

HOUSE OF LORDS

Merits of Statutory Instruments Committee

15th Report of Session 2008-09

Drawing special attention to:

Draft Carbon Budgets Order 2009

Draft Carbon Accounting Regulations 2009

**Draft Climate Change Act 2008 (2020
Target, Credit Limit and Definitions)
Order 2009**

**Waste Batteries and Accumulators
Regulations 2009**

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

- (1) The Committee shall, subject to the exceptions in paragraph (2), consider—
 - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
 - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).
- (2) The exceptions are—
 - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
 - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
 - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
 - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
 - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
 - (c) that it may inappropriately implement European Union legislation;
 - (d) that it may imperfectly achieve its policy objectives.
- (4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

Rt Hon. the Baroness Butler-Sloss GBE	The Lord James of Blackheath CBE
The Lord Crisp KCB	The Lord Lucas
The Baroness Deech DBE	The Baroness Maddock
The Viscount Eccles CBE	The Lord Rosser
The Lord Filkin CBE (<i>Chairman</i>)	The Baroness Thomas of Winchester
The Lord Hart of Chilton	

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Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from the Stationery Office.

Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Statutory instruments

The Government's Office of Public Sector Information publishes statutory instruments on the internet at www.opsi.gov.uk/stat.htm, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

Fifteenth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

A. Draft Carbon Budgets Order 2009

Draft Carbon Accounting Regulations 2009

Draft Climate Change Act 2008 (2020 Target, Credit Limit and Definitions) Order 2009

Summary: These SIs form an implementation package for the provisions of the Climate Change Act 2008 aimed at achieving the UK's carbon reduction targets. During the passage of the Act, there was significant debate in the House on the issue of carbon budgets and accounting, and in particular around the provisions allowing for the purchase of carbon credits from overseas [e.g. HL Deb 27 November 2007, Cols 1134 - 1214]. Collectively, these SIs: set the first three carbon budgets; introduce a carbon accounting system which will be used to monitor compliance with the targets for reducing greenhouse gas emissions; amend the level of the 2020 Target in the Act from a 26% reduction in carbon dioxide to a 34% reduction in all greenhouse gases (on the advice of the Committee on Climate Change); define "international aviation" and "international shipping" for the purposes of the Act; and set the limit of the net amount of carbon units that may be credited to the net UK carbon account for the first budgetary period as zero carbon units (excluding under the EU Emissions Trading Scheme).

These instruments are drawn to the special attention of the House on the grounds that they give rise to issues of public policy likely to be of interest to the House.

1. These three draft SIs have been laid by the Department of Energy and Climate Change under the Climate Change Act 2008 ("the 2008 Act"). They are subject to the affirmative procedure. The SIs form an implementation package for the provisions of the Climate Change Act aimed at achieving the UK's carbon reduction targets. Specifically:
 - The Carbon Budgets Order 2009 sets the first three carbon budgets, as required by the Act. The budgets cover the periods 2008-2012, 2013-2017 and 2018-2022, and represent the budgeted maximum level of the net UK carbon account for the three periods;
 - The Carbon Accounting Regulations 2009 introduce a carbon accounting system, as provided for by the 2008 Act, which will be used to monitor compliance with the targets for reducing greenhouse gas emissions; and
 - The Climate Change Act 2008 (2020 Target, Credit Limit and Definitions) Order 2009 amends the level of the 2020 Target in the 2008 Act, sets a limit on the use of carbon credits that can be used to meet the first carbon budget, and defines "international aviation" and "international shipping" for the purposes of the Act.
2. During the passage of the 2008 Act, there was significant debate in the House on the issue of carbon budgets and accounting, and in particular

around the provisions allowing for the purchase of carbon credits from overseas. There are also two provisions in the third Order above which are significant developments since the Act. These are:

- The amendment of the level of the 2020 target, to a 34% reduction in all targeted greenhouse gases from a 26% reduction in carbon dioxide. This amendment is based on the advice of the Committee on Climate Change; and
 - The setting of the limit of the net amount of carbon units that may be credited to the net UK carbon account for the first budgetary period as zero carbon units (excluding under the EU Emissions Trading Scheme).
3. Given the significance and complexity of the package contained in these three instruments, the House may wish to use the debate on the instruments to satisfy itself that all of the components fit together logically, and that the Government can fully justify the developments to the package since the passing of the Climate Change Act 2008.

