EXPLANATORY MEMORANDUM TO

THE RESTRICTION OF PUBLIC SECTOR EXIT PAYMENTS REGULATIONS 2020

2020 No. 1122

1. Introduction

1.1 This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 These Regulations will restrict prescribed public sector bodies from making exit payments above £95,000 in connection with a person leaving employment or vacating office.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The schedule to these Regulations individually lists each prescribed public sector body. HM Treasury has undertaken an exercise of cross checking various existing lists of public sector bodies, including the ONS public sector classification guide, Whole of Government Accounts, and the Cabinet Office Public Bodies guide. HM Treasury has also sought comments from other government departments in relation to their arm's length bodies. HM Treasury is therefore confident a justification can be provided for each body that is listed. The schedule may need to be amended from time to time, for example to include a newly created body.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The enabling powers in sections 153A, 153B and 153C Small Business, Enterprise and Employment Act 2015 ('the 2015 Act') apply to the United Kingdom as a result of section 163 of the 2015 Act, with exceptions relating to payments made by authorities exercising reserved or devolved functions or by the Scottish Parliamentary Corporate Body, and payments to made to specific Welsh office holders as set out in sections 153A(10) and 153B(1) of the 2015 Act.

3.4 The English Votes procedures are not applicable.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 The Chief Secretary to the Treasury has made the following statement regarding Human Rights:

"In my view the provisions of the Restriction of Public Sector Exit Payments Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 These Regulations are made in order to impose restrictions on the amount of an exit payment a listed public sector authority can make in connection with the exit of an employee or office holder, where that exit takes place after these Regulations come into force. The restrictions cap an exit payment at a prescribed amount, currently £95,000 except in specific circumstances as set out in these Regulations.

6.2 The cap will apply to payments of a prescribed description which are not exempt, including payments arising from a contractual entitlement such as redundancy payments. These Regulations set out the sequence in which multiple exit payments are to be treated as having been paid where multiple exits take place in a 28-day period. These Regulations also make specific provisions in relation to statutory redundancy payments and early retirement related payments, as well as provide flexibility by allowing exit payments to be paid in excess of the cap with HM Treasury consent or in compliance with HM Treasury directions.

6.3 The enabling power in the 2015 Act was added by section 41(1) of the Enterprise Act 2016 and is in addition to the power contained in section 154 of the 2015 Act to make future regulations in connection with the repayment of public sector exit payments. HM Treasury will confirm on a later date when these regulations will be made.

6.4 There is no other legislation currently linked to this instrument.

7. Policy background

What is being done and why?

7.1 Section 153A(9) of the 2015 Act allows for the level of the cap, currently set at £95,000 to be varied by regulations therefore allowing revaluation upwards or downwards if appropriate, whilst still fulfilling the manifesto commitment.

7.2 According to the annually published Whole of Government Accounts, exit packages over £100,000 amounted to £200 million in the 2017-18 financial year. The total of all exit packages in the same financial year was £900 million. Compulsory redundancies and other agreed departures such as voluntary redundancies are included within this total. This is the most recent data available. Whilst it is difficult to predict future workforce and redundancy trends, we expect the exit payment cap given effect by these Regulations to significantly reduce that amount. Any savings would fall to and remain with employers.

7.3 These Regulations will result in some public service pension scheme provisions needing amendment due to the cap applying to employer-funded early access to pension arrangements to allow for early retirement. In this scenario, the pension scheme member receives an actuarially reduced pension from the scheme to reflect early receipt of pension benefits with the employer funding the amount of reduction through arrangements between the employer and pension scheme. This increases the member's pension rights and enables the scheme member to have early access to their pension benefits without any actuarial reduction, ahead of their normal pension age.

7.4 These benefits do not represent pension an individual has accrued through years of service. Members of the Local Government Pension Scheme over the age of 55 and with more than 2 years' membership who are made redundant may immediately receive unreduced pension benefits. Other public sector pension schemes have similar features, although these payments are typically the largest in the local government sector. Our expectation is that these schemes will be amended to allow members the option to use their own monies to make up any shortfall or take a partially reduced pension.

