

**GOVERNMENT RESPONSE TO  
CONSULTATION ON DRAFT  
REGULATIONS**

**THE DRAFT FINANCIAL ASSISTANCE SCHEME  
(MISCELLANEOUS PROVISIONS) REGULATIONS 2009**

9 June 2009

## Introduction

Between 11 February 2009 and 25 March, the Department for Work and Pensions (DWP) undertook a consultation exercise on the draft Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2009. The draft Regulations were made available on the DWP website.

DWP received 148 responses to the formal consultation on the draft Regulations. A list of respondents is included at Annex A. There were 30 responses from organisations interested in the pensions field, including actuaries, trustees and pension lawyers. A further response was received after the consideration of responses was completed, which is not listed in Annex A; it raised no additional points to those covered below.

DWP also received responses from those directly affected by the Financial Assistance Scheme and their representatives. The Pensions Action Group (PAG) sent in a formal response and 40 individuals sent in responses supporting this, some of whom identified themselves as PAG members.

The Department is grateful for the contributions received. Draft Regulations have been laid before Parliament and will come into force after Parliamentary approval.

This document sets out the main points made by respondents and provides the Government's response. The finalised draft Regulations and accompanying explanatory memorandum will be available on the DWP website: <http://www.dwp.gov.uk>

The final Regulations and accompanying Explanatory Memorandum will be available on the Office of Public Sector Information's website at:

<http://www.opsi.gov.uk/si/si-2009-index>

And the FAS website at:

<http://www.dwp.gov.uk/lifeevent/penret/penreform/fas>

The consultation also asked for initial views on current thinking around the transfer of the assets remaining in the qualifying schemes and the associated changes to the Assistance structure. A number of responses were received which are now being considered as part of the development of the policy which will be formally consulted on later in the year.

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## **General**

### *The December 2007 Announcement*

1. The consultation explained the Government's proposals to implement certain remaining elements of the extension to the Financial Assistance Scheme (the FAS) announced in December 2007, including final changes to payments to people who were not members of qualifying schemes which will be transferring their residual scheme funds to government.

2. However, many individuals did not respond on the proposed way in which this could be done, but instead expressed their disagreement with the content of the December 2007 announcement. Their objections focussed on the areas where the proposals did not replicate what their scheme would have provided, had it not begun to wind up underfunded.

3. However, the FAS was never intended or presented as a replacement for all of the benefits lost when schemes went into wind-up underfunded. Rather it was, and is, a form of financial help for those who have lost part, or all, of their accrued pension. The Government never planned for the FAS to replicate each scheme's structure of benefits.

4. Whilst the Government understands that a number of people would like to receive the exact amount or structure of payment that they may have been expecting, it continues to consider that the announced extension represented an appropriate final settlement. The consultation was about the detail and delivery of the structure of that settlement.

#### *The Court Judgments*

5. The circumstances under which schemes wound up underfunded have been considered by the Parliamentary Ombudsman and the Courts. However, there appears to be some misunderstanding over what the conclusion of this action was.

6. The Parliamentary Ombudsman published a report on the information provided by the Department on the security of occupational pension schemes. The Government rejected the findings and most of the recommendations and this rejection was challenged through the Courts.

7. Mr Justice Bean agreed with the Parliamentary Ombudsman that some official information on the security of occupational pension schemes provided under successive Governments was misleading. However, he also decided that this did not cause all the losses suffered by everyone who was a member of an occupational pension scheme that wound up underfunded between the relevant dates.

8. The case was also considered by the Court of Appeal which agreed with the Government that the maladministration identified by the Ombudsman

could not be assumed to be a significant contributory cause of the financial losses of affected members. Neither Court made any compensation order.

9. The Government believes that the FAS, as extended by the December 2007 announcement, provides an appropriate response the Ombudsman's Report.

*90 per cent*

10. A number of individuals expressed the view that the proposals did not meet the Government's commitment of providing 90 per cent of the individual's pension (and must therefore, by implication, be amended). This seems to be based on a misunderstanding of that commitment. In December 2007, when the final extension to the FAS was announced, that statement said that:

*"All scheme members will be guaranteed 90% of their accrued pension at the date of commencement of wind up, revalued to their retirement date"*

11. That made it clear that the 90 per cent figure related to the amount of the expected pension *at the date the scheme began to wind-up*. The note to that sentence said that revaluation after wind up began would be in accordance with the FAS rules (revaluation in line with price inflation, capped at 5% per year compound for the period) and the level of indexation announced was also clearly in accordance with FAS, not scheme, rules.

*The Guaranteed Minimum Pension*

12. Where schemes had been contracted-out prior to April 1997, a member's pension would have been calculated taking account of the statutory rules around the Guaranteed Minimum Pension (GMP). Some of the responses raised issues relating to those rules and how the FAS would deal with them.

13. Assistance is based on the expected pension accrued at the day before the start of wind-up. This amount of the expected pension will be calculated taking account of the GMP rules. Thereafter, the GMP rules, like the scheme rules, fall away and the FAS rules are applied. This is because the FAS is not paying the scheme pension; it is paying Assistance based on the pension accrued to the date wind-up began. The FAS does not take on responsibility for the scheme pension, nor for paying any contracted-out rights that the individual may have accrued prior to the scheme beginning to wind-up.

### *Funding*

14. A number of respondents have commented that the Government should increase funding to cover all lost benefits, citing the support provided to the banking system and, by default, the pension schemes provided by individual banks for their staff.

15. The Government does not believe that an appropriate comparison can be drawn between the justifiable support given to certain banks and the structure of the Financial Assistance Scheme. The Government believes that - faced with potential collapse of the banking system last autumn and the devastating consequences this would have had for households and businesses across the UK - taking action in relation to the banks was essential. While the taxpayer does face risks as a result, the cost of doing nothing would have been far greater, and the taxpayer will benefit from the money received when the Government's investments are sold.

