

FINANCIAL GUIDANCE AND CLAIMS BILL

Consolidated Memorandum from the Department for Work and Pensions & HM Treasury to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Financial Guidance and Claims Bill (“the Bill”). It consolidates two supplementary memorandums provided whilst the Bill was in the House of Commons, on 26 January (Commons Committee stage) and 5 March (Commons Report stage). The Bill completed its Third Reading in the House of Commons on 24 April 2018 and is due to return to the House of Lords for consideration of Commons amendments on 25 April 2018.
2. References to Commons amendments are made within the heading of the explanation of each delegated power. Clause references are to Bill version 131 (the Bill as introduced into the Commons).

B. PURPOSE AND EFFECT OF THE BILL

3. This Bill establishes a new arms-length body to replace the Money Advice Service, the Pensions Advisory Service, and the Department for Work and Pensions’ ‘Pension Wise’, and makes provision for the funding of debt advice in the devolved administrations. It also enables the transfer of Claims Management Companies regulation from the Ministry of Justice to the Financial Conduct Authority. It also makes provision for banning cold-calling in relation to pensions and other services and for establishing a debt respite scheme.

C. NEW AND AMENDED DELEGATED POWERS

Part 1: Financial Guidance

Clause 1 and Schedule 2: The single financial guidance body – transfer schemes under section 1 [Commons amendments 1 & 35]

Power conferred on: Secretary of State

Power exercised by: schemes

Parliamentary Procedure: None

Context and Purpose

4. These are the usual provisions commonly found that are essential to enable property, rights and liabilities to be transferred from an existing body to a new one. In the Commons Clause 1 and Schedule 2 were amended to permit transfer schemes to be made to transfer property, rights and liabilities from the consumer financial education body (the Money Advice Service) to the devolved authorities. This is necessary because the Bill will result in responsibility for the provision of debt advice in Northern Ireland, Scotland and Wales passing from the consumer financial education body to the devolved authorities.

Justification for delegation

5. Powers to make transfer schemes are needed as the detail and complexities involved in a transfer of property, rights and liabilities from one body to another are likely to be technical and, as such, more suitable for an instrument made by way of a scheme, rather than in legislation.

Justification for procedure

6. Staff and property transfer schemes in respect of the body abolished by the Bill are, as usual, not subject to any Parliamentary procedure.
7. The provisions about transfer schemes concern operational matters that are ancillary to the substantive issues in this Bill which Parliament will have scrutinised during its passage.

New Clauses: Unsolicited direct marketing: pensions & Unsolicited direct marketing: other consumer financial products etc [Commons amendments 10 & 11]

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure

Context and purpose

8. The Government committed to banning pensions cold-calling in a consultation response on pension scams in August 2017. The rationale for this policy is to make it illegal for scammers to contact individuals to induce them to transfer their pension savings into inappropriate or fraudulent investments. Pension cold-calling can cause considerable consumer detriment. Pension savings are often an individual's largest asset, but there are low levels of consumer engagement and fraudsters have found pension savings to be a lucrative target in recent years.
9. The previous Clause 4 of the Bill (inserted in the House of Lords) provided for the new single financial guidance body to advise the Government on a ban on cold-calling in relation to financial services (which would include pensions) should it believe there to be significant consumer detriment which results from such cold-calling. On the back of this advice, the clause enabled the Secretary of State to introduce a ban on such cold calling through regulations.
10. However, the need to wait for advice from the SFGB meant that the power would be exercised slowly – with the Government estimating that any ban on cold-calling made under this power would only have come into force in 2020. However, given the significant risk of consumer detriment surrounding pensions cold-calling, the Government is committed to implementing a pensions cold-calling ban to a much quicker timetable. We made this commitment to speedy implementation in our response to a Work and Pensions Select Committee report, published in December, on preventing pension scams.
11. Clauses on unsolicited direct marketing should be read together. The first clause 'Unsolicited direct marketing: pensions' allows the Government to implement a ban on cold-calling in relation to pensions through regulations – fulfilling our commitment to enact the ban to a quicker timetable. The second clause 'Unsolicited direct marketing: other consumer financial products etc' replicates a power already existing in Clause 4, through enabling the Government to lay regulations to ban cold-calling in relation to other consumer financial services and products should it believe this would be beneficial to consumers.