B. Waste Batteries and Accumulators Regulations 2009 (SI 2009/890)

Summary: These Regulations implement the provisions of Directive 2006/66/EC concerning waste batteries and accumulators. The Directive aims to ensure that the cost of separately collecting, treating and recycling waste batteries is borne by battery producers, and that collection and recycling rates are improved. In terms of the scheme as it relates to industrial and automotive batteries, the aim is to provide a safety net for what the government estimates is an already strong 90–95% recycling performance. But the targets set by the Directive for waste portable battery recycling are a significant step up from the current UK recycling level. Member states are required to collect at least 25% of waste portable batteries for recycling by 2012, increasing to 45% by 2016: currently only 3% of portable batteries in the UK are sent for recycling. Producers of portable batteries will be required to join a “Battery Compliance Scheme”. Each scheme will have to collect a quantity of waste batteries proportionate to the amount of batteries their members put on the market each year. The Committee could not see, on the evidence so far presented, how the proposed system will generate the incentives necessary to bring about the required significant and rapid changes in people’s behaviour.

These Regulations are drawn to the special attention of the House on the ground that they may imperfectly achieve their policy objectives for portable batteries.

4. These Regulations implement the provisions of Directive 2006/66/EC concerning waste batteries and accumulators. The Directive aims to ensure that the cost of separately collecting, treating and recycling waste batteries is borne by battery producers, and that collection and recycling rates are improved (to minimum target levels specified in the Directive).
5. In terms of the scheme as it relates to industrial and automotive batteries, the aim is to provide a safety net for what the Government estimates is an already strong recycling performance in the UK, with a recycling rate of around 90–95% of the approximately 200,000 tonnes of such batteries that are placed on the market annually. The Regulations therefore contain various take-back and collection obligations (and offences) for producers and various entitlements for the public, garages and others. The Department for

Business, Enterprise and Regulatory Reform (BERR) will have a monitoring and enforcement role for this part of the scheme.

6. For portable batteries, the starting point is very different. In the UK, approximately 30,000 tonnes of portable batteries are placed on the market annually, and only around 3% are currently sent for recycling. The Directive aims to increase the level of waste portable battery recycling by requiring Member States to collect at least 25% of waste portable batteries for recycling by 2012, increasing to 45% by 2016. As the Government acknowledge, this is a challenging target (Explanatory Memorandum, para 7.5). The Department for Environment, Food and Rural Affairs (DEFRA) will have overall responsibility for this part of the scheme.
7. Producers of portable batteries will be required to join a “Battery Compliance Scheme” (BCS) which will collect, treat and recycle batteries on behalf of producers. Each BCS will have to collect a quantity of waste batteries that is proportionate to the amount of batteries their members put on the market each year. The Regulations set “interim targets” for collection by BCSs of 10% in 2010 and 18% in 2011. Although there is no financial penalty on schemes that do not meet these interim targets, the Environment Agency may withdraw approval from a compliance scheme if it appears unable to meet its obligations. Compliance schemes can be prosecuted if they do not hit the 2012 target. The Directive also requires all persons selling portable batteries professionally (i.e. retailers) to take them back free of charge from end users (i.e. consumers).
8. The bulk of the Regulations as they relate to industrial and automotive batteries come into force on 5 May 2009. The Government intends that the new system for portable batteries will become operational from 1 January 2010 (1 February 2010 for the distributor take-back obligation).
9. In response to concerns raised by the Merits Committee about the practicalities of the Regulations; and how producers, BCS’s and existing recycling and waste authorities would work effectively together, the Departments concerned (BERR for industrial and automotive batteries, and DEFRA for portable batteries) submitted further information on the intended workings of the scheme. These notes are included at Appendix 1 and 2 respectively.
10. DEFRA suggests that BCSs will have a great deal of flexibility in how they achieve their quota, mentioning collections from households, shops, postal returns, public buildings or offices (supplementary memorandum, para 8). Despite this further evidence, the Committee remains to be convinced exactly how such a significant change in people’s behaviour will be brought about. Specifically, the Committee was not clear from the evidence provided why or how the system will provide sufficient incentives for individual households or members of the public to participate in sufficiently large numbers to meet the targets, especially as the scheme will be in operation for less than 3 years before the first major target date of 2012. **Our concern about the practicalities of the scheme leads us to question whether, for portable batteries, the Regulations are likely to achieve their policy objectives. The House may wish to seek further information from the Government about how exactly it is envisaged that the Battery Compliance Schemes will generate the incentives necessary to achieve the required significant and rapid changes in people’s behaviour.**

11. We note that the policy will be monitored (Explanatory Memorandum, para 12.2), and expect that prompt action will be taken in the event that this monitoring raises concerns about the practicalities of the scheme.