7.5 To accommodate for pension schemes not yet being amended, regulation 8 of these Regulations allow for payments to be made to the pension scheme member or where appropriate to another person such as a nominated partner up to the level of the cap.

7.6 Since the coming into force of the enabling power in the 2015 Act, some public sector bodies have tried to adjust exit terms for employees and implement a similar cap. However, this has proved to be difficult and, in some cases has resulted in legal challenge in the absence of a legal obligation upon an employer to cap payments arising from a contractual entitlement.

7.7 The Scottish Government have implemented a £95,000 cap on exit payments for bodies where pay and terms are devolved. This was done by updating the Scottish Public Finance Manual. HM Treasury has decided to proceed with a legislative approach in order to apply the exit payment cap to contractual arrangements.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union/trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This is the first instrument made under these powers, so consolidation is not needed at this time.

10. Consultation outcome

10.1 HM Treasury undertook a 12-week consultation on the draft Regulations, schedule, guidance document, and directions from 10 April 2019 to 3 July 2019. The consultation received approximately 600 responses via post, email and online survey. HM Treasury officials met with the Trades Union Congress Public Services Liaison Group and separately with representatives from the Nuclear Decommissioning Authority and associated agencies.

10.2 The government response to the consultation has been published [1]and is available on www.gov.uk. Whilst many responses agreed with the principle of these Regulations, many respondents disagreed with specific policy details.

10.3 Examples were provided of lower earning employees who may potentially have their exit payment capped due to length of service. Many of these examples were of local

[1] https://www.gov.uk/government/consultations/restricting-exit-payments-in-the-public-sector

government employees due to the inclusion of pension top-up payments in scope of the cap. These payments are explained in paragraph 7.3.

10.4 Following consultation, these payments will be kept in scope of the cap as this fulfils the policy objective of ensuring value for money and fair use of taxpayer funds. However, to provide flexibility a waiver system has been designed for use in exceptional circumstances, either in compliance with the directions or with HMT consent. The Ministry of Housing, Communities and Local Government will be taking forward legislation to amend the Local Government Pension Scheme to account for this exit payment cap and provide members with more flexibility.

10.5 In the interim, the guidance document published at consultation outlined the option for employers to pay the individual an equivalent cash sum up to the level of the cap if they are unable to offer partial top-up payments due to the scheme not being amended.

10.6 The Regulations as consulted on did not include an earnings threshold. This is a mechanism that would prevent individuals earning under a certain amount being subject to the cap. HM Treasury believes that this type of mechanism for protecting low earners is, amongst other things, likely to disproportionately impact older workers without justification and therefore has made an informed decision not to include this feature in the Regulations.

10.7 HM Treasury consulted on a staged implementation approach. This will no longer be taken, and the cap will instead apply across all of the public sector immediately, subject to limited exemptions outlined in the guidance document.

11. Guidance

11.1 HM Treasury will publish updated guidance for applying the exit payment cap alongside the coming into force of these Regulations. This will explain the Regulations in plain English and provide users with further information on applying the cap and the waiver provisions.

12. Impact

12.1 There is no, or no significant impact on business, charities or voluntary bodies.

12.2 These Regulations will impact public sector bodies listed in the schedule by imposing a cap on specific types of exit payments that can be made.

12.3 An Impact Assessment has not been prepared for these Regulations because they only affect bodies that are classified as public sector bodies by the Office of National Statistics.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 As a result of section 29 of the Small Business, Enterprise and Employment Act 2015, the scope of these Regulations does not meet the definition of qualifying activity.

14.2 These Regulations will be reviewed by HM Treasury on a non-statutory basis. The measures set out in these Regulations aim to reduce the spend on exit packages.

14.3 Any future additions to the schedule will be made through further affirmative Regulations. Whilst we do not have any planned regular intervals for reviewing the schedule, this opportunity can be used to review the Regulations if necessary.

15. Contact

15.1 ExitPaymentCap@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

15.2 Eleanor Tack, Deputy Director for Workforce, Pay and Pensions team, at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 Stephen Barclay, The Chief Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.