

Government response to the 2011 consultation on the draft Financial Assistance Scheme Regulations 2012

May 2012

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Executive summary

1. On 10th June 2011 the Government started a consultation on the draft Financial Assistance Scheme Regulations 2012. This consultation ended on 1 September 2011. At the same time the Government consulted on a draft set of regulations making amendments to other legislation consequential on the changes made by the Financial Assistance Scheme Regulations 2012.
2. The Government received no responses on the draft consequential amendments regulations.
3. The Government has received 19 responses on the draft Financial Assistance Scheme regulations: one from an individual and 18 from institutions with an interest in the pensions field.
4. The draft regulations are intended to:
 - consolidate all the regulations which have amended the Financial Assistance Scheme regulations since 2005;
 - make a number of changes to clarify and/or ensure the existing policy is reflected in the regulations; and
 - make certain, specified changes to implement new policy.
5. The comments are summarised below with the Government's response to those comments.

Questions and responses

Question 1: extending the scheme qualifying conditions to cover further schemes

6. The proposed extension was generally welcomed. Nine responses expressed concerns, of which seven related to the time limits imposed, and in particular, the deadline by which schemes in this position would need to have started to wind up.
7. Respondents were concerned that the time limits could prompt unnecessary wind-ups, (for example, where a company is currently supporting a pension scheme but has no legal obligation to do so), and that other schemes could fall outside the time-limits. Extending the time limits and/or taking a discretion to waive the time-limit were suggested, and respondents warned that failing to protect schemes in the future could lead to further amending regulations, and/or potential legal challenge on the basis that the UK had not implemented the Insolvency Directive¹ correctly.
8. Some respondents felt that help should come from the Pension Protection Fund (PPF), rather than the taxpayer, and one suggested that pensioner members

¹ Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.

should be paid 100 per cent, as they would be in the PPF. One respondent believed that there should be a mechanism to enable non-statutory employers to become statutory employers.

Government response

9. Given the consultation on these regulations began in June 2011, the Government believes that trustees have had sufficient notice to either attach a statutory employer to their scheme or to consider and start winding up the scheme, if necessary. The Government does not, therefore, think that extending time limits is necessary, as there has been enough time and the mechanisms available to enable employers to assume responsibility for schemes.
10. The Government does not think that these schemes should go into the PPF. Widening the PPF entry criteria to include schemes without a statutory employer would change the nature of risk managed by the Board of the PPF. Other schemes might object if they felt that schemes could get into the PPF without being subject to scheme funding/employer debt legislation and if levy bills increased to cover this.
11. Finally, there is no reason why this group of pensioners should, exceptionally, be paid more than the normal Financial Assistance Scheme (FAS) 90 per cent, even if it was possible to level up to 100 per cent only for members in the affected schemes, as suggested. All members of the FAS who had reached their retirement age at the start of wind-up would also have to be paid the increase and the subsequent costs are not affordable in the current economic situation.

Question 2: reflecting pension sharing orders implemented during wind up

12. There were five responses on this issue. All considered the proposal sensible. There were two issues raised: one respondent questioned whether assistance could be shared and the other commented that the draft legislation did not appear to deal with pension debits according to the intention.

Government response

13. The Government is pleased by the general support for this proposal. It confirms that, assistance cannot be shared as part of a divorce, although Courts can take into account the fact that one member of the couple is getting such a payment.
14. In response to the comment on the pension debit legislation, the Government has checked how the draft Regulations work and made some amendments.

Question 3: surviving disabled dependants over 23 years old

15. Four comments on this issue were received, which all welcomed the proposal. One response asked for clarification as to whether or not a child who is over age 23 would have their pension decreased.

Government response

16. Where a disabled child is in receipt of a scheme payment before the scheme began to wind up, they are entitled to assistance up to the date the scheme would have stopped payments, had it continued to operate. Therefore, where the scheme would have paid a disabled child for life, the FAS will do so. Payments will not be reduced when the child reaches age 23.
17. However, the situation is different where a disabled child first becomes entitled to a scheme payment during wind up, even where the scheme would have paid that child for life. In these cases assistance will stop when the child reaches age 23.
18. If the scheme is not transferring assets to government, it will buy a lifetime annuity for the child with the assets remaining in the scheme. These draft Regulations provide for the FAS to make a payment based on the child's asset share, where they are in the same situation as described above, but the scheme is transferring assets to government.
19. In both cases the amount paid to the disabled child after they reach age 23 could be less than the assistance (or the assistance plus the scheme payment) in payment before that age.