Justification for delegation

12. In relation to the pensions cold calling ban, the development of this ban is complex and the government is still refining the details of how a ban will work in practice. As outlined when the Government responded to a consultation on pension scams which included proposals on banning pensions cold-calling, there are difficult policy details, such as defining the types of calls which are banned, and the circumstances in which there should be exclusions for legitimate business activities – including where an existing relationship exists. These issues need careful and detailed work with stakeholders, which we are currently undertaking, to ensure that a ban is robust and effective for consumers.
13. It would be a mistake to pre-judge this policy-making process by setting out specific details of the ban in primary legislation at this stage before the different options available can be properly assessed, including during consultation with stakeholders.
14. The Government is also keen to ensure that the ban on pensions cold-calling is flexible and can respond to emerging threats to consumers. Although the scope of the proposed ban is broad, fraudsters could find new ways to circumvent a ban, and the Government feels it sensible to ensure that a ban can be future-proofed through further changes to regulations. This was a view which was repeated strongly in the response to the government's consultation on a pensions cold calling ban.
15. In relation to the cold calling ban on other consumer financial products, the Government also believes it to be necessary to have a regulation making power to introduce any further such bans. This is for two reasons:
 - a. Debates on the Bill have shown that there are concerns over cold-calling in relation to other, non-pension, consumer financial products and service. The Government has therefore made provision in the Bill for this issue to be kept under review via the SFGB's consumer protection function. On the back of any further evidence gathered here, it is important we have the power to introduce such bans.
 - b. The proposed regulation-making power will enable the Government to protect consumers by responding quickly and effectively to emerging areas of consumer detriment in this area. This is important given the significant prospect of consumers being harmed by such cold-calling.

Justification for procedure

16. The Regulations are subject to the affirmative procedure in both Houses of Parliament. The affirmative procedure is appropriate in this case as it affords

sufficient parliamentary scrutiny for these powers. In particular, the amendment contains a Henry VIII regulation-making power. This enables the regulations to make incidental, supplementary, consequential, transitional or saving provision to Acts of Parliament. The power is limited in that it will only be used for the purposes of establishing a cold-calling ban on pensions or other consumer financial products and services. However, this power does not include provision that limits such a power to legislation passed before or later in the same session as the Bill itself. This is because it may be necessary to amend Acts passed later than 2018, because there is no time limit as to when the Government has to make regulations to ban cold-calling in relation to pensions or other consumer financial services.

New clause: Personal pension schemes: requirements to refer members to guidance etc. [Commons amendment 7]

Duty conferred on: the FCA

Duty exercised by: general rules made by the FCA

Parliamentary procedure: none

Context and purpose

17. This new clause amends section 137FB – “FCA general rules: disclosure of information about the availability of financial guidance” – of the Financial Services and Markets Act 2000 (“the FSMA”).
18. Section 137A – “The FCA’s general rules” – of the FSMA provides that “(1) *The FCA may make such rules applying to authorised persons— (a) with respect to the carrying on by them of regulated activities, or (b) with respect to the carrying on by them of activities which are not regulated activities, as appear to the FCA to be necessary or expedient for the purposes of advancing one or more of its operational objectives.*” Subsection (2) provides that “*Rules made under this section are referred to in this Act as the FCA’s general rules.*” An “authorised person” is a person authorised to carry out an activity regulated by the FCA and these activities include establishing, operating or winding up a personal or stakeholder pension scheme.
19. The clause would require the FCA to make general rules (under section 137A) requiring the trustees and managers of a “relevant pension scheme” to ensure a member or their survivor, when they make an application to access or transfer their pension benefits, is referred to the specific pensions guidance provided by the SFGB, and its delivery partners, about what they can do with their flexible benefits. The rules must also require that the trustees or managers provide the member or their survivor with an explanation of the nature and purpose of the guidance and prevent the trustees or managers from proceeding with the application until the member, or their survivor, has either received such

guidance or has opted out of receiving it. A “relevant pension scheme” is a personal or stakeholder pension scheme.

20. There are existing consultation requirements in respect of general rules made under section 137A of the FSMA. Section 138G provides that the power to make general rules is exercisable in writing and that the rules must be published. Section 138I of the FSMA also provides that, before making general rules, the FCA must publish them in draft (accompanied by an explanation of their purpose) and must have regard to any representations received in response (although section 138L provides that this requirement to consult does not apply if the FCA considers that the delay involved in carrying out the consultation would be prejudicial to the interests of consumers). Finally, subsection (4) also provides that, before publishing a draft of the rules, the FCA would be required to consult the Secretary of State and the SFGB. As a result, the FCA must consult on the draft rules which will give stakeholders and the public the opportunity to make representations which the FCA must have regard to. It must also publish the rules in writing in order to bring them to the attention of stakeholders and the public.