16. As a result, the position of these banks' pension schemes may have been strengthened, but the Government considers this to be an inevitable consequence of the necessary action taken to protect the country's wider economic interests.

## **General**

17. There were not many comments on the general questions. Where individual responses raised issues which are addressed later, they are covered under that question.

### **Question 1: impact on the position of disabled people**

5 responses: all from organisations.

18. None of the respondents thought that the changes would have an adverse impact on disabled people.

#### ***The Government's Response***

19. The Government welcomes the confirmation that disabled people are not adversely affected by the proposals.

### **Question 2: impact on the position of men or women.**

5 responses: all from organisations.

20. None of the responses thought that the changes would have an adverse impact on men or women.

#### ***The Government's Response***

21. The Government welcomes the confirmation that men or women are not adversely affected by the proposals.

### **Question 3: do the draft Regulations achieve the expressed intentions**

10 responses: 7 organisations and 3 individuals.

22. All who addressed the issue agreed that the draft Regulations met the stated intentions. One said that it was disappointed the draft Regulations did not cover the transfer of scheme assets. It felt that this was causing a delay in schemes completing winding-up.

### ***The Government's Response***

23. The Government welcomes the confirmation that the draft Regulations achieve their objective. The Government has previously announced that it would introduce the December 2007 changes incrementally, concentrating on those changes which could be delivered comparatively quickly and which would most benefit scheme members. Because of technical complexities and the limited impact on member payments, the transfer of assets has been left to a later stage.

## **The Structure of Assistance**

### **Question 4: The Date Payment Begins**

71 responses: 12 organisations and 59 individuals.

24. There were four respondents who agreed with the approach taken by the Government. That agreement was based on the belief that the balance of loss borne by members and taxpayers had been set at a sensible level.

25. Issues were raised on five different areas:

- (a) what should be regarded as the normal retirement age;
- (b) early access;

- (c) ill-health early access;
- (d) terminally ill access; and
- (e) payment before May 2004.

### *Normal Retirement Age*

26. Respondents had no objection to payment in general being from normal retirement age (NRA) although concern was raised that the current legislative definition was ambiguous, as it was unclear whether NRA is the one in the scheme rules when the individual left the scheme or when the scheme entered wind-up.

27. A number of respondents said that they thought that NRA was defined inappropriately. Different respondents put forward a number of different situations which they thought ought to be accommodated:

A number of respondents argued that, where a scheme had never turned down a request for retirement earlier than the recorded NRA, this earlier date is the “real” NRA.

It was pointed out that in some scheme rules allowance was made for retirement at an age earlier than the normal retirement age, without any conditions attached and without any actuarial adjustment. One said that a particular scheme had adopted such a rule to deal with its equality responsibilities. It was argued that, in these cases, the NRA was the earlier age.

An opinion put forward was that the FAS should make allowances for retirement ages based on contingent factors, such as employer consent or redundancy. It was felt that the test should be whether or not this was a genuine part of the overall benefits and if the scheme had made financial provision for this. Others argued that the line drawn between contingent and non-contingent factors was a false one.

Where a member had two periods of service with two different NRAs, it was felt that it should be treated as two separate pensions and paid accordingly.

#### *Early access with actuarial reduction*

28. It was argued that, as actuarially reduced early access was cost-neutral, there was no reason why it should not be provided for in the FAS. Respondents pointed out that it was provided by the PPF. Others argued that members of schemes which had made financial provision for early access (and thus, it was argued, provided for a lower pension) should be allowed early access. It was the belief of some respondents that the cost would not be very high, as not everyone would take advantage of the facility and that the funds which will be taken into government would pay for this benefit.

29. Some said that the FAS should make provision for increases to Assistance if an individual chose to delay taking his Assistance.

#### *Ill-health early access*

30. It was argued that limiting ill health early access to actuarially reduced FAS payments to those within five years of NRA was both disappointing and arbitrary. Some felt that the rule should apply from a common age of 55, arguing that it produces inconsistent treatment between individuals.

#### *Terminally ill early access*

31. It was said that some GPs are reluctant to tell patients that they are terminally ill, because of the impact that statement may have on them. The suggestion was made that family, friends or the DWP should be able to contact the GP in these circumstances and confirm the position.

#### *Payment for periods before 14 May 2004*

32. It was thought that people should not be penalised because of the date at which they became pensioners. The argument was also made that the catalyst for the schemes collapsing was the change to the tax regime in 1997 and, therefore, payments should start from then: the announcement of the FAS in May 2004 only occurred then because the Government had delayed dealing with problem.

### ***The Government's Response***

#### Normal Retirement Age

33. With regard to the apparent confusion over the description currently in the legislation, the Government believes that it is clear, but has decided to amend the description to put the issue beyond doubt. NRA for FAS purposes is the age specified in the scheme rules *at the point the member ceased to accrue benefits in the scheme* as the age at which that member would normally retire.

34. The Government accepts that, in some cases, individual members close to retirement when the scheme began to wind-up may have anticipated taking their pension at a date other than the normal retirement age as recorded in their scheme rules. However, having considered the matter, the Government still believes its position is appropriate. The use of the age actually specified in the scheme rules allows for certainty and consistency of treatment across the FAS. It would be difficult (if not impossible) for scheme members to prove, for instance, that their employer would have allowed them to retire at an earlier age than specified in the scheme rules, when the employer no longer exists. One respondent commented that people's belief that they could have left earlier might, in fact, be based on a misunderstanding of the terms of their scheme.

#### Early access

35. As mentioned in the consultation document, while actuarially reduced early access is cost neutral over an individual's lifetime, it does bring costs forward. This is not an issue for a funded pension scheme (or the funded PPF). However, the FAS is not funded in this manner: its costs are met out of public funds, as and when they arise. Therefore bringing costs forward is a significant matter for the FAS.

36. The Government accepts early access is an attractive aspect of many pension schemes and annuities. It has concluded that it is not sufficiently important to justify cutting back other elements of the assistance structure which are of more benefit to more people. The Government has listened to previous concerns of stakeholders by focussing available resources on allowing early access to those who are unable to work due to ill health.

