

FINANCIAL ASSISTANCE SCHEME

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

**THE GOVERNMENT RESPONSE TO THE
CONSULTATION**

June 2008

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INTRODUCTION

1. On 28 March 2008 the Government launched a consultation on the draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008 (“the draft Regulations”)¹.
2. The Financial Assistance Scheme (FAS) 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).
3. The draft Regulations set out proposals to implement further elements² of the extension to the FAS which was announced on 17 December 2007 by the Rt Hon Peter Hain, the then Secretary of State for Work and Pensions. The draft Regulations:
 - allow early payment for those members unable to work due to ill health;
 - extend the FAS to members of certain schemes which wound up under-funded with a solvent employer;
 - speed up initial payments;
 - allow the PPF to be more closely involved in developing and managing the new FAS arrangements;
 - allow the scheme manager to direct trustees in order to ensure that any reduction in the scheme's assets is kept to a minimum; and
 - remove the option to apply for reinstatement into the State Additional Pension for those eligible for FAS.
4. To enable us to provide help for qualifying members as soon as possible the written consultation period for the draft Regulations was limited to six weeks and ended on 9th May 2008. Given this shortened timescale, the Department held meetings during that period with representatives from trades unions and the Pensions Action Group to facilitate their responses.
5. This document sets out the main points made in the consultation responses on the draft Regulations and provides the Government response. We received 28 written responses (and held a number of meetings with campaigners and trade unions). A list of 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

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

² The FAS (Miscellaneous Provisions) Regulations 2008 which came into force on 4/6/2008 implemented our first package of enhancements. They guarantee all FAS qualifying members 90% of their accrued pension, paid from the later of the member's normal retirement age (NRA) and 14 May 2004 (the date FAS was first announced).

Regulations, which were laid on 18th June 2008 with a view to them coming into force by the summer recess in July, subject to them going through all stages of the Parliamentary process and being approved by that time.

6. The remaining elements of the extension to the scheme announced on 17 December last year will be provided for in further draft regulations to be developed later this year.
7. 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.
8. 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-2008-index>
9. This document is available on the DWP website: <http://www.dwp.gov.uk>
10. A paper copy of this document can be obtained from:
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RESPONSE TO CONSULTATION

Discussion

Early payments for those members unable to work due to ill health

11. The draft Regulations provide for ill health payments for qualifying members where the FAS scheme manager is satisfied that they are unable to work due to ill health and are likely to continue to be unable to do so until their Normal Retirement Age (NRA). Ill health payments (and interim ill health payments where the qualifying scheme has not yet wound up) can be made from the age 5 years before a qualifying member's NRA. So if, for example, a person's NRA is 62, he will be eligible from age 57. If the NRA is 60, he will be eligible from age 55.
12. Many respondents queried the estimated take-up figures of 10-20% stated in the Consultation Document and felt that the estimate quoted was too high.
13. Whilst many respondents welcomed the ill health provisions as a step in the right direction, most called for a widening of the age band. Some respondents would like reduced assistance to be payable from age 50 or age 55 irrespective of the health of the member, in a similar approach to that taken by the PPF. Others felt that reduced assistance should be paid early on grounds of ill health from any age. Some felt there should be no actuarial reduction applied to ill health payments, whilst others felt that, reduced payments should, at the very least, be payable to all members in ill health over the age of 50.
14. Many respondents called for early access to be effective from the later of the date a member first suffered ill health or the 14th May 2004.
15. The 'unable to work' condition also generated concern as it could deter individuals on low incomes from undertaking part-time work. Some respondents favoured a definition of 'unable to work in a like capacity to their previous job', or, if this was unacceptable, a small earnings exemption based on the Lower Earnings Limit to help those who despite poor health wish to boost their incomes in retirement through some part-time occupation.