Justification for delegation

21. The FCA’s general rule-making power in section 137A of the FSMA already gives the FCA a discretionary ability to make rules of this kind and this amendment simply makes particular requirements of the FCA rather than delegates additional powers to that body. The FCA is the appropriate body to make these rules.

New Clause: Occupational pension schemes: requirements to refer members to guidance etc [Commons amendment 8]

Duty conferred on: the Secretary of State and the Department for Communities

Duty exercised by: regulations

Parliamentary procedure: negative procedure

Context and purpose

22. This new Clause inserts a new section 113B – with the same heading – into the Pension Schemes Act 1993 (“the PSA”).
23. The clause would require the Secretary of State to make regulations requiring the trustees and managers of occupational pension schemes to ensure a relevant beneficiary, when they make an application to access or transfer their pension benefits, is referred to the specific pensions guidance provided by the SFGB, and its delivery partners, about what they can do with their flexible benefits. The regulations must also require that the trustees or managers provide the beneficiary with an explanation of the nature and purpose of the

guidance and prevent the trustees or managers from proceeding with the application until the beneficiary has either received such guidance or has opted out of receiving it. A “relevant beneficiary” is a member of the scheme or another person of a prescribed description who has a right or entitlement to flexible benefits under the scheme.

24. The clause does not include any requirement for the Secretary of State to carry out a consultation before laying the regulations but it does require the Secretary of State to have regard to any rules made by the FCA under clause 19. This is because the expectation is the Secretary of State will lay regulations which will mirror the FCA’s rules and the FCA will be required to consult before making their rules. Not including an express consultation requirement therefore means that, while the Secretary of State will still be able to carry out a consultation if it is considered necessary to do, the Secretary of State will not, for example, be required to conduct one where it would simply duplicate work already done by the FCA.
25. The clause also makes provision for the regulations to provide for the Secretary of State or a prescribed person to issue guidance to which the trustees and managers of occupational pension schemes must have regard when complying with the requirements. The intention would be to use this power to enable the Pensions Regulator (“TPR”) to issue guidance on how pension scheme providers should effectively comply with the regulations. It is expected that the FCA will also issue guidance for providers of personal and stakeholder pension schemes to explain how they should comply with rules set by the FCA. This power to enable the Secretary of State or a prescribed person to provide guidance will allow equivalent guidance to be given to providers of occupational pension schemes in respect of details such as how the trustees or managers must ensure beneficiaries are referred to the guidance which it would not be appropriate to include in regulations.

Justification for delegation

26. The Government does not have an existing power to make regulations equivalent to those proposed in the Clause (Personal pension schemes: requirements to recommend guidance etc). This new clause is therefore necessary to enable the Government to create parity in the requirements on providers of personal, stakeholder and occupational pension schemes.

Justification for procedure

27. The new regulations would be made subject to the negative procedure. This is the same procedure as is provided for in respect of the very similar power for the Secretary of State to require personal and occupational pension schemes to provide members and other prescribed persons with specified information in

section 113 of the Pension Schemes Act 1993. The government considers the negative procedure will provide a suitable level of Parliamentary scrutiny as the substance of the requirements to be imposed in the regulations is set out on the face of the Bill and the regulations will therefore only bring this into force and provide additional detail where necessary. Using the negative procedure will also be a more proportionate procedure if the Secretary of State needs to make amendments to the regulations if, for example, methods of communication between trustees and managers and beneficiaries, change in the future.

Corresponding provision for Northern Ireland

28. Finally, the clause also includes a corresponding duty on the Department for Communities to make corresponding regulations in respect of Northern Ireland by inserting a new section 109B into the Pension Schemes (Northern Ireland) Act 1993.

Part 2: Claims Management Services

New Clause: Legal services regulators' rules: charges for claims management services [Commons amendment 19]

Power conferred on: The Law Society of England and Wales, the Law Society of Scotland, the General Council of the Bar and the Chartered Institute of Legal Executives.