Question 4: default level of survivor benefits

20. There were four responses to this question, all of which agreed with the proposal.

Government response

21. The Government is pleased by the response on this issue.

Question 5: the calculation of ill health payments, when an actuarial factor is applied

22. Five responses were received on this issue. Three supported the idea generally, although one did say that the proposal made the administration more complex. One specifically said that they thought it reasonable not to change the amount of payments to those already in receipt.
23. One respondent thought the FAS should use the scheme actuarial factors and another thought there should be no actuarial reduction at all.

Government response

24. The Government accepts that the proposed approach makes the administration more complex, but feels that the alternative would be unfair.
25. The Government uses a single set of actuarial factors to ensure consistency across the FAS membership. In addition, as many of the FAS schemes began winding up some years ago, the factors they used are, inevitably, becoming more out of date.
26. It is common for pension schemes to apply an actuarial factor when allowing members to draw their pension before the scheme's normal retirement age (although some schemes provide for unreduced early access where the member

has a life-limiting illness). The Government does not believe the FAS should offer benefits that are more generous than those provided by schemes.

Question 6: payments not protected when the 10 July 2009 Regulations came into force

27. There were three comments on this, all of which agreed that this was a reasonable proposal.

Government response

28. The Government is pleased by the response on this issue.

Question 7: transitional protection

29. There were five responses on transitional protection, all of which supported the general proposition. One said that they thought anyone with an overpayment as a consequence of the two named exceptions should not have that overpayment recovered. Another asked whether those who might have their payments reduced as a consequence of changes made by the Financial Assistance Scheme Regulations 2012 would also have their payments transitionally protected.

30. One respondent said that they did not think the draft regulation on transitional protection achieved the policy intent and a final respondent mentioned the change from using the crystallisation date to using the date of wind up to determine the expected pension and actual pension made by the Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2009. The respondent suggested that those who were having their assistance calculated with reference to the crystallisation date before the amendments made by those regulations should have their payments protected

Government response

31. The Government accepts that offering transitional protection to ensure payments do not go down when the legislation governing FAS payments changes does complicate the assistance calculation. However, where a member had their final payment calculated (that is their annual or ill health payment) the Government does not believe it is fair to reduce the amount if the legislation is changed afterwards, except in very limited cases.

32. Where the amounts are being reduced because the exceptions noted apply, no overpayment will be recovered from the individuals concerned.

33. Anyone in receipt of an annual or ill health payment when the Financial Assistance Scheme (Miscellaneous Provisions) Regulations 2009 came into force, did have their payment protected. The amount of the initial payments (ie. payments made on account of entitlement) was not protected, as members will have realised that the amounts were provisional and could change.

Question 8: how to deal with underpin cases

34. Seven respondents provided substantive comments on the options for the treatment of underpins in FAS schemes. The consultation paper had asked for views on whether legislation should:
- require trustees to identify and discharge money purchase underpins prior to the scheme's assets transferring to FAS; or
 - convert the money purchase underpin into a FAS payment.
- The consultation also asked whether the calculation of the relative value of the defined benefit and money purchase elements in an underpin arrangement should happen at the **crystallisation** date (that is when the scheme commenced to wind-up) or the **calculation** date (that is the date when the value of the scheme's assets are established prior to transfer to Government).
35. Views were mixed on both of these aspects although all respondents agreed that this was a complex and finely balanced area. One suggested it was so complex that it should proceed on a slower track than the proposed timetable for the FAS Regulations 2012. Several respondents also linked the recent judgment in the Bridge case to this issue. One respondent suggested an alternative proposal which combined discharge and taking rights into FAS. Several respondents also commented on the actuarial issues raised by using either the crystallisation or calculation date, although there was a slight preference for the latter.
36. In the light of the level of interest in this issue, and the mix of views, officials held a workshop with some of the respondents to explore a solution that balances the treatment of all members and taxpayers and is operationally deliverable. These respondents (mainly trustee firms), suggested that:
- money purchase members should 'share some of the pain' and not receive full discharge of their 'pots'; and
 - the taxpayer should not make up the reduction in assets of other scheme members when money purchase members receive more than currently.