INSTRUMENT OF INTEREST

Education (Student Support) Regulations 2008 (Amendment) Regulations 2009 (SI 2009/862)

12. These Regulations have been made urgently to mitigate the consequences of a programming error in the Student Loans Company's computer system. As a result of the error, 3,232 students in England were overpaid loans in the first two terms of the 2008/09 academic year. Under the 2008 Regulations, the Secretary of State is required to recover overpayments of loans in the academic year in which they are made. These Regulations therefore increase the amount of loan that can be paid to this particular group of students, to avoid them receiving much lower loan payments for the third term than they were informed they would receive. The programming error has now been corrected and the SLC have run a series of checks. They have also added extra scenarios to their testing procedures to make it easier to identify any such problems at an early stage in future. Further information from the Department for Innovation, Universities and Skills is published at Appendix 3.

INSTRUMENTS NOT REPORTED

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments requiring affirmative approval

Legal Services Act 2007 (Register European Lawyers) Order 2009

Registered Foreign Lawyers Order 2009

Instruments subject to annulment

SI 2009/862 Education (Student Support) Regulations 2008 (Amendment) Regulations 2009

SI 2009/988 Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009

SI 2009/989 Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2009

SI 2009/990 Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 2009

SI 2009/991 Armed Forces (Conditional Release from Custody) Order 2009

SI 2009/992 Court Martial Appeal Court (Bail) Order 2009

- SI 2009/993 Armed Forces (Proceedings) (Costs) Regulations 2009
- SI 2009/994 Criminal Justice Act 1988 (Application to Service Courts) (Evidence) (Revocation) Order 2009
- SI 2009/1023 Excise Goods (Drawback) (Amendment) Regulations 2009
- SI 2009/1025 Local Government Pension Scheme (Amendment) Regulations 2009
- SI 2009/1032 Immigration (Passenger Transit Visa) (Amendment) (No. 2) Order 2009
- SI 2009/1033 Crime and Disorder Act 1998 (Responsible Authorities) Order 2009
- SI 2009/1034 Textile Products (Indications of Fibre Content) (Amendment) (No. 2) Regulations 2009
- SI 2009/1056 Cat and Dog Fur (Control of Import, Export and Placing on the Market) (Amendment) Regulations 2009
- HC 413 Statement of Changes in Immigration Rules

Instruments subject to annulment (Northern Ireland)

- SR2009/142 Police and Criminal Evidence (Application to the Police Ombudsman) Order (Northern Ireland) 2009
- SR2009/158 Criminal Justice (Northern Ireland) Order 2008 (Consequential Provision) Order 2009
- SR2009/161 Allocation of Housing and Homelessness (Eligibility) (Amendment) Regulations (Northern Ireland) 2009