Response

16. In the consultation document we stated that we expected approximately 10-20% of members to have successful applications. Several respondents feel that this estimate is too high. We believe that the responses are based on an assumption that access to FAS ill health

- payments will be as strict as occupational pension scheme rules. However, as FAS payments will be actuarially adjusted to achieve neutral long-term cost we do not intend to have a burdensome ill health test aimed at preventing access to early payment.
17. As the Government believes that a priority is to introduce ill health provisions quickly for those nearest to retirement, it considers that it is appropriate to allow all schemes members in ill health a facility to access the FAS ill health payments up to five years before their FAS would be paid at NRA. This follows representations that the announcement made in December 2007 (that there would be early access for those over 60) would have no practical effect for those whose NRA was 60. We will, however, consider the issues relating to the qualifying age for entitlement to ill health payments and the period to which such entitlement should relate, again, along with other issues when considering the content of further draft Regulations later this year.
18. The qualifying test for FAS ill health payments is not aimed at preventing access to early payment. Whilst occupational pension schemes generally operate stringent ill health tests with an aim of preventing access to enhanced ill health pensions, the FAS will provide actuarially reduced payments so the qualifying test can be less burdensome. The FAS scheme manager will make a decision on whether they consider the member is fit for work, taking into account the member's own statement and evidence the member supplies in support.
19. The FAS scheme manager will take into account any advice received that a person should refrain from work even where that person has then continued to work, for example because of the need for income, any perceived therapeutic benefits of light work etc. In addition, and unlike some occupational pension schemes, FAS will not require members to demonstrate reduced life expectancy when applying for an ill health early payment.

Extending the FAS to members of schemes which wound up under-funded with a solvent employer

20. The draft Regulations issued for consultation sought to amend the FAS qualifying rules to allow schemes with solvent employers - which started winding-up between 1st January 1997 and 10th June 2003 - to be eligible for the FAS where the employer has paid the relevant statutory debt. The Government's intent was that under-funded occupational pension schemes should first look to the employer to pay the relevant debt before turning to the Govt for help.
21. Respondents indicated that they thought a condition which required the sponsoring employer to have met the 'statutory debt' defined under

section 75 of the Pensions Act 1995 could be read as meaning that schemes where there was no statutory debt at the start of wind-up could not qualify for help from FAS.

22. Cases where a scheme that began to wind-up prior to 11th June 2003 may not have undergone a formal section 75 valuation were also highlighted. For example, the employer will often have injected cash over the wind-up period to facilitate the purchase of annuities and to pay transfer values, but not in response to a formal section 75 debt certificate. At the end of the process all members would have received their statutory Minimum Funding Requirement (MFR) entitlements and there would be no debt to certify.
23. Respondents have suggested that members of schemes which managed the wind-up in this way will be in the same position as members of a scheme where a formal debt was calculated and served but, based on the draft Regulations, would appear to be excluded from FAS compensation.
24. There was also some concern that the wording of the Regulations might also exclude those schemes funded above MFR levels but below a level to meet full buy-out costs.
25. Another respondent mentioned schemes which are in the midst of litigation concerning the debt owed by the employer. The response said that under the draft Regulations such schemes would not be able to seek assistance from the FAS.

Response

26. Our intention is to make pension schemes eligible for the FAS where they started winding up with a solvent employer (after 1st January 1997 and before the employer was required to meet the full buy-out cost). The draft Regulations that were consulted on set a condition that the employer should have paid the statutory debt, as the Government would expect trustees to recover the debt they can from the employer before turning to the FAS for assistance.
27. Following the comments in respect of the statutory debt condition we have amended the draft Regulations to make specific provision for schemes which were funded in full to statutory debt levels (or higher) would be eligible for assistance.
28. A number of responses set out examples where the statutory debt may quite reasonably not have been paid, for example because the legal costs of pursuing the debt may be larger than the debt itself. It is not the Government's intention for schemes to fall outside the FAS where trustees

have acted entirely properly. Following the examples that have been raised with us, the re-drafted Regulations give the FAS scheme manager some discretion to treat the relevant condition as having been met where he is satisfied that an appropriate proportion of the debt was discharged or is likely to be discharged; and in his opinion, it was reasonable that the full amount of the debt has not been discharged.

29. It is not our intention to be overly prescriptive about the evidence we would require. In practice when considering schemes with solvent employers the FAS Operational Unit may look for a number of different types of evidence depending on the situation:
- If there was no debt owing to the scheme at wind-up a copy of the trustees minutes confirming this.
 - If there was debt owing to the scheme at wind-up then a copy of the debt certificate and either:
 - a copy of the minutes or accounts showing the payment in full; or
 - a copy of the minutes or accounts showing any payment, and the legal advice or trustees minutes explaining any decision not to pursue the full debt.