Government response

37. This is a particularly difficult issue as there is very little information available about the number and type of people who might be affected by the different options. In considering a solution, the potential benefits of any move to deliver changes over a longer track had to be balanced against the need to discharge the liabilities in these schemes relatively quickly, to provide certainty to members. As there was no consensus among those who responded to the consultation, the Government has given much thought to the best way forward for all involved – those members with significant money purchase pots, the remaining defined benefit members of the scheme and tax payers.
38. The Government has decided to amend its valuation guidance so that relevant FAS schemes apply a modified version of Option A from the original consultation.

39. Under this approach, defined benefit underpins to money purchase benefits should only take effect if the value of the accumulated money purchase pot does not equal, or exceed, the value of the underpin benefit at the point of determination (the comparison date). Similarly, a money purchase underpin to a defined benefit should only take effect if the value of the accumulated money purchase pot is equal to or exceeds the value of the defined benefit at the test date. Trustees will be required to discharge money purchase liabilities in relevant cases externally whilst remaining assets in respect of defined benefit members will transfer to the Government.
40. In order to make this process easier the comparison date will be closer to the final valuation Calculation Date than the Crystallisation Date, as the latter would have involved some schemes undertaking comparisons as at a date many years in the past. The flexibility provided by FAS guidance allows trustees to make comparisons at a date when more recent market conditions can be considered. The Government believes that this will make for an easier test. The decision on comparison dates reflects the preferred approach in the comments received.
41. The revised FAS guidance for actuaries in schemes transferring assets to government is being issued alongside this response.
42. Overall, the Government thinks its proposal is the fairest approach and closer to the outcomes originally envisaged for these members. In addition, this approach is consistent with the legislation applicable to schemes that started to wind up on or after 6 April 2005 and in line with what was the policy intent for pre-6 April 2005 schemes.
43. In reaching this view the Government is aware of the potential effect on some individuals whose pots are only just below the value needed to exceed the DB underpin. Some respondents to the consultation referred to these circumstances. However, the Government has had to strike a balance between the deliverability and simplicity of the ultimate solution, with the potential effect of some individuals in particular cases. The Government has decided that it is equitable to have a process that is consistent with the broader legislation
44. The Government realises its approach might mean some re-working for schemes which have already provisionally allocated funds differently. The discharge of the money purchase liabilities could mean that the defined benefit members of the scheme receive a lower asset share than under one of the other options, although the support offered by the FAS to these members means that the majority are unlikely to see a difference to their FAS payments.
45. However, it is possible that an interim pension in payment to a defined benefit member may need adjusting if asset shares change. This could result in some defined benefit pensioners getting a lower payment from their scheme and from the FAS once assets transfer. To mitigate the impact on these members and the reworking needed, the FAS will not recover any overpayments made by schemes during the winding up period to any pensioners paid over 90 per cent, because the scheme included funds in the scheme asset allocation which are re-allocated

to the money purchase members as a consequence of the Government's favoured approach.

46. As this change is delivered via guidance there will be no amendment needed to the Regulations. Amended valuation guidance is now available on the FAS website.

Question 9: delegation of determinations

47. There were four responses to this question. No one objected to the proposal as a matter of principle, however all respondents had comments to make. Two respondents sought assurance that there would be a right of appeal against delegated determinations and asked what form this would take. One mentioned that such delegation would be inconsistent with the approach taken by occupational pension schemes. Another said the key is to ensure the commercial provider had clear guidelines to ensure consistency.

Government response

48. Delegated decisions are subject to the same review and appeal process as un-delegated decisions.
49. The Government is satisfied that, should the FAS scheme manager decide to delegate these decisions it will ensure that the commercial provider is conversant with the appropriate criteria to be applied for these decisions, that a consistent approach is applied, and that any necessary support will be provided.

Question 10: handling complaints of maladministration

50. The Government received six responses on this issue. No respondents objected to the transfer of the investigation of complaints of maladministration by the FAS scheme manager to the PPF Ombudsman. However, respondents did object to the proposal that the initial complaint had to be made to the FAS scheme manager within 28 days of the complainant discovering that maladministration had occurred.

Government response

51. Given the objections raised to it, the Government considered whether to retain the proposed 28 day limit (which only applies to acts of maladministration that occur after these regulations come into force) on complaints and has decided to keep the time limit at this level. This limit should not create difficulties, as the FAS scheme manager has the discretion to accept complaints after the 28 day period has expired, if it considers that the circumstances for the delay were reasonable.