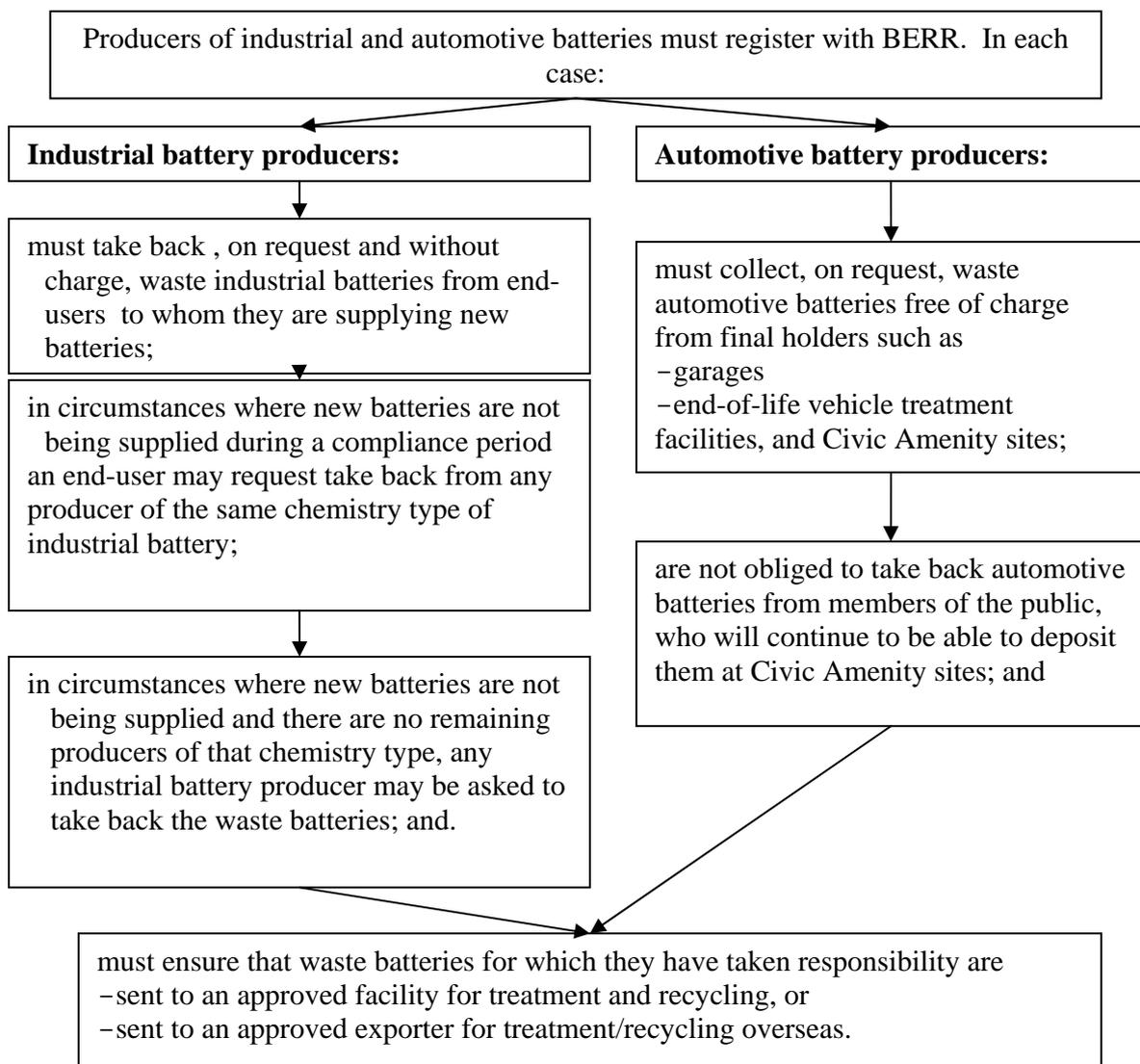
APPENDIX 1: WASTE BATTERIES AND ACCUMULATORS REGULATIONS 2009 (SI 2009/890): INFORMATION FROM BERR

Further information from the Department for Business, Enterprise and Regulatory Reform

The system being introduced to implement the Directive's provisions relating to waste industrial and automotive batteries is designed to allow the market to maintain the high recycling rates that have traditionally been achieved, while introducing statutory "producer responsibility" to provide a safety net when collection, treatment and recycling might become uneconomic. Defra is providing a separate note in respect of the system relating to waste portable batteries.

How the 'system' will work

The simplified schematic below sets out the system being introduced for the separate collection of waste industrial and automotive batteries.



The division of responsibilities within the 'system' - who does what?

Producers of industrial and automotive batteries must register with BERR, and report annually the tonnages and chemistries of batteries being placed on the market in the UK and dealt with under their take-back and collection obligations. Producers must publicise how end-users and final holders may access their entitlement to free take-back and collection. Approved battery treatment operators and exporters must report annually the tonnage of waste batteries recycled in UK or overseas.

How practical is the system?

The UK has traditionally had a strong recycling performance --estimated to be in excess of 95%, for larger lead-acid industrial batteries and waste automotive batteries – driven by the positive value of recovered lead. BERR did not wish to introduce a system that might disrupt successful collection and recycling activity, or significantly distort current market arrangements.

