employer.

Government Response

2.82 This issues raised by respondents are not specific to associated employer schemes. The Government's Responses to these points are covered elsewhere in this document.

Question 17: Can you foresee any problems with providing information to the principal employer for non-associated multi-employer schemes?

Regulation 12 (draft regulation 13) Information

Respondents' views

2.83 Feedback suggested that data protection requirements and commercial sensitivity were the two main concerns in relation to non-associated multi-employer schemes providing information to the principal employer. For example, some respondents thought that unrelated employers would be unwilling to share commercially sensitive information, such as employee salary details. Others said there would be possible data protection issues for trustees because they might have to share one employer's data with another employer.

Government response

2.84 The Regulations impose a legal obligation on the trustees of a scheme to share the required data with the employer and their actuary. We have discussed this issue with representative groups and concluded that where data protection or commercial sensitivity issues arise, the sponsoring employers will need to reach agreement and should be able to devise pragmatic local solutions. Where a principal employer is not already in place, data protection issues should be included in the employers' consideration of a mechanism to appoint a principal employer for the purposes of the amendment power.

Question 18: Are all the things we require the actuary to certify correct? For example, can the actuary certify that the amendments comply with Schedule 14 paragraph 3?

Regulation 11 (draft regulation 12) requirement for actuary's certificate

Respondents' views

2.85 Stakeholders were concerned about the requirement in draft regulation 12(1) for an actuary to certify certain matters. They thought that it is for a lawyer, not an actuary, to certify compliance with Schedule 14 paragraph 3 of the Pensions Act 2014.

2.86 Another issue was how flexible actuaries could be in relation to the content of the certificate, and whether or not the layout of the certificate must match that in the Regulations exactly, creating a risk that the certificate is invalid if it does not use the exact wording provided, or could it contain additional information.

Government response

2.87 On reflection, we agree that whether the proposed amendments might affect members' subsisting rights is more a question for a legal advisor than the actuary. We have removed the requirement for the actuary to certify that the amendments comply with paragraph 3 of schedule 14. We have, however, retained the requirement for an actuary to certify that the proposed amendments comply with paragraph 2(2) of Schedule 14. Paragraph 2(2) sets the limits on the extent of the amendments that can be made. It is asking an actuary to certify that, for example, a proposed amendment to employee contributions would not increase the amount of the total annual employee contributions of the relevant members by more than the annual increase in the employer's national insurance contributions in respect of them.

2.88 In terms of the content of the certificate, we have revised regulation 11 so that the minimum information to be certified is specified in the Schedule to the Regulations. The actuary can add additional information or explanation if he or she wishes (in addition to the usual practice of the actuary providing a separate report for the employer, containing the analysis and recommendations relating to the employer's proposals to change the scheme rules). This information includes the estimates of the values of the scheme amendments, that the amendments comply with paragraph 2(2) of Schedule 14 to the Pensions Act 2014, and that the calculations have been made in accordance with the requirements in the Regulations.

Questions 19 to 22

2.89 These questions concern multi-employer schemes and relate to regulations 13 to 15 (draft Regulations 14 to 16).

Question 19: Do the changes in the definitions work effectively for:

a. **Employers sponsoring a single employer section of a segregated multi-Employer Scheme (MES)?**

b. **Employers sponsoring a multi-employer section of a segregated MES where the employers are associated?**

c. **Employers sponsoring a multi-employer section of a segregated MES where the employers are not associated?**

d. **Employers sponsoring a non-segregated scheme where the employers are associated?**

e. **Employers sponsoring a non-segregated scheme where the employers are non-associated?**

Respondents' views:

2.90 The two main issues were:

- Some respondents thought that the proposals are potentially unworkable for many multi-employer schemes, especially those with non-associated employers. They were concerned about how employers would, in practice, give the principal employer the power to act in order to use the statutory override on their behalf.

- Respondents were concerned about different uses of the word "section" in draft Regulations 14, 16 and 17. The same word is used to refer both to a part of a scheme with a different benefit scale and a section in a segregated scheme.

Government response

2.91 The Department's intention is to enable any employers who sponsor a private sector scheme, including those who sponsor multi-employer schemes, to be able to use the power to amend scheme rules if they are unable to agree changes with the scheme trustees. To that end the Regulations make provision so that, depending on the structure of the multi-employer scheme, either each employer may act or one employer, the "principal employer", may act on behalf of all employers in the scheme. We recognise, however, that no single process will work for every scheme but the approach chosen attempts to find a pragmatic balance.

