

FINANCIAL ASSISTANCE SCHEME

**THE FINANCIAL ASSISTANCE SCHEME
(MISCELLANEOUS PROVISIONS) REGULATIONS 2008**

**THE GOVERNMENT RESPONSE TO THE
CONSULTATION**

29 April 2008

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INTRODUCTION

1. On 6 March 2008 the Government launched a consultation on the draft Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2008 (“the draft Regulations”)¹.
2. The Financial Assistance Scheme was set up in September 2005 to provide help to scheme members who had lost out on their final salary pension in circumstances of company failure prior to the introduction of the Pension Protection Fund (PPF). The draft Regulations set out proposals to implement key elements of the extension to the FAS which was announced on 17 December 2007 by Rt Hon Peter Hain, the then Secretary of State for Work and Pensions.
3. Under the terms of that announcement, all FAS qualifying members will be guaranteed 90% of their accrued pension, paid from the later of the scheme normal retirement age (NRA) and age 60. The draft Regulations are intended to implement these key enhancements to the scheme.
4. To help ensure that qualifying members receive payment at these revised levels as soon as possible the written consultation period for the draft Regulations was limited to two weeks and ended on 20 March 2008. Opposition Members of Parliament and other stakeholders agreed with DWP Ministers that the limited written consultation period would facilitate speedy implementation whilst still providing adequate time for the consultation to be meaningful. Given the limited written consultation period, the Department held meetings during that period with representatives from the Trades Unions and the Pensions Action Group to facilitate their responses.
5. This document sets out the main points made in relation to the draft Regulations and provides the Government response². 28 respondents provided their views or those of the organisation they represent. Some of those respondents asked not to be identified; a list of the other respondents is contained in an Annex to this document. The Government is grateful for the contribution of all respondents towards developing a final draft of the Regulations which were laid on 29 April 2008, with a view to

¹ A copy of the draft Regulations can be found on the Financial Assistance Scheme (FAS) website: <http://www.dwp.gov.uk/fasH>.

² A separate consultation on proposed revisions to the annuity factors employed by the FAS was also published on 6 March 2008 (but with a longer timescale). A further set of draft Regulations (the draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008) were published for consultation on 28 March. The Government response to issues raised in relation to those consultations will be published in due course. Details of those consultations can be found on the FAS website.

them coming into force by the Whitsun recess (22 May), subject to Parliamentary approval.

6. This document describes the policy underpinning the changes being made to the FAS by the draft Regulations. The Government's comments on the draft Regulations should not be taken as an authoritative interpretation of the law. Such an interpretation can only be provided by a court.
7. The final regulations and accompanying explanatory memoranda will be available on the Office of Public Sector Information's website at: <http://www.opsi.gov.uk/si/si-2008-index>
8. This document is available on the DWP website: <http://www.dwp.gov.uk>
9. A paper copy of this document can be obtained from:
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RESPONSE TO CONSULTATION

Discussion

Increasing payments to 90%

10. The draft Regulations provide for top-up FAS payments to be made to bring qualifying members' total income up to 90% of their accrued pensions and for related payments to be made to eligible survivors (surviving spouses or civil partners of qualifying members). Whilst many respondents welcomed the increase to 90% from the current 80% some commented that full restoration of pension benefits should be made including full indexation in accordance with scheme rules.

Response

11. The Government recognises the difficulties experienced by those who lost their pensions through no fault of their own. The Government believes that the reforms announced on 17 December 2007, including the increase to 90% and indexation in respect of assistance derived from post-1997 service³, represents an appropriate settlement for those affected that will

³ The 17 December 2007 announcement included a commitment that payment of assistance derived from post-1997 service will be increased in line with inflation (subject to a 2.5% limit).

result in assistance under the FAS being broadly comparable to compensation paid under the PPF.

Treatment of pensioner members

12. Two respondents asked for clarification of the treatment of those members who reached retirement age before their scheme started winding up.