#### Ill-health early access

37. In the December 2007 announcement the Government proposed to allow for early access on the grounds of ill-health from age 60. Whilst this approach would have extended access to FAS payments to those whose NRA was over 60, it would not have allowed any greater access to those whose NRA was 60. This issue was highlighted during early meetings with stakeholders including Trade Unions, the Pensions Action Group and trustees of qualifying schemes. For consistency, and in light of concerns expressed by these groups, this was changed to allow for early access up to five years before NRA.

38. During that consultation similar issues were raised as have been expressed here and in June 2008 the Government promised to re-consider the issues relating to the qualifying age for entitlement to ill-health payments and the period to which such entitlement should relate together with other issues when considering the content of further draft Regulations later that year.

39. As a result of those considerations the Government introduced the FAS and Incapacity Benefit (Miscellaneous Amendments) Regulations 2009 which came into force in March this year and allow early unreduced access to FAS payments for members who are aged 55 or over and who are severely ill.

#### Terminally ill access

40. The Government does not want any barriers put in the way of someone who is terminally ill accessing their Assistance speedily. The FAS does not require the actual member to apply for payment on these grounds: payments can begin from “the day on which the scheme manager is first notified that that member may be terminally ill” (Regulation 17(3) of the Financial Assistance Scheme Regulations 2005).

41. Currently where someone other than the member contacts the FAS staff and indicates that the member is not aware of their condition, the FAS staff try to verify the position via Departmental systems. (For instance, if the individual is in receipt of Disability Living Allowance because of terminal illness.) At present the only cases where the FAS staff have had to contact the member’s doctor is where the member was aware of the diagnosis and has given permission.

42. We have considered the process in place for members seeking early access to their FAS payments who may be terminally ill and we do not believe that this process would lead to a GP having to tell a person that they are terminally ill if the circumstances were such that it was not considered appropriate to do so. As a result, there are no changes to the relevant regulations.

#### Payment for periods before 14 May 2004

43. The Government has considered the representations made on this issue, but does not propose to change its long-standing position in this area.

### **Question 5: Treatment of Rights Accrued at Different Dates**

62 responses: 13 from organisations and 48 from individuals.

44. Nine responses agreed with the proposals, saying that they were sensible and pragmatic. One pointed out that this would not only be simpler but also more efficient: only one assessment would be necessary and it would avoid bringing trivial amounts into payment.

45. Most of those who objected thought that parts (or tranches) of pension which had been accrued to different pension ages (for instance, where a scheme changed its NRA for future accruals) should be paid from the due dates and not from the NRA. The reason given was that this is what the schemes would have done and therefore what the member would have expected. The fact that the PPF follows this approach was also put forward as a reason.

46. One response argued that, while a single payment age was acceptable, it should be the earliest date, not the NRA.

47. Two respondents, while generally supportive of the proposed approach, said it seemed unfair where an individual member left the scheme shortly after the change in normal retirement age. Another, possibly in reaction to this point, said that the individual should be allowed to choose to take their full accruals at one of the tranche dates, with appropriate uplift or reduction of the other tranches.

48. There were two technical comments on the methodology used:

(a) in the example given in the consultation document revaluation is applied as well as a late retirement factor (LRF). A respondent said that, in times of low inflation, doing the calculation this way could mean

people lose out. They said that most schemes would apply only a LRF and include some allowance for revaluation in it; and

(b) another respondent said that they presumed a comparison would be made between:

(i) the pension calculated using the final pensionable salary at the lower NRA and a LRF; and

(ii) the pension calculated using the final pensionable salary at the single payment age (or higher NRA)

and taking the greater of the two. For deferred members they would expect the same approach to be used

49. A number of respondents wanted clarification as to what would constitute a tranche and, in particular, whether GMPs were tranches, for FAS purposes.

### ***The Government's Response***

50. It is not the understanding of the Government that all individuals could have expected their scheme to allow them to take each tranche as it falls due. This is supported by two of the responses which, agreeing with the proposed approach, commented that it was consistent with scheme members' expectations in most cases (although they also made the point that schemes would generally have allowed for actuarially reduced early access).

51. The Government has sympathy with the point that an individual member might have accrued the vast majority of their pension to an age earlier than the one recorded in the scheme rules and had planned to retire at that age.

52. The FAS deals with members of schemes which generally started to wind-up between 1 January 1997 and 5 April 2005. As a result, by the time the draft Regulations are in force:

- Anyone in a scheme which started to wind-up on 1 January 1997 who was aged 53 or over at that time will already be over age 65 and in receipt of Assistance.
- Anyone in a scheme which started to wind-up on 5 April 2005 who was aged 61 or over at that time will be over age 65 and in receipt of Assistance. They are likely to have already taken their scheme pension, if receipt at age 60 was important to them.

53. The Government therefore believes that, for the vast majority of those for whom there is a perceived disadvantage, the difficulty no longer exists. These people have already waited the five years between age 60 and 65 and will benefit from the actuarial uplift provided for in the current draft Regulations (unless they have been capped).

54. The Government does not believe that asking those younger than this to wait is unreasonable, as they will have had less expectation of retiring at any particular age.

55. On the technical points raised:

(a) the respondent is correct in his analysis: if the calculation is done as the Government proposes and inflation were lower than the level assumed, then the member would get less on the proposed method than under the one favoured by the respondent. However, under that method members lose if inflation that is higher than assumed. There are also administrative reasons for adopting the Government's proposal, as it means that revaluation is the same on all tranches, so they can be aggregated.

(b) This calculation procedure is not valid for FAS schemes, since it is only of relevance to members who retire from active pensionable service.

56. The word “tranche” is used to mean any pension or part of a pension which would have been payable under scheme rules (ignoring any special rules on ill-health grounds) for life without actuarial adjustment at an age other than the member’s normal retirement age. The Government proposes to treat GMPs as a tranche for FAS purposes.