Question 11: scheme manager compensating for maladministration

52. There were five responses on this issue. Most agreed that this was a sensible proposal. One asked where the funds would come from to pay any compensation.

And another asked why the FAS would operate a stricter test than used for PPF maladministration.

Government response

53. The regulations provide for any maladministration complaints against the FAS to use the PPF complaints process. Any compensation payments will be made in line with guidance issued by Her Majesty's Treasury and the amount will be appropriate to the distress or inconvenience caused.

Question 12: paying pension arrears to deceased member's estates

54. There were four comments on this issue and all respondents agreed with the proposal.

Government response

55. The Government is pleased by the response on this issue.

Question 13: schemes should generally pay arrears of pension where death occurs before the transfer of assets

56. There were five responses all of which supported the proposal, although one did comment that this approach could delay transfer.

Government response

57. The Government is pleased with the support for this proposal. It acknowledges that some delay in the transfer of assets might occur in some schemes as a consequence, but does not expect the situation to arise often and thinks the alternative might give rise to a greater delay in the payments being made.

Question 14: does the consolidation and simplification of the Regulations achieve the aims set out in this consultation document

58. The single respondent pointed out a number of areas where they thought the draft Regulations did not achieve the policy objectives. One comment is worth highlighting regarding a specific situation which the respondent believes is not covered by the draft Regulations.

59. This situation identified was where a scheme member had part, or all, of their pension entitlement taken away after wind up begins, because they have committed certain offences under the Pensions Act 1995. In these circumstances, the member has a reduced pension entitlement, but the respondent thought that this reduction could not be reflected in the assistance calculation.

Government response

60. The Government has considered the provisions of the Pensions Act 1995 which allows for the reduction of a scheme member's pension entitlement. The relevant sections are:

- a. Section 92 and 93 allows for a pension to be forfeited where the member has been found guilty of certain serious crimes (such as murder); and
- b. Section 91(5) allows a person to give up part, or all, of their pension in certain circumstances. Specifically, section 91(5)(d) and (e) deal with the situation where the member owes a debt to the employer as a consequence of a "criminal, negligent or fraudulent act or omission" or owes a debt to the scheme after having been found to be in breach of their duties as a trustee.

61. Generally assistance is based on the amount of scheme pension accrued by a member before the beginning of wind up. There are some specific exceptions to this rule - for instance where a deferred member transfers out only part of their accrued rights before wind up begins. This means that, if the rare situations as described above occur, assistance would be based on the higher, unreduced, amount of pension.

62. The Government has considered the situation described by the respondent and has decided to amend the draft Regulations so that, where a member has given up or forfeited part or all of their scheme pension in the circumstances described above, this reduction will be used as the basis of the assistance calculation from the date the scheme reduces the pension entitlement. Using the reduced amount of pension entitlement will affect any calculation based on the member's entitlement, such as survivor payments or payments to surviving dependent children.

63. The Government is not intending to allow for assistance itself to be reduced, if the circumstances arise after the scheme has discharged its liability to the member.

Question 15: what are the potential effects on different groups

64. There were two responses on this matter, neither of which reported any obvious discriminatory effects. One respondent said that it will be important to ensure that none occurs in practice and that it might be useful for the scheme manager to include guidance on non-discrimination to its commercial provider.

Government response

65. The Government is pleased that no one thinks the draft Regulations have any discriminatory effect. It will pass on the comments regarding guidance to the Scheme Manager.

Question 16: will the consolidation and simplification of the Regulations deliver the same outcomes

66. There were three responses to this question all of which welcomed the approach taken as it makes the regulations easier to understand.

Government response

67. The Government has where possible removed the need to cross reference to the PPF regulations. However, by aligning the process of investigating complaints of maladministration by the FAS scheme manager with that of the PPF, it has been necessary to make reference to the PPF regulations, as the processes for making and investigating a complaint are now the same.

Question 17: any additional consequential amendments needed

68. There were two responses to this question. One brought attention to an omission they had found and suggested that a further check was done to ensure all references are amended.

General

69. There were, in addition, a number of responses which did not specifically fall into one of the questions asked.

70. One respondent suggested that the scheme manager be given powers to alter benefits where it thinks the amount is inconsistent with the basic FAS principles and intervention is required to ensure fairness.