Power exercised by: Rules

Parliamentary Procedure: None

Context and purpose

29. This Clause gives the *Law Society of England and Wales, the General Council of the Bar and the Chartered Institute of Legal Executives* a power to make rules restricting fees for certain claims management services charged by persons whom they regulate. The Law Society of England and Wales has a duty to make such rules where the service concerns claims in relation to financial products or services, and the Law Society of Scotland is given a power to make rules in relation to these cases.
30. This mirrors the powers given to the Financial Conduct Authority elsewhere in the Bill. The purpose of the duty on the Law Society for England and Wales, and the power given to the other legal services regulators, is to ensure that there is parity and equal treatment between providers of claims management services regardless of their regulator. The Bill already provides for an interim fee cap in relation to PPI claims, but this comes to an end in relation to those regulated by the Law Society of England and Wales, when the Law Society makes its own

rules, and in other cases on 29 April 2020. Those other legal service regulators will, if appropriate, be able to exercise their power to make similar rules if necessary having considered the nature and extent of any issues in relation to charges and fees that require addressing.

Justification for delegation

31. The legal services regulators, as the market regulators, are the appropriate bodies to develop and make rules regarding fees for claims management services that legal service providers can charge consumers for their services. Those regulators can also provide guidance and supplementary material as to how they consider the rules will operate. This will provide greater clarity for those they regulate and allow rules for charges to adapt should the market change in the future. There will also be greater certainty for the regulator to rely on its rules when taking action by reference to its rules against contraventions.
32. Any rules made by the legal service regulators will be made under the same conditions and safeguards as other rules made by them. For those regulators within England and Wales this will include having to act, so far as is reasonably practicable, in a way which is compatible with the regulatory objectives set out in the Legal Services Act 2007 and obtaining the agreement of the Legal Services Board to their rules.

Justification for procedure

33. The Treasury and, in relation to those legal services regulators within England and Wales, the Lord Chancellor considers that no Parliamentary procedure is required in respect of these powers for legal service regulators to make rules about charges for claims management services. Regulators' rules are subject to their own rule making procedures.

New Clause: Extension of power of the Law Society of Scotland to make rules [Commons amendment 20]

Power conferred on: Treasury

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and purpose

34. Subsection (1) of this Clause confers a power on the Treasury to amend clause 32 in order to extend the power of the Law Society of Scotland to make rules imposing a cap on fees charged for claims management services.

35. It provides that the power given to the Law Society of Scotland to make rules in relation to fees charged for claims management services provided in connection with a claim concerning a financial product or service may be extended to apply in relation to claims management services provided in relation to all, or any description of, claim.

Justification for delegation

36. As with the broader power for legal services regulators in England and Wales, this will ensure it is possible for the Law Society of Scotland to act, should fees for claims management services other than for claims concerning financial services and products become an issue. The Scottish Government is currently taking legislation through Scottish Parliament, which is closely related to this issue (see the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill). Taking a power to extend the power of the Law Society to make rules will ensure that if the power is needed, it will interact in the right way with that legislation, provided it is passed by the Scottish Parliament.

Justification for procedure

37. Any regulations made under this power will be subject to the affirmative procedure and require the consent of the Scottish Minister before regulations are made (the consent requirement included is in recognition of the Scottish Government's interest in the Scottish legal profession, and not because the regulation of claims management services is in any way devolved). The Treasury consider this is the appropriate procedure given the power can be used to extend the regulation of legal professions who carry out claims management services in relation to claims which do not concern financial products or services.

Part 3: General

Clause 30: Commencement [Commons amendments 26-33]

Power conferred on: Secretary of State and HM Treasury

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: None

Context and Purpose

38. Clause 30 provides for the commencement of the provisions within the Bill.
39. As amended, Clause 30 will provide for the new Clause (Unsolicited direct marketing: pensions) to come into force on Royal Assent.

40. The Clause will also provide for subsections (6) to (9) of the new Clause (Occupational pension schemes: requirements to refer members to guidance etc) to come into force on a day appointed by order made by the Department for Communities in Northern Ireland. Such an order is exercisable by statutory rule and may also make transitional, transitory and saving provision in connection with the coming into force of those subsections as well as incidental and supplementary provision.

41. The amendments to this Clause also will provide for new Clause (Unsolicited direct marketing: other consumer financial products etc) and new Clause (PPI claims: interim restriction on charges imposed by legal practitioners after transfer of regulation to FCA) to come into force two months after Royal Assent.

42. The remaining new clauses will be commenced on such a day as appointed by regulations.

Justification for delegation

43. It is essential to be able to bring provisions of the Bill into force at the appropriate time.

Justification for procedure

44. In common with commencement provisions in previous legislation, these powers will not be subject to parliamentary procedure. This is considered appropriate because the provisions to which they relate will have been fully debated as part of the Bill. Regulations will relate to the implementation of the commencement of provisions in the Bill which have not already been brought into force, and are therefore largely operational in nature.

**Department for Work and Pensions & HM Treasury
25 April 2018**