### **Question 6: Decreases in scheme pension after payment begins**

56 responses: 12 from organisations and 44 from individuals.

57. 11 of the responses generally supported the proposal that the FAS should reflect any planned decrease in scheme pension entitlement, with some questions as to the method and whether these type of arrangements were as uncommon as the Government thought.

58. Those that did not support the proposal wanted the step replicated, regardless of the structure of the annuity. The reason given was that the higher pension from NRA was given by the scheme to tide the individual over to the date at which the state pension would be put into payment and this was still necessary.

### ***The Government’s Response***

59. The FAS has not been designed to replicate scheme rules and can see no reason to accept the administrative complexity necessary for reflecting a bridging amount, where the trustees have not sought to do so in the annuity they are providing.

### **Question 7: Bringing the Actual Pension to Account**

57 responses: 12 from organisations and 45 from individuals.

60. There was agreement that, where the individual had an annuity purchased for them by the scheme, the actual amount of this annuity should be brought to account.

61. There was, however, some disagreement on the treatment of those who took all or part of their remaining fund as a lump sum.

(i) two respondents thought that, where the amount of pension applicable to a lump sum was known (for instance, where the scheme had offered an annuity amount which the individual had turned down in favour of a transfer value) this amount should be used instead. One reason given was that, otherwise, the FAS calculation will mask the scheme's own factors, leading to inconsistency between members;

(ii) one respondent suggested that, for consistency, a notional annuity should be calculated for all members, based on the transfer value at wind-up;

(iii) three respondents said that it was vital that the factors used should be kept under review, so that the amount of the notional annuity relates to what could be bought;

(iv) one commented that many who transferred their remaining funds out of the scheme will have put the money into another pension vehicle. It would be wrong to bring the resulting annuity to account, as the member might have made further contributions or might have taken risks with the investment, knowing that the FAS would top up.

62. One respondent said that the current approach of calculating entitlement differently, depending on whether the member died before or after assistance was in payment should be reconsidered so that the approach to taking annuities in payment was applied consistently.

### ***The Government's Response***

63. A clarification of the proposal might be useful, as some of these comments seem to be based on a misunderstanding. Where the scheme discharges its liability towards the member by purchasing an annuity, the Government is proposing to bring the actual amount of that annuity to account. However, in all other circumstances a notional annuity will be calculated. So, for instance, where a member takes a transfer value, the FAS will calculate a notional annuity based on the amount of that transfer value. The FAS will ignore any income that individual gets as a consequence of that transfer (whether it is higher or lower than the calculated notional annuity).

64. The Government did consider whether, when the amount of the pension applicable to a lump sum was known, this should be used instead of a notional amount. However, the Government decided to continue with the current system as using standard annuity factors results in consistent treatment across the FAS.

65. The Government has looked again at how it proposes Assistance should be calculated for survivors and surviving dependants and agrees that taking account of the actual annuity paid to them in all cases is the right approach to achieve consistent outcomes. Currently where members die after schemes have discharged their liability to them, survivors are paid half the Assistance which was, or would have been payable, to the member regardless of the amount of annuity paid to the survivor. Taking account of the actual annuity paid to survivors will mean that all survivors receive at least half of 90 per cent of the member's expected pension in line with the policy intention. It will also allow for the appropriate amount to be divided equally between survivors in cases where there is more than one dependent child or surviving spouse or civil partner.

### **Questions 8 & 9: the Assistance Cap**

To question 8 there were 71 responses: 10 from organisations and 61 from individuals. To question 9 there were 15 responses: 8 from organisations and 7 from individuals.

66. 16 respondents supported the proposals on the cap in total - a flat cap, increased in line with RPI and increased back to April 2007 as an appropriately simple approach. The balance made a number of different points:

- (i) three respondents thought the FAS should have the same approach as the PPF to the cap;
- (ii) one thought the increases should not be backdated;
- (ii) one thought the increases should be backdated to May 2004.

67. However, the majority of respondents objected to the existence of a cap, because they felt it penalises those who have contributed most to the pension scheme - those with long service and high earners. They thought it was a double penalty, because all FAS members lose ten per cent of their pension and then this group lose a further percentage. A number of the responses offered solutions to this perceived unfairness:

- (i) abolish the cap.
- (ii) re-assess entitlement annually applying the cap for that year, until the individual has reached 90 per cent of his expected pension; and
- (ii) relate the cap to long service.

### ***The Government's Response***

68. There has been a cap on Assistance since the outset of the FAS in order to control costs. While very few people have, as yet, had the cap applied to their entitlement, the Government feels that it is still a necessary part of the system.

69. While relating the cap to length of service or some other criteria is superficially attractive, it makes the administration more complex and creates a cliff edge where a person can have the cap applied because they are just on the wrong side of the period of service.

### **Questions 10: Indexation**

116 responses: 13 from organisations and 103 from individuals.

70. This question was the subject of the highest number of responses. Seven of the responses (all from organisations) supported the proposals, the rest objected to them for various reasons and put forward a number of alternative suggestions.

71. All of those who opposed the proposals, objected to the limitation of indexation to post-1997 accruals only and many objected to the cap of 2.5 per cent on the level of indexation. A number of reasons were put forward in support of the objections:

(i) scheme members had paid for scheme levels of indexation, and therefore should get it. If the scheme had not offered indexation, the expected pension would have been higher;

(ii) inflation will speedily reduce the value of the Assistance paid and inflation effects pensioners more than younger people;

(iii) not providing better indexation undermines the Government's commitment to provide 90 per cent of the expected pension;

(iv) unlike those entering the PPF, FAS members have very little post-1997 accruals and therefore not indexing pre-1997 accruals has a disproportionate effect.