Speeding up initial payments

30. The draft Regulations reduce the period allowed for trustees or pension scheme managers to supply information used in determining and making FAS payments. They also introduced timescales for providing information in respect of the new ill health and interim ill health payments.
31. The Regulations also remove the role for trustees or scheme managers in applications for initial payments, and provide that the FAS scheme manager, using his discretion, may make initial payments in anticipation of annual payments being payable.
32. A respondent expressed some concern around timescales linked to ill health cases. They felt that an initial rush of ill health cases could mean that trustees or pension scheme managers would struggle to meet the demand for data within the set timescale of 14 days. The respondent suggested a filter system to be applied to ill health claims by the FAS Operational Unit before data is requested from trustees and pension scheme managers in order to reduce initial pressure as members seek to take up this new option for early payment.

Response

33. We have noted these concerns and as the likely case load becomes clearer, we will consider the implications for our processes. In cases where the trustee is unable to supply the information required within the

timescales set the FAS scheme manager has the power to extend the 14 day deadline for receipt of the information, and we will look sympathetically on cases where there are a large volume of requests.

Providing for the Pension Protection Fund (PPF) to be more closely involved in developing the new FAS arrangements

34. The draft Regulations issued for consultation provided for the Board of the PPF to advise the FAS scheme manager in relation to the FAS. We also invited comments on whether other functions would be suitable for the Board of the PPF as FAS develops. Respondents welcomed this involvement and agreed it was sensible to make use of the PPF's experience in developing the new FAS.

Response

35. As part of our consultation we have been liaising with the Board of the PPF around its future FAS-related role. Following these discussions we have expanded the draft Regulations to give the Board of the PPF a function to manage the transfer of assets of FAS qualifying pension schemes. The Government thinks that PPF project managing pension schemes to wind-up makes best use at this time of the synergies between the current PPF activities and processes now needed in FAS. However, the Government is continuing to look at the role the PPF can take in the governance of FAS.

36. Finally, it should be reiterated that the Government has no intention of allowing levy payments to fund FAS activity, or for tax revenues to fund the PPF compensation. PPF accounting will clearly separate PPF and FAS activities.

Removing the option to apply for reinstatement into the State Additional Pension for those eligible for FAS

37. The Regulations will mean that any person qualifying for FAS will no longer meet the conditions for reinstatement into the State Additional Pension. There is one exception to this - where someone has, before the commencement of the provisions, been offered the opportunity to be reinstated by his scheme. They will still be able to select this option.

Response

38. The Pensions Action Group and trade unions were in agreement with the suggestion that FAS members should no longer be able to apply for reinstatement of State Additional Pension. However one respondent whilst not objecting to the proposal did raise concerns about the short

notice given. Their view was that any member who had contacted Her Majesty's Revenue and Custom (HMRC) about reinstatement prior to the announcement should be allowed to continue the process.

39. The draft regulations allow any member who has been offered reinstatement before the Regulations come into force to accept the option if they wish. The decision to suspend the issue of calculations was made to prevent nugatory work by both HMRC and trustees.

General comments

40. There were some drafting suggestions and requests for clarification in the legislation. The Government has taken these on board as appropriate.
41. 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.
42. The Government has noted these comments and will be considering the issues in detail before consulting on further draft Regulations later this year.
43. Some individual queries were also received and we have responded directly to points raised in these submissions.

Thanks

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

LIST OF RESPONDENTS

| Name | Organisation |
|---------------------|--------------------------------|
| Ian Jones | |
| Graham Church | |
| John Anderson | |
| Nicola Cameron | Law Society of Scotland |
| Dominic Grimly | Hewitt Associates |
| Neil Copeland | Spence and Partners |
| Robert Thornton | Scottish Widows |
| Brian Wilson | |
| John Wilson | |
| Edwin Bruce-Gardner | Eastearly Ltd |
| Bryan Freake | Unite |
| Peter Beattie | |
| Matthew Appleton | Allen & Overy LLP |
| Mark Edwards | AXA |
| Jonathan Noble | Burness |
| | Cobbetts LLP |
| Patricia Sargent | Pensions Action Group |
| Antony Miller | Bridge Trustees Ltd |
| | Wrigleys Solicitors |
| Naomi Cook | GMB |
| | Sacker and Partners |
| Clifford Chance | Clifford Chance LLP |
| Duncan Buchanan | Lovells |
| John Mortimer | Society of Pension Consultants |
| Ian Greenstreet | Association of Pension Lawyers |
| Chris Martin | Independent Trustee Services |
| Terry Monk | Independent Trustee Services |
| Robert Hails | The Actuarial Profession |

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