71. A further respondent suggested that the FAS website should also be consolidated.

72. Finally, there were also some comments on what elements of the lost pension the FAS covered. For instance, some respondents objected to the fact that early access is limited to those in ill health.

Government response

73. The suggestion that the scheme manager is given powers to alter benefits in certain circumstances is interesting. However, having given this some thought, the Government does not think it is appropriate to legislate in such a manner. It would, effectively, allow the scheme manager to ignore the regulations at its discretion which could lead to members being treated differently and introduce some uncertainty as to entitlement.

74. The FAS website is the responsibility of the scheme manager. But the Government will pass on the suggestion.

Annex A – List of questions in the consultation

- Q1. The Government welcomes comments on the proposal to extend the scheme qualifying conditions for the FAS for certain schemes without a statutory employer.
- Q2. The Government would be interested in any comments on the proposal to reflect pension sharing orders implemented during the winding up of a qualifying pension scheme.
- Q3. The Government welcomes comments on the proposal that the FAS should pay certain surviving disabled dependants at the level of their survivor notional pension from age 23 for life.
- Q4. The Government welcomes comments on its proposal to provide a default apportionment of survivor/dependant benefits to be used when calculating notional pensions based on scheme rules where those rules leave apportionment to trustee discretion which has not yet been exercised.
- Q5. The Government welcomes comments on its proposed changes to the calculation of initial and annual payments in respect of ill-health to ensure that future payments are calculated on the intended basis and on its proposals for dealing with those already in receipt of such payments.
- Q6. The Government welcomes comments on the way it proposes to deal with those whose payments were not protected from a reduction when the amendments to the FAS Regulations came into force on 10 July 2009.
- Q7. The Government would welcome any comments on the transitional protection, including the proposed exclusion of two circumstances.
- Q8. The Government welcomes comments on:
- which of these two options would be preferable to ensure there is equitable treatment between members with money purchase underpins and other members in such schemes; and
 - by reference to which date the assessment should be made.
- It would also welcome comments on the operational implications of either approach.
- Q9. The Government welcomes comments on the proposal that the FAS scheme manager should be able to delegate determinations relating to ill health, severe ill health, terminal illness and the financial dependency or interdependency of certain survivors to the FAS scheme manager's commercial provider.
- Q10. The Government would welcome comments on the proposal that the investigation of complaints of maladministration by the FAS scheme manager should be transferred to the PPFO. The Government would also welcome any comments on the time limits and specifically whether there should be a time limit imposed on complaints to the scheme manager concerning issues arising before these regulations come into force.

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Q11. The Government would welcome comments on the proposal that the FAS scheme manager should be able to make compensation payments in respect of maladministration.

Q12. The Government welcomes comments on the proposal that the FAS scheme manager is able to make payments of pension arrears to the estates of members who die between the calculation date and the transfer of assets.

Q13. The Government is also interested in comments on the intention that the pension scheme is generally expected to pay arrears of pension prior to transfer where death occurs between the calculation date and the transfer if it is possible to do so.

Q14. The Government would like comments on whether the consolidation and simplification of the Regulations achieve the aims set out in this consultation document.

Q15. The Government would welcome comments on the potential effect of these changes on equality between different groups. In particular, the Government welcomes comments on:

- whether there are any differential impacts on different racial groups;
- whether disabled people would be affected differently than non-disabled people; and
- whether men and women would be affected differently by these changes.

Q16. The Government would welcome views on whether the consolidation of and simplification of the Regulations will deliver the same outcomes as before for relevant members. This question may be of particular interest to pensions and legal professionals.

Q17. Are there any additional consequential amendments that are required to bring into effect the changes made under the consolidation of the main FAS Regulations?

Annex B – List of respondents

Anglo United Pension Scheme

Aon Hewitt

Association of Pension Lawyers

Bridge Trustees Ltd

Broadstone Ltd

Capita Hartshead

Cobbetts

Eversheds

George and Harding Group Pension Scheme Trustees

Law Society of Scotland

Mercer

Pensions Action Group

Pension Protection Fund

Pension Protection Fund Ombudsman

Society of Pension Consultants

Mr Richard Nicholl

Tower Watson

Trades Union Congress

Xafinity