72. There were a number of different approaches proposed as an alternative to the Government's proposal:

- (i) many thought that the indexing of Assistance should reflect the scheme rules;
- (ii) a significant minority supported increases on all the Assistance based on:
  - RPI capped at 5 per cent;
  - RPI capped at 10 per cent; or
  - full indexation.
- (iii) indexation should be paid on the Assistance that reflects the existence of a GMP in the expected pension;
- (iv) one response suggested that Assistance should be increased to reflect the value of the scheme indexation.

### ***The Government's Response***

73. Given the obvious strength of feeling on this issue, the Government carefully considered whether the proposal should be amended. After serious thought, and in the light of the fact that the proposed indexation is fully in line with the extension to the FAS announced in December 2007, the Government has decided that the proposal should be unchanged.

74. The Government acknowledges that, in some cases, the indexation on offer is not as generous as would have been offered by some schemes. However, as mentioned above, the FAS was never designed to replace in full the structure of the lost scheme pensions. The Government acknowledges that the current indexation proposal means that, over time, the buying power of any Assistance paid will be reduced, but observes that, unless the relevant pension scheme had offered full protection - which is unlikely - this would in many cases have occurred anyway.

75. The Government estimates that, to provide indexation at RPI capped at 2.5 per cent on all the Assistance would increase costs by about a third: an extra £856 million (net present value) over the lifetime of the scheme. Whilst the Government appreciates the importance of indexation, the Government does not consider that this would be a proportionate use of taxpayers' money. The Government could not, as some have suggested, use the remaining funds in the scheme which are being taken into Government to fund the increased indexation. The significant extension to the FAS announced in December 2007 was predicated on these funds being transferred to government and the additional value derived from them part-funding the announced extension.

76. The Government remains convinced that the funding allocated to the FAS is best applied to covering as large a percentage of the expected pension as possible, as this is of immediate benefit, rather than protect a lower percentage over a longer period.

#### **Question 11: reducing annuities**

7 responses: all from organisations.

77. None of the respondents had any experience of annuities being reduced, if deflation occurred. One said that, even if such a decrease was permissible, they doubted if an annuity provider would apply it, for commercial reasons. Another thought it might occur where a defined contribution scheme had policies in the trustees' name.

#### ***The Government's Response***

78. In the light of these responses, the Government does not propose to provide for such situations. However, it will monitor the situation and consider amending the legislation in the event that circumstances change.

#### **Question 12: Surviving partners**

67 responses: 14 organisations and 53 individuals.

79. 66 responses were broadly in favour of the proposed approach. One respondent commented that the extension to cover surviving partners was more generous than the provisions in some of the schemes that they had dealt with, whilst another said he had not seen any evidence of this issue being raised by scheme members.

80. A small number commented on the potential disparity between survivor rules in a scheme and those in the FAS, as this could result in situations where a scheme may be paying a survivor's pension to the spouse or civil partner, while the FAS is paying the nominated unmarried partner. One respondent from an organisation was concerned that if a surviving partner were paid Assistance rather than a spouse, that spouse could lose out by having a deduction applied to the state widow(er)'s pension when they were not receiving any Assistance.

81. Some comments were also made that the proposed nomination process would lead to additional costs to schemes if they had to undertake a nomination exercise. It was suggested that some schemes had no nomination process covering surviving partners, other than for lump sums arising on death.

### ***The Government's Response***

82. It is the Government's intention to pay Assistance to a surviving partner only where there is, or was, provision to do so within the qualifying schemes and that partner has also met the other FAS qualifying criteria outlined in the consultation. The written nomination of a partner by the qualifying member is essential where there is also a legal spouse or civil partner and this can be either to the member's scheme or to the FAS scheme manager. The Government does not expect those schemes still winding up to undertake a fresh nomination exercise in response to the changes, though it suggests that

such schemes consider informing their members, as part of any ongoing communication with them, to ensure that any existing nominations are kept up-to-date. Members will also be able to nominate partners directly to the FAS scheme manager using a FAS nomination form which will be available from the FAS Operational Unit.

83. The Government accepts that there may be instances where there is a mismatch between beneficiaries of survivor payments made by schemes and FAS, in particular around the contracted out element of the pension. The Government believes this to be an unavoidable consequence for those schemes that have contracted out, where the trustees would be constrained to pay the spouse's contracted out element to the individual entitled to it, so only the non-contracted out element could be paid to another dependant.

84. However, this situation can already arise in schemes that provided for partners, and the Government believes that it is right that members can have the opportunity to nominate the partner they wish to receive survivor Assistance on their death.

85. In the state pension system, the Additional Pension can only be inherited by a spouse or civil partner. This amount is reduced where the deceased spouse or civil partner had been a member of a contracted-out pension scheme. This reduction to the spouse's or surviving civil partner's inherited Additional pension will still occur, even where the FAS pays a surviving partner and not a spouse.

### **Question 13: Surviving Dependants (dependent children)**

21 responses: 11 organisations and 10 individuals.

86. Nine respondents from organisations and five individuals favoured the Government's approach. Four respondents queried whether it was right to pay surviving dependants when the scheme rules would not have provided for them and suggested using the same approach proposed for surviving partners

i.e. only when there is entitlement to a pension under the rules of the pension scheme. One respondent suggested that, where scheme rules allowed, payments should continue to dependent adult children older than age 23.

### ***The Government's Response***

87. The Government's proposal for Assistance to surviving dependants will bring FAS in line with the PPF and provide a benefit available in most schemes. The PPF has an upper limit of age 23 as do many schemes, due to an increase in tax liability from this age. The Government continues to believe this to be the most appropriate cut-off point for surviving dependent children.

88. Separating out any schemes that did not provide for dependants would mean adding to the administrative complexity. Our estimates indicated that the difference between paying Assistance to all surviving children and only paying those where the member's scheme provided this protection is very small.

89. The draft Regulations requires that a child was financially dependent on the deceased member, in addition to the age and other criterion. The Government expects the scheme manager to take a sensible and pragmatic approach when applying this test.