2.92 Draft regulation 17 has been removed (this is dealt with more fully later in this document). So the term "section" in these Regulations now only refers to a part

of a scheme which is clearly identifiable and separate for funding and investment purposes.

Question 20: Do you agree that employers sponsoring non-associated multi-employer schemes are able to use the statutory override as we have suggested?

Respondents' views:

2.93 Many respondents re-stated the concerns they raised in response to earlier questions, about the definition of principal employer and how that definition could work for non-associated employers. Some respondents called for a mechanism whereby such employers could appoint a principal employer to act. Other concerns were about sharing data that is commercially sensitive with the principal employer. These points have been addressed in our responses to questions 1 and 17 (which are reproduced below for ease of reference):

Question 1 Government response

2.94 We have revised the definition of "principal employer". The new definition provides that that anyone nominated to act on behalf of the employers participating in a multi-employer scheme to agree scheme funding matters with the trustees would be able to use the statutory override power on behalf of the employers.

2.95 Where there is no person nominated by the employers to agree decisions about scheme funding with the trustees, the employers will have to nominate someone to act on their behalf.

2.96 As to the suggestion that consent to using the amendment power should be sought from all employers in a scheme, we have attempted to find a pragmatic balance between making the statutory override power workable for multi-employer schemes and protecting the position of individual employers. We believe allowing anyone nominated to act on behalf of the scheme for scheme funding matters to use the power but otherwise requiring employers to decide who would act strikes a reasonable balance.

2.97 As to the suggestion about having a specially nominated employer, we do not think this is necessary, as we have developed a solution based around existing scheme funding arrangements.

Question 17 Government response

2.98 The Regulations impose a legal obligation on the trustees of a scheme to share the required data with the employer and their actuary. We have discussed this issue with representative groups and concluded that where data protection or commercial sensitivity issues arise, the sponsoring employers will need to reach agreement and should be able to devise pragmatic local solutions. Where a

principal employer is not already in place, data protection issues should be included in the employers' consideration of a mechanism to appoint a principal employer for the purposes of the amendment power.

Question 21: Are there other options you would like us to consider for non-associated multi-employer schemes?

Respondents' views:

2.99 Respondents came forward with a number of proposals in relation to non - associated multi-employer schemes including:

- employers to nominate a representative body to exercise the statutory override.
- a mechanism for appointing a representative employer to act as principal employer will need to be established for these non-associated multi-employer schemes.
- a joint power resting in all participating employers.
- express provision in legislation for an employer to be nominated to act as "principal employer" by the other employers.

Government response

2.100 We considered carefully the various proposals. We decided on the approach for a principal employer outlined in our response to Question 1 which is repeated below for ease of reference.

Question 1 Government response

2.101 We have revised the definition of "principal employer". The new definition provides that that anyone nominated to act on behalf of the employers participating in a multi-employer scheme to agree scheme funding matters with the trustees would be able to use the statutory override power on behalf of the employers.

2.102 Where there is no person nominated by the employers to agree decisions about scheme funding with the trustees, the employers will have to nominate someone to act on their behalf.

2.103 As to the suggestion that consent to using the amendment power should be sought from all employers in a scheme, we have attempted to find a pragmatic balance between making the statutory override power workable for multi-employer schemes and protecting the position of individual employers. We believe allowing anyone nominated to act on behalf of the scheme for scheme funding matters to use the power, but otherwise requiring employers to decide who would act, strikes a reasonable balance.

2.104 As to the suggestion about having a specially nominated employer we do not think this is necessary as we have developed a solution based around existing scheme funding arrangements.

Question 22: Are there any situations where there would be more than one principal employer in relation to a scheme or a section of a scheme?

Respondents' views:

2.105 Respondents were in general not aware of situations where there would be more than one principal employer in relation to a scheme or section of a scheme.

Government response

2.106 As stated previously in this document, we have now amended the definition of principal employer in respect of multi-employer schemes.

Cross–subsidy questions

Draft regulation 17 Schemes with different rules for different members (removed from final Regulations)

Question 23: Will this Regulation help prevent cross – subsidy between these member groups

Question 24: Is there any other provision that would help prevent deliberate cross-subsidy?