Rather, the UK's approach is to introduce 'producer responsibility' obligations for industrial and automotive battery producers that allow current activity to continue, and to ensure that the Directive's prohibition on the disposal of these types of waste batteries by incineration or landfill is complied with.

How will it be monitored?

BERR will be the recipient of the annual sales and collection figures reported by producers, and of the annual recycling and export figures reported by recyclers and exporters. Although there will not be a precise correlation between new battery sales and waste battery arisings – given the long lifespan of many industrial batteries in particular – this data, taken together, will provide a useful indicator to help the Government assess, and be able to report to the European Commission, whether the UK is meeting its obligation to achieve recycling of all waste industrial and automotive batteries.

How will you manage any risks and how will you ensure that the scheme meets its stated policy objective?

BERR will be the registrar of industrial and automotive battery producers, and will also be responsible for enforcing producers' collection, treatment, and reporting obligations, either directly or through a suitable appointed organisation.

In addition to the monitoring and enforcement role that BERR will undertake, the Department will be establishing an industrial and automotive batteries 'consultation group' as has been established under the auspices of the End-of-Life Vehicle (ELV) Regulations, and the Waste Advisory Board (WAB) under the WEEE Regulations. This group will be made up of representatives of the various parties with obligations under the Regulations, and will be invited to advise on issues which may arise during the operation of the system in the early years.

April 09

APPENDIX 2: WASTE BATTERIES AND ACCUMULATORS REGULATIONS 2009 (SI 2009/890): INFORMATION FROM DEFRA

Further information from the Department for Environment, Food and Rural Affairs

The Batteries and Accumulators Regulations 2009 transpose the EU Batteries and Accumulators Directive 2006. The main aim of the Directive is to increase the recycling of waste batteries.

The 2009 Regulations set up a system of “producer responsibility” for the collection, treatment and recycling of portable batteries (e.g. AA, button cells, laptop & camera batteries etc.) The new system is intended to become operational from 1st January 2010.

Portable battery producers and compliance schemes

Producers of portable batteries in the UK (i.e. manufacturers or importers) will meet their responsibilities under the Directive and Regulations by joining “Compliance Schemes” which will collect, treat and recycle batteries on behalf of producers. This is similar to existing producer responsibility systems such as those for packaging and for waste electrical and electronic equipment (WEEE).

We expect that there will be several compliance schemes which will compete to provide value for money to battery producers. Businesses wishing to operate a battery compliance scheme will need to meet strict criteria for approval which will be assessed by the relevant environment agency in England & Wales, Northern Ireland, or Scotland. The environment agencies will also monitor the performance of compliance schemes to ensure that they meet their collection targets (see below).

Producers who place less than 1 tonne of batteries a year on the UK market will not be required to join a compliance scheme and will therefore not bear the costs of financing the collection, treatment and recycling of batteries. However, small producers will have to register directly with an environment agency and report their sales data, since this information is needed to assess and report the overall size of the UK market for portable batteries.

Collection arrangements and targets

The Directive and Regulations set targets for the collection of portable batteries for recycling. Each compliance scheme will have to collect a quantity of waste batteries that is proportionate to the amount of batteries their members put on the market each year.

The annual collection rate for portable batteries in the UK at present is around 3%. The collection targets in the Directive are 25% by 2012 and 45% in 2016. To assess how well the compliance schemes are progressing towards the Directive targets, the Regulations set out “interim targets” for collection by compliance schemes of 10% in 2010 and 18% in 2011. There is no financial penalty on schemes that do not meet these interim targets, but the Environment Agencies may withdraw approval from a compliance scheme if it appears unable to meet its obligations.

To meet their targets, compliance schemes will need to introduce and/or fund portable battery collection systems across the country. Schemes will have a lot of flexibility to choose the collection systems they use. These could be collections from households, shops, postal returns, public buildings or offices.

Distributor take-back

The Directive requires all persons selling portable batteries professionally, i.e. retailers, to take them back free of charge from the end users (i.e. consumers). In

the Directive and Regulations such sellers are described as “distributors”. Compliance schemes must be able to collect batteries free of charge from distributors.