### **Question 14: Polygamous Marriages**

11 responses: 9 organisations and 2 individuals.

90. The majority considered the Government's proposal to be acceptable, whilst commenting that, generally in their experience, the issue was of marginal concern with a very small impact. Some organisations commented that the approach was consistent with the one commonly used by many schemes, while others had little or no experience of the issue and a few were not aware of situations where polygamous marriages would be legally recognised under UK law.

91. Two respondents representing organisations did not think that it was reasonable to extend assistance beyond the lifetime of the first spouse, arguing that:

- (a) schemes would only pay one spouse; or
- (b) there would be substantial additional cost which it would be unreasonable for the taxpayer to fund, because the last spouse was likely to be younger.

92. One respondent queried whether pensions should also be split in the case of polyandry (ie. a woman with more than one husband) and a further respondent highlighted what they considered to be an inconsistency between state contributory benefits which do not recognise more than one surviving spouse and the government sponsored FAS.

### ***The Government's Response***

93. The term polygamy covers both sexes. That is, it encompasses the situation where a man has more than one wife (polygyny) and where a woman has more than one husband (polyandry). UK law recognises as valid a polygamous marriage that took place in a country where such marriages are permitted.

94. Assistance is not a benefit, but a payment provided to members of defined benefit occupational pension schemes who lost all or part of the pension they were expecting. The Government's proposal reflects the approach taken by many occupational schemes, that allow trustees to use discretion and it is consistent with other changes being made to ensure that those who would have been entitled to survivor pensions from the schemes (such as certain unmarried partners) are entitled to assistance.

95. The proposal will incur negligible cost, as the Government intends to divide a single survivor payment equally between more than one spouse.

### **Question 15: Transitional Provisions**

11 responses: 8 from organisations and 3 from individuals.

96. All responses were broadly in favour of the transitional provisions for annual payments. However, a significant minority thought that transitional protection should also extend to those members in receipt of any type of initial payments (not just those covered by transitional provisions in earlier legislation). The reasons given were that members in receipt of initial payments would normally expect that these payments would go up, when the final assessments were made, not down. Others commented that, if the only reason initial payments were in place was because the FAS was still awaiting information from the scheme, these individuals should not be penalised for this delay. A further comment was that, although it was accepted that members in receipt of initial payments could see their payments vary for a number of reasons, they did not believe that these legislative changes should be one of those reasons, due to members expectation that FAS Assistance will be calculated on the terms currently applicable to them, whether this be annual or initial payments.

### ***The Government's Response***

97. A fundamental principle of any payments made on account of a final settlement is that they can be adjusted and this is the case with scheme interim pensions and FAS initial payments. Communications with scheme members by FAS and schemes will have made clear that adjustments may be made. The need for adjustment may arise for a number of reasons. For example, there have been cases in which schemes have decreased interim pensions because of the funding position of the scheme, and FAS has made corresponding increases to top-up payments to maintain the 90 per cent level of expected pensions.

## **Administrative Changes**

### **Question 16: Allowing for Payments at Periods Other than Monthly**

11 responses: 6 from organisations and 5 from individuals.

98. All respondents supported this proposal, seeing it as a reasonable and appropriate flexibility.

#### ***The Government's Response***

99. The Government is pleased that the respondents support this proposal.

### **Questions 17 Reconciling Payments Made on Account of Entitlement**

13 Responses: 11 organisations and 2 individuals.

100. All the respondents were broadly in favour of this proposal. There was some qualification, as it was believed that the FAS would not be able to obtain the information needed to do the reconciliation calculation in all cases. One respondent asked for clarification as to how this reconciliation would work where the member died during the interim period and an interim pension was put in place for a survivor. Another asked if members might try and take action against trustees if scheme overprovision was recovered by the FAS.

#### ***The Government's Response***

101. The Government welcomes the support for this proposal and confirms that overpayments to a deceased member will only be recoverable from their estate and not from any survivor.

102. Trustees will normally pay arrears and recover overpayments for periods before 14 May 2004, as there is no entitlement to Assistance before this date. The Government has issued guidance to trustees to encourage them to strive to pay interim pensions at levels that are in line with scheme funds. This approach is intended to avoid members seeing a decrease in their future Assistance payments to take account of any excess interim pension payments made. Of course, trustees will wish to take into account the individual circumstances of their members and, in some cases, paying arrears for periods after 14 May 2004 could be in the member's best interests.

**Question 18: exceptional circumstances where overpayments should not be recovered or brought to account**

7 responses: 5 from organisations and 2 from individuals.

103. It was generally held that the FAS needed a sensible policy which allowed for reasonable recovery periods and discretion to waive such recovery in appropriate cases. One respondent thought that the decision to recover should explicitly be a reviewable determination.

104. One respondent said that recovery should be from the estate, where the individual had died and that recovery should not occur where the amount was trivial, where it would cause hardship or where the higher amount of Assistance led to a lower amount of means-tested benefit being paid.

***The Government's Response***

105. The Government is pleased that its approach on this matter has been endorsed by respondents and will take account of their comments when the guidance on this matter is drafted.

## **Questions 19: Information Required from Scheme Trustees and other relevant parties**

16 responses: 14 from organisations

106. There were mixed views as to the amount of work required to provide the information specified. Seven of the respondents thought that the task would be very time-consuming and costly: schemes hold incomplete data and manual records will need to be located and reviewed. In addition, the information required by the FAS does not always match that held and therefore further manipulation of the data is required. The respondents also complained that they have been asked to do this a number of times before, as the FAS has extended so has its information requirements.

107. Other respondents thought that difficulties would only arise in some cases, such as information on benefits in payment and some commented that they believed the task would not be an unduly onerous task, since the necessary records should have been maintained by the parties now being asked to provide the information.

108. Five of the respondents commented on the extra costs involved and three said directly that the FAS should pay for the extra work generated by the information requests.