Respondents' views

2.107 Generally, respondents thought that draft regulation 17 was well-intentioned, if impractical. Some respondents felt that the draft Regulation introduced significant complexity and could produce perverse results; others thought that it could cause additional, unnecessary expense. There were concerns that schemes were not necessarily organised in ways which the Regulation expressed. It was suggested that the employer would have an interest in avoiding measures that would be blatantly unfair to a particular group of employees, and one respondent questioned whether the provision was needed at all. Two respondents provided alternative options for this draft Regulation.

Government response

2.108 We included this draft Regulation on the assumption that pension schemes would have clearly defined sections / groups of members with different scheme rules that applied to them; these sections / groups would therefore be easy to identify and certify where the employer's amendment power was used. However, this does not appear to be the case.

2.109 We thoroughly investigated the suggestions made by consultees for alternative ways to require separate certification for different groups of members accruing benefits under different rules. We realised that retaining this provision could have made using the Regulations too onerous in some circumstances and employers may have decided that the amendment power was unworkable. In other cases, this provision could have resulted in unintended outcomes. We concluded that it was not possible to satisfactorily regulate for this situation, and have therefore removed this provision. We would expect employers to explain clearly to employees, as part of the consultation process, how different groups of employees are affected by the proposed amendments.

SCHEDULE Information to be included in Actuary's certificate (SCHEDULE 1 in draft regulations)

Question 25: Is there any other information that should be included in the actuary's certificate?

Respondents' views:

2.110 In summary, respondents' views were:

- As regards the data and assumptions used, the wording on the certificate should be flexible enough to allow for various possibilities as to different levels of explanation. Alternatively, rather than trying to capture this detail on the certificate, reference could usefully be made to an attaching report from the actuary describing this, with the content of such a report being subject to the principles in the Financial Reporting Council's Technical Actuarial Standards;

- The proposed effective date of the amendments should be included in the certificate.

Government Response

2.111 We have changed the required form of the actuary's certificate from the consultation draft so that the actuary's certificate has to include the information contained in the Schedule to the Regulations rather than being exactly in the form specified in the Schedule. The basic content of the certificate is the same, but provided the required information is included, other information that the actuary feels is relevant to the calculations can also be included. We would also expect that the actuary would provide a report for the employer, providing an actuarial analysis of the employer's proposals.

2.112 New regulation 16 requires the employer to consult the trustee or managers of the scheme about an appropriate amendment date (that is, the date the amendments will take effect) following the issue of the actuary's certificate. This means it is not possible for the actuary to enter the date of the amendment on the certificate before that consultation takes place.

Question 26: We would be grateful if respondents could include estimates of costs, by scheme size, including a breakdown of professional fees where possible.

Government response

2.113 We are very grateful to those who replied to this question. A very small number of estimates were received. Respondents were unable to provide robust estimates that we could use in the Impact Assessment that accompanies these Regulations.

Chapter Three: Other issues raised by respondents

3.1 This chapter deals with the issues which were raised by respondents but not covered in Chapter 2.

Regulation 2: Interpretation

Respondents' views

3.2 A number of respondents said that greater clarity was needed about when amendments to scheme rules using the statutory override would have effect. One respondent commented that it would be helpful if it were made explicit that terms that have not been defined in the draft Regulations are to be consistent with meanings in other legislation.

Government response

3.3 We acknowledge the concern about when amendments take effect and, in order to clarify this, we have added a new definition to regulation 2 - the "amendment date" - which is the date when amendments using the power take effect (see also new regulation 16). In relation to the definitions point, the terms used in the Regulations have the same meaning as any terms which are defined in The Pensions Act 2014. Terms that are not defined have their usual English meaning.

Regulation 3: Protected persons to whom the power does not apply

Respondents' views:

3.4 We received a number of comments about regulation 3, which in summary were:

a. that a date should be specified for when a member had to be a protected person to be outside of scope for amendments made by the statutory override;

b. that an active member in the Railways Pension Scheme can have protected person's status in respect of previously accrued rights only and these members should be in scope for amendments made by the override;

c. that whilst the draft Regulations relating to the railways industry (specifically draft regulation 3(4)) correctly exclude from the scope of the override power persons with protected rights, they should also dis-apply

the override power from persons with the right (sometimes referred to as "the indefeasible right") to participate in the Railways Pension Scheme.