Response

13. Under the Financial Assistance Scheme Regulations 2005 as they will be amended by the draft Regulations, members in receipt of pensions at the crystallisation date⁴ can qualify for top-up payments to the same level as other qualifying members (90% of their accrued pensions). However, because of the way in which schemes allocated their assets when they wound up most 'pensioner' members will actually receive their pension in full from those assets, unless their scheme was very poorly funded⁵. Where their scheme has completed winding up such members should already be receiving such pensions from an insurer under an annuity contract.
14. Under the terms of the 17 December 2007 announcement, the Government will receive the residual assets of schemes which have not yet completed winding up. In doing so, Government will have regard to the pensions which members - including pensioner members - would have received from their schemes had they continued to wind up and discharge liabilities by annuity purchase.

Payments relating to past periods

15. The draft Regulations retain the current principle under which payments cannot be made in relation to a period before 14 May 2004, the date when FAS was first announced, even if members lost out on pension payments before that date. Two respondents raised concerns over the period across which FAS payments are made.

Response

⁴ The crystallisation date is a date set by the trustees of the scheme before it starts to wind up at which the status of members crystallises for the purposes of allocating scheme assets. In most cases the crystallisation date is the date immediately before the start of wind up.

⁵ Schemes must have started to wind up between 1 January 1997 and 5 April 2005 in order for members to qualify for FAS assistance. With effect from 6 April 1997, a statutory priority order prescribed the order in which defined benefit schemes that were winding up allocated their assets against their liabilities. The priority order has changed over time but liabilities in respect of pensions in payment at the crystallisation date have occupied a relatively high position in all priority orders that have applied across the relevant FAS period.

16. The Government continues to believe that it is right that FAS payments only relate to periods after the date FAS was first announced. And the statement made on 17 December 2007 made clear that enhanced payments would only be made for the period from 14 May 2004. In addition, retaining the 14 May 2004 date assists in current administrative delivery and helps control costs. However, we will continue to consider this point alongside the issues raised in this and other consultations, before consulting on further draft Regulations later this year.

Normal Retirement Age

17. The draft Regulations provide for payments to be made from a qualifying member's normal retirement age (NRA). The draft Regulations maintain the existing definition of NRA employed under FAS rules of the age specified in the rules of the qualifying pension scheme at which the member will normally retire, together with a lower limit of age 60 and an upper limit of age 65. A number of respondents raised concerns about the implications of this definition.

18. It was noted that the proposed definition did not contemplate the payment of assistance in respect of tranches of benefits that may have been payable under scheme rules before NRA. We understand that such tranches may for example have arisen in relation to bulk-transfers of rights into schemes during company takeovers, or in relation to 'Barber window' benefits⁶.

19. Other responses noted that some members may have expected their full pension to have been paid without reduction under scheme rules before their NRA, perhaps as a consequence of a long service rule under which pensions became payable after a certain period of service irrespective of the overarching NRA that applies to the member.

20. In other submissions circumstances were detailed in which pensions may have come into payment earlier than a member's NRA had the scheme continued to operate on an ongoing basis (rather than entering wind-up). In some such scenarios pensions may have been paid without reduction; in others a reduction would have applied; and in some cases conditions would have to be met before those unreduced or reduced pensions would be paid (for example, the consent of the employer or of the trustee).

⁶ Most FAS schemes used to have different retirement ages for men (usually 65) and women (usually 60). On 17 May 1990 the European Court of Justice decided in the case of Barber versus Guardian Royal Exchange that it was unlawful under European law to discriminate between men and women. From the date of the judgment until such time as a valid amendment was made to scheme rules, pension schemes had to treat men on the same footing as women. So men usually have a pension age of 60 for any pension accrued during that period (known as the 'Barber window').