The Directive states that when collecting batteries the environmental impact of transport should be considered, whilst providing an accessible collection network for all. To take this into account, the Regulations would exempt those retailers who sell less than 32 kilograms of portable batteries a year (about 1200 average AA batteries) from the requirement to take back batteries.

At the request of the retail sector, distributor take-back will start on 1st February 2010 to avoid Christmas/New Year. Defra will appoint an enforcement body for this distributor take-back obligation later this year.

Treatment and recycling of portable batteries

Portable batteries collected either in-store by distributors or by other means, e.g. Local Authority kerbside collections, in schools, offices etc. will be collected by compliance schemes and sent to treatment facilities for recycling.

The treatment facilities in the UK or elsewhere in the EU will issue evidence of the quantities of batteries received from each scheme (they may work for more than one scheme). From this information schemes will be able to assess whether they reached their collection targets for the year.

The operators of battery treatment facilities are responsible for ensuring that the “recycling efficiencies” required by the Directive are met. From 2011 there are targets for “recycling efficiencies”, which mean that the operators of battery treatment facilities will need to demonstrate that they are recycling at least 50% by weight of the collected portable batteries. Higher standards apply to nickel-cadmium (75%) and lead-acid batteries (65%). The Environment Agencies are the responsible bodies for monitoring the approved treatment operators and exporters.

April 09

**APPENDIX 3: EDUCATION (STUDENT SUPPORT) REGULATIONS 2008
(AMENDMENT) REGULATIONS 2009 (SI 2009/862)**

Further information from the Department for Universities, Innovation and Skills

Q1. What exactly went wrong with the computer programme?

A1. There was an error in one line of code in the SLC's computer programme which is used to calculate the amount of loan for living costs for a group of students from households with more than one eligible student. If a household has more than one student undertaking higher education within it, then the amount that household is expected to contribute towards children's maintenance is split between the number of children in higher education during the Academic Year. This is referred to as a "split contribution" and the provisions are set out in paragraphs 10 -12 of Schedule 4 to the main Student Support Regulations for the 2008/09 Academic Year. The programming error caused the child's entitlement to maintenance support not to be reduced by this split contribution. This resulted in an overpayment of loan to a small group of 3,232 students subject to split contributions, approximately 0.4% of English domiciled students in 2008/09.

Q2. Was it one fault which affected all the students?

A2. Yes. See answer to question 1 above.

Q3. Were all the students affected in exactly the same way (and to the same financial extent)?

A3. The programming error had the same effect on the students in question: i.e. it caused all the affected students to receive an overpayment of loan.

However the amount of overpayment depended on individual students' personal and family circumstances and the elements of the student support package that they were applying for.

More than 85% of the affected students were incorrectly assessed as being entitled to a loan of between £800 and £1,260 more than permitted under the Student Support Regulations for the 2008/09 Academic Year. This will have resulted in these students being overpaid between £528 and £832 more loan for living costs than they were entitled to for the first two terms of their course for the 2008/09 Academic Year.

The highest incorrect annual assessment was £1,260 and the lowest under £60.

Q4. What is the potential for repetition of the problem and how is the risk being managed?

A4. The programming error which resulted in overpayments for this group of students for 2008/09 has now been corrected. The SLC has also checked similar scenarios to the one that caused the error and have confirmed that there are no problems.

The area of computer code which caused the problem for 2008/09 has been checked for all previous academic years and also for 2009/10. The SLC has confirmed that they have found no errors and have added extra scenarios to their testing procedures to make it easier to identify any such problems at an early stage in future.

Q5. What is the Secretary of State's management process of the Student Loans Company (briefly)?

A5. The process for managing the performance of the SLC is set out in a Framework Document. The current Framework Document came into force at the beginning of April 2009 and clearly sets out the responsibilities of the SLC for reporting performance and bringing risks and issues promptly to the attention of the Department.

The SLC reports its financial and non-financial performance to its Board on a monthly basis. A DIUS Assessor, who acts on behalf of the Secretary of State, attends SLC Board meetings to gain assurance that the SLC is being managed effectively.

In addition, the SLC Chair and Chief Executive attend formal performance reviews with the Department at least twice a year. At least one of these reviews is conducted by the Minister. During these reviews, the SLC's progress in achieving its performance targets is assessed, as well as any current delivery issues.

May 09