Government response:

3.5 We agree with the points in paragraph (a) and (b). Regulation 3 now excludes from the scope of the amendment power, persons who are "protected" (as defined in relation to each industry by regulation 3) on or after the amendment date. So the amendment power cannot be used in respect of protected persons who are active members of the scheme on the date amendments made using the employer's amendment power take effect, nor does it apply to those who may have left the scheme before that date, but re-join later and their protection remains, as their employment was considered continuous. Regulation 3(4) also now excludes those people who are only protected in respect of previously accrued rights.

3.6 In relation to point (c), the amendment power is not relevant to determining who is eligible to be a member of a scheme. Therefore we did not need to consider an exclusion in relation to the indefeasible right to be a member of the Railways Pension Scheme.

Further restrictions on the use of the power - new Regulation 9:

Respondents' views

3.7 There was a concern among stakeholders about employers potentially using the power to make changes that would not be counted as reducing scheme liabilities, and therefore would not count towards the limit on the extent of changes that can be made under the power, and amending the scheme rules in a way which would not necessarily have a bearing on the employer's immediate funding costs.

Government Response

3.8 We agree this is a concern and have added a provision to prohibit one type of scheme amendment. Regulation 9(1) prohibits an employer taking a power to determine any matter away from the trustees. This would for example, prevent an employer amending the scheme rules so that it is the employer, rather than the trustees, who consents to deferred members taking early retirement.

Notification of amendment date – new Regulation 16:

Respondents' views

3.9 Respondents asked how the changes were to be implemented.

Government Response

3.10 The provisions in the Pensions Act 2014 give employers the power to make amendments to scheme rules without trustee agreement. No formal procedures for bringing the amendments into effect are needed since the power to make the amendments derives directly from the legislation. However, we recognise that some procedure is needed so that trustees can implement the amendments. New regulation 16 requires the employer to consult the trustees or managers of the scheme about the timing for the amendments to come into effect.

Guidance for actuaries

Respondents' views

3.11 Some stakeholders asked us to publish guidance setting out the role of the actuary.

Government response

3.12 We have responded to the main issues raised in the consultation in this Response document, so we do not consider it necessary to issue further guidance.

When do employers' contributions reduce?

Respondents' views

3.13 Respondents asked whether the regulations should give employers a power to reduce their scheme contributions. Respondents also queried when the employer would see a reduction in their scheme contributions following use of the amendment power: would employers have to wait until the next triennial valuation to reduce their scheme contributions if the trustee refused to authorise a mid-cycle revision to the schedule of contributions? Another concern was whether the trustee or employer could be in breach of the obligation to record all contributions / make payments according to the agreed schedule of contributions where amendments using the power were made.

Government response

3.14 Employers may not use the amendment power to directly reduce their contributions to the scheme. The policy intention is not about enabling employers to amend the scheme rules without trustee agreement to reduce their contributions, as this would interfere with scheme funding arrangements. Scheme funding requirements are set out in Part 3 of the Pensions Act 2004. The timing of when the employer's contribution will reduce depends on the

exact circumstances of the scheme, the decisions made by the scheme trustees and sponsor, and where the scheme is in its triennial funding valuation cycle.

3.15 The Pensions Regulator's "Code of practice no.3 Funding defined benefits" states, in the section headed "Changes in circumstances": "Trustees should be alert to material changes which may lead them to review, and if necessary, revise their scheme investment or funding strategies." We would expect scheme trustees to react to any use of the amendment power by the sponsoring employer by considering the appropriate process and timing for reviewing relevant scheme funding documentation.

3.16 Once the amendment power has been used, the trustees would have a duty to consider revising the schedule of contributions to reflect the change, for instance, an increase in member contributions. We agree that not doing so would lead to a conflict between the schedule of contributions and the scheme rules relating to the level of member contributions. The Regulations give the employer the choice of calculation date, so the employer could choose a calculation date to minimise any such problems.

Can amendments be "void" or "voidable"?

Respondents' views:

3.17 Some respondents asked whether amendments that failed to comply with requirements in the Regulations would be void or voidable.