21. Other respondents raised cases in which access to pensions may have been allowed before NRA according to trustee and employer custom and practice but which were not written into scheme rules.
22. In all such scenarios respondents raised concerns that the definition in the draft Regulations might not reflect members' expectations of the age at which they would take some or their entire scheme pension and felt the payment age used by FAS should be amended to reflect this expectation.

Response

23. The definition of NRA employed in the draft Regulations has been used since the outset of FAS and all information submitted to the FAS Operational Unit for the purposes of calculating FAS payments has been provided on the basis of that existing definition. The Government will retain the definition of NRA in the draft Regulations to enable enhanced payments to be delivered as quickly as possible using information already held by the operational unit. However the Government will continue to consider the issues raised in relation to the definition of NRA in the context of achieving broad comparability with the PPF, subject to further consultation and draft Regulations later in the year.

NRA in relation to assets allocated to members

24. A linked issue was raised in relation to members for whom a pension would have been secured using the assets allocated to them at wind-up but where under the terms of the announcement made on 17 December 2007 those assets will now be paid to the Government. The respondent asked how pensions that would have been secured to come into payment before the FAS NRA by way of those assets will be treated once those assets are paid to the Government.

Response

25. The Government will consider this issue alongside those other issues that arise as a result of the decision to bring the residual assets of FAS qualifying schemes into Government^[SCD5] before issuing further draft Regulations for consultation later this year. In doing so Government will be mindful of the legal entitlements members have in relation to assets that would have been allocated to them under scheme and statutory priority rules. In the interim, before the Government receives these assets, trustees will continue to progress the administration of their schemes including putting pensions into payment to members as appropriate.

General comments

26. There were a number of drafting suggestions and requests for clarification in the legislation. The Government has taken these on board as appropriate.
27. A number of submissions were received relating to issues not covered by the draft Regulations. Some of these issues related to other reforms announced on 17 December 2007, for example the payment of lump sums, the application of indexation in relation to assistance derived from service after April 1997 and preserving the value of the FAS cap. Other issues raised included general concerns about the operation of the FAS, for example:
- concerns around tax treatment of FAS payments⁷;
 - court cases slowing the scheme wind-up process;
 - treatment of unmarried partners;
 - potential changes to information requirements; and
 - the treatment of Additional Voluntary Contributions.
28. The Government has noted these comments and will be considering the issues in detail before consulting on further draft Regulations later this year.
29. Some individual queries were also received and we have responded directly to points raised in these submissions.

Thanks

30. The Government is most grateful to all those who took the time to comment on the draft Regulations.

⁷ On 31 March 2008, the Government clarified that FAS payments paid in respect of past periods can be taxed according to the tax year in respect of which they are being paid. DWP and HMRC officials are currently discussing the most appropriate way to ensure individuals are given the opportunity to apply for this allocation.

LIST OF RESPONDENTS ⁸

| Name | Organisation |
|-------------------|--------------------------------------|
| Dominic Grimley | Hewitt, Bacon and Woodrow |
| Nayiga Tanthuwani | Mercer Limited |
| Terry Monk | Independent Trustee Services Limited |
| Gerald Whitehead | Trustee, BETEC retirement plan |
| Naomi Cooke | GMB |
| Robert Thomson | N/A |
| Peter Lapinskas | N/A |
| Alan Marnes | N/A |
| Dave Allen | N/A |
| Patricia Sargent | N/A |
| Stan Seymour | N/A |
| Kenneth Molloy | N/A |
| John Williams | N/A |
| Harry Million | N/A |
| David Burbridge | N/A |
| Patrick Moloney | N/A |
| Kenneth Donaldson | N/A |
| Peter Beattie | N/A |
| Paul Ruse | N/A |
| John Tubbs | N/A |
| T G Holloway | N/A |
| John Williams | N/A |
| Christine Berkley | N/A |
| T Stewart | N/A |
| Kenneth Noden | N/A |

⁸ DWP officials also held meetings with Unite, Community and GMB unions and with the Pensions Action Group at which responses to the draft Regulations were discussed.