### ***The Government's Response***

109. The Government has listened to the arguments that supplying information to the FAS is considered by some respondents to be time-consuming and costly. Equally, the Government has considered comments from respondents that supplying information would not be unduly onerous.

110. On balance, the Government has concluded that the information requirements are relevant and necessary, and that it is reasonable to expect respondents to meet them.

## **Question 20: Reporting scheme expenditure to the scheme manager**

12 responses: 10 from organisations

111. This suggestion was generally well received and comments indicate that these actions are generally part of trustee good practice. However it was felt that changes to the investment of assets should be notified to the FAS scheme manager before they are implemented rather than afterwards.

112. Objections expressed were around concerns over the cost of such reporting and the particular difficulties this could cause to smaller schemes. The suggestions to avoid these difficulties included:

- changing the timing to six monthly reporting;
- the scheme manager should be able to call for such data, at its discretion; and
- monitoring should not be applied to schemes across the board.

### ***The Government's Response***

113. The Government welcomes the support from respondents that the collection of scheme expenditure data is good practice.

114. The Government has taken account of comments to request details of significant investment changes *before* they take place on the basis that this approach is more pragmatic and enables discussion and consideration before action is taken by the trustee. As a result the Government has amended regulations to request information *before*, rather than *after* changes in the investment of scheme assets are made.

## **Question 21; requirement to inform scheme manager of legal action**

13 responses: 9 from organisations

115. The responses received agreed in principle that FAS should be notified of relevant legal proceedings and a specific reference to providing details of complaints to the Ombudsman was also suggested. Respondents requested for guidance to be issued to ensure that trustees and administrators understand what they are expected to report on. There were also suggestions that the timescale to provide the information within 14 days of these Regulations coming into force was too short and should be extended to 28 days.

### ***The Government's Response***

116. The Government welcomes support for the notification of contemplated legal and other actions and proceedings and intends to provide an explanation of “contemplated” and “significant” in guidance. The Government has considered concerns raised that the 14 day timescale for notifying of actions and proceedings is unworkable and has extended the 14 day deadline to 28 days.

117. The Government welcomes the suggestion to extend the provision to include specific reference to Ombudsman complaints and has amended the provision to include such a reference.

## **Question 22: Timing for the Provision of Information**

17 responses: 15 from organisations and 2 from individuals.

118. Those who expressed an opinion thought that one month for the provision of information would normally be an acceptable time period to

provide information, where it was already held. However, a number of the respondents pointed out that the trustees or scheme administrators may not hold the information required - for instance where the scheme member has died. In these cases, the time limit for the provision of information should start from the date the scheme obtains the information.

119. Two other timescales were also questioned:

(i) one respondent thought that 14 days to notify a scheme to the FAS was too short, as there are many things for trustees to do in the early days. They thought that the 28 days for the equivalent provision in the PPF was more sensible.

(ii) another respondent thought that 14 days to provide changes to information already provided was very tight. They also commented that many of the timescales were set from the date the Regulations came into force. This appeared to be logistically challenging and staggered deadlines were suggested.

### ***The Government's Response***

120. The Government accepts the point put forward with regard to the notification of death and will amend the draft Regulations as suggested, to require trustees, administrators or annuity providers to provide information to the scheme manager within one month, beginning on the date that the trustee, administrator or insurer becomes aware that the member has died.

121. In more general terms, where it is not possible for the provision of information within the timescales set out in regulations, the FAS scheme manager may extend the timescales, where appropriate.

### **Question 23: Reviews and Appeals**

6 responses: 4 from organisations and 2 from individuals.

122. All of the respondents welcomed this proposal. In the answer to question 18, it was suggested that overpayments should be explicitly made a reviewable matter.

### ***The Government's Response***

123. The Government welcomes the support for the extension of the right to review and appeal FAS determinations.

124. The Government does not agree that there is a requirement to make overpayments a reviewable matter. If a person is concerned that the calculation of their overpayment or the period that the overpayment relates to is incorrect they can ask the FAS scheme manager to provide an explanation of how the overpayment has been calculated and, if it is found to have been calculated incorrectly, the FAS scheme manager can adjust the overpayment.

## **The Operation of the Financial Assistance Scheme**

### **Question 24: The Board of the Pension Protection Fund becoming the FAS Scheme Manager.**

17 responses: 10 from organisations and 7 from individuals.

125. The proposal was generally seen as a sensible measure. However, a number of caveats were raised:

- that the funding of the two bodies - the FAS and the PPF - must remain transparently separate and there should be stringent accounting arrangements to ensure this is so;
- charges by the Board for undertaking FAS work should be transparent and separate, particularly where services are shared;
- that there should be no merging of the rules applying to each of the schemes. The FAS regime must be maintained separate in both design and justification;
- the new responsibilities for the Board must not have a negative impact on the Board's ability to run the PPF properly.

126. Concerns were also expressed over whether the Board would seek to apply the current PPF-related processes on the FAS schemes, which the respondents felt would be inappropriate. One respondent expressed a concern that the broader knowledge of the current FAS administrators (on such issues as social security benefits) would be lost in the change.

### ***The Government's response***

127. The Government is pleased with the general agreement on the proposal that the Board of the PPF should become the FAS scheme manager and administer the FAS. The Government can give an absolute commitment that funding for FAS will remain separate to that of the PPF and the administration costs and Assistance payments will continue to be met by Government.

128. Work to ensure that the correct resources are available for the FAS has taken place and the majority of staff from the FAS Operational Unit will work on secondment to the PPF to ensure continuation of service and mitigate the risk of FAS work impacting on PPF administration.

129. The Government understands that well over half the FAS schemes have been in the process of winding up for more than seven years. It is

expected that the PPF will put in place appropriate and proportionate measures to deal with this situation.

**Question 25: allowing for delegation of certain functions to a commercial provider**

12 responses: 6 from organisations and 6 from individuals.

130. All the respondents supported this proposal, but some specifically said that their support was predicated on the assumption that there were tight controls in place and that it was the most cost-effective approach.