Government Response

3.18 The Department's view is that amendments would be void. There is no provision in the Regulations as to how they would be declared void or by whom.

Amendments made under the normal power of amendment

Respondents' views

3.19 There was a concern about some employers potentially "double dipping": employers and trustees agree to amendments to scheme rules - to take account of the employer's increased costs due to the abolition of contracting out - using a scheme's normal power of amendment; however, subsequently the employer uses the statutory power of amendment to make further changes. Respondents said that, in practice, trustees ought to be able to make clear, and document accordingly, that they are only agreeing to relevant scheme amendments on the understanding that employers will not "double dip" by subsequently using the amendment power.

3.20 It was suggested that the Explanatory Notes to the Regulations highlight this possibility in order to remind trustees who are agreeing to amendments under the normal power of amendment that they may wish expressly to record that their agreement to such amendments was predicated on that understanding.

Government Response

3.21 Our view is that trustees should, where appropriate, make it a condition of any amendments made under the normal power of amendment where the intention is for the employer to recoup their increase in NI costs that the employer does not subsequently use the statutory override power, obtaining the employer's written consent to this.

3.22 In relation to the point about the Explanatory Note, we understand respondents' concerns, but the Regulations deal only with the amendment power, and the Explanatory Note to the Regulations can only explain what is contained in the Regulations.

Consultation requirements

Respondents' views

3.23 Stakeholders expressed concerns about the need to consult members over the changes to scheme rules using the employer's amendment power. One respondent asked whether using the amendment power would trigger a statutory duty to consult, and if so, this should be made clear in the Regulations. Another respondent wanted the Government to make it clear that the duty to consult was not overridden where the employer power was used. In addition, three main issues were identified:

- Why require consultation when the changes are limited (so members are protected),

- The cost to the employer of working out whether alternatives suggested by members would be within the override limits,
- How the consultation requirement would work for multi-employer schemes.

Government Response

3.24 The existing consultation legislation, when scheme rule changes are proposed will apply (the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006)[2] and employers should clearly set out the scheme amendments they propose to make, together with how this will impact members.

3.25 Employers will have a range of options for amending scheme contributions and benefits using the power. It is therefore necessary for consultation to take place, for the same reasons as for any other scheme amendments.

3.26 In particular, members and their representatives should be assured by the employer that their proposals to make scheme rule changes are equitable across scheme membership. It is critical that employers' proposals are transparent, as we have not been able to include an explicit provision to prevent deliberate cross-subsidy between different groups of members.

3.27 As to how the consultation requirement would work for multi-employer schemes, the normal consultation arrangements will apply in the same way as for when any other change is proposed to pension scheme rules. We are aware that an employer may not agree with the proposals, but still have to consult employees; this will be no different from what would happen under scheme amendments proposed by the trustee.

3.28 The use of the amendment power is at the discretion of the employer. Where the employer chooses to use the power, consultation will incur costs. These arise as a result of the existing statutory requirement to consult, which would apply whether employer sponsors make amendments with the agreement of the trustees in the ordinary way, or by making changes using the amendment power.

[2] http://www.legislation.gov.uk/uksi/2006/349/contents/made

Annex A: Consultation respondents

Aon Hewitt
Associated Society of Locomotive Engineers and Firemen
Association of Consulting Actuaries
Association of Member-Nominated Trustees
Association of Pension Lawyers
Aviva
BP UK Pensions & Benefits
British Airways Pensions
Capita Employee Benefits
Confederation of British Industry
EEF (the manufacturers' organisation
Electricity Pension Trustees Limited
Eversheds LLP
First Actuarial LLP
Hogan Lovell International LLP
Hymans Robertson LLP
Institute and Faculty of Actuaries
KPMG LLP
Mercer
Mr G Withers
National Association of Pension Funds
National Union of Rail, Maritime & Transport Workers
Royal Bank of Scotland Group
RPMI (acts as executive and administrator of the Railways Pensions Scheme on behalf of the Railway Pension Trustee Company Limited
Sackers & Partners LLP
Scottish Widows
Squire Patton Boggs (UK) LLP
Superannuation Arrangements of the University of London
The Law Society of Scotland's' Pensions Law Sub-committee
The Society of Pension Consultants
Towers Watson
Trades Union Congress
Transport Salaried Staffs Association
Unite the union

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