***The Government's response***

131. The Government welcomes the support for the ability for the Board of the PPF to delegate some of its work to a commercial provider. Where work is so delegated the Board will remain wholly responsible and accountable for that work and will put in place the controls required by "Managing Public Money" (guidance and rules produced by Her Majesty's Treasury on how to manage and use public funds).

**Question 26: Information Sharing between the Department, the FAS Scheme Manager and any Third Party Provider**

12 responses: 7 from organisations and 5 from individuals.

132. There was no objection raised to this proposal, which was felt to facilitate efficient and accurate decision making. However, the caveat was that measure must be in place to ensure information sharing was done securely and limited to that which was necessary for the tasks to be performed.

***The Government's response***

133. The Government welcomes support for the sharing of relevant information and can confirm that it will ensure that only necessary data is shared, and that services provided by the FAS scheme manager and any third party provider will be subject to accreditation to current Government and DWP Information Security standards.

### **Question 27: Payments to Schemes**

18 responses: 13 from organisations and 5 from individuals.

134. This proposal was generally welcomed, although there were some observations on the detail.

(i) There could be some legal difficulties for trustees receiving funds from a third party and, once received, only spending the funds on the matters specified by the FAS, because of trustees' duties. They thought overriding legislation would be needed.

(ii) The objectives must be clear to ensure consistency of treatment between schemes and to ensure that the funds provided are used as expected. For instance, if the funds are given to trustees, can they then use them to pay an insurance company - which might be the administrator of the scheme.

(iii) There was a question as to whether there would be a cap on the amount paid.

### ***The Government's response***

135. The Government welcomes the support for its proposal. Each scheme that requests payment will have different circumstances and therefore the FAS scheme manager will need to make a decision on a case-by-case basis.

Therefore the Government believes it would be inappropriate to place a cap on the amount that could be paid.

136. The FAS scheme manager will set the terms and conditions it considers appropriate to ensure that any monies paid will not be used for any other purpose. The Government does not intend unconditional payments to be made by the FAS scheme manager, but for a specific intended purpose. When deciding how to use the money, the trustees will need to take into account all relevant circumstances. When balancing the interests of members, the Government does not anticipate there to be any circumstance where it could be in the members' best interests to spend money in contravention of terms set by the FAS scheme manager. No changes to the relevant provisions have been made as a result.

## List of Respondents to the Consultation

Allatt, Stan	Grace, Thomas
Altmann, Ros	Grant, Isobel
Asociation of Pensions Lawyers	Green, John
AXA	Grice, Edward
Barker, Dave	Griffiths, Walter
Barker, Jo	Gunn, James
Barnett, Anthony	Harrison, John
Bax, Richard	Healy, Philip
Beattie, Peter	Hendry, Robert
Bebbington, Sue	Hewitt
Benson, John	Higgins, Joseph
Bladon, Robert	HMRC
Boraston, Edwin	Holden, Gail
Boucher, John K	Holden, John
Boundy, Andrew	Hoorstom, Ronald
Bowerbank, Ronald	Hopkins, Craig
Brown, Alan	Horn, A
Brown, Kerry	Humphrey, Peter
Brown, Tony	Hunt, John
Buck Consultants Ltd	Husband, Charles
Burbridge, Graham	Hutcheon, John
Campbell, Brian	Hymans Robertson
Campbell, Mary	IPT
Capita Hartshead	Ironmonger, Wendy
CBI	ITS
Clayton, Alan	Jardine Lloyd Thomas
Colah, Pahlan	Jenner, Bob
Community Trade Union	Jones, Elaine
Coonan, Bernard	Jones, M H O
Cowley, J	Kelleher, Lesley
Crick, Neil	Kirkland, Derek
Crutchfield, Richard	L&G
Cumberworth, Peter	Lancaster, David
Davie, Ian	Lapinskas, P
Dawson, P B	Large, P
Digwood, Barry	Law Debenture
Eddison, James	Lodge, Tim
Entrust Pensions Ltd	MacDougal, I
Evans, David	Maguire, James
Fidler, Rex	Marnes, Alan
Finney, Clive	Martin, Tom
First Actuarial	McBride, Craig
Fraser, W D	McGlynn, John G
Garden, William	Meadow, Bruce

Meelings, Brian  
Mendelson, Roger  
Mercer  
Molloy, Kenneth  
Moloney, P  
More, Steve  
Morgan, D Michael  
Muir, Gordon  
Nicholl, Richard  
Noden, N E  
Norwich Union  
Nuttal, G  
O'Donnell, Thomasina  
Parker, M D  
Parr, Andrew  
Pate, Robert  
Paterson, Scott  
Pensions Action Group  
Pensions Ombudsman  
Pensions Regulator (the)  
Pinsent Masons  
Pitman, Stephen  
Pitmans Trustees Ltd  
Pollock, Patricia & Alan  
Potter, Alan  
Prudential  
Punter Southall Group  
Reid, Alex  
Ritchie, Jean  
Royal London Group  
Ruse, Paul  
Sanders, Bill  
Sargent, Patricia  
Scotia Holding PLC  
Segundo, A  
Sharkie, Elizabeth  
Simkins, Dave  
Simpson, Alan (MP)  
Sloane, Patrick  
Small, David  
SPC  
Stark, David

Sweeten, William  
Sumpster, Colin  
Trustee Advisory Panel<sup>1</sup>  
Tubbs, John  
Thomson, Robert  
Tudor, John  
Ward, Linda  
Waugh, Tom  
Webber, Mike  
Wheller, Peter  
Williams, John R  
Wilson, Alan  
Wilson, Brian  
Wise, Elizabeth  
Woolley, Ian  
Xafinity paymaster

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<sup>1</sup> The FAS Trustee Advisory Panel is an informal body comprising a number of trustees of, and other professionals involved with, FAS schemes. It meets on an irregular basis to assist the Department for Work and Pensions in designing the practical implementation of the extension to the FAS.

