EXPLANATORY MEMORANDUM TO

THE OCCUPATIONAL AND PERSONAL PENSION SCHEMES (AUTOMATIC ENROLMENT) (AMENDMENT) REGULATIONS 2012

2012 No. 1257

THE AUTOMATIC ENROLMENT (MISCELLANEOUS AMENDMENTS) REGULATIONS 2012

2012 No. 215

THE AUTOMATIC ENROLMENT (OFFSHORE EMPLOYMENT) ORDER 2012

2012 No. 1388

THE COMPROMISE AGREEMENTS (AUTOMATIC ENROLMENT) (DESCRIPTION OF PERSON) ORDER 2012

2012 No. 212

1. 1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

1.2 It should be read in conjunction with the Explanatory Memorandum prepared for the regulations being amended (included at the end of the document and available at http://www.legislation.gov.uk/uksi/2010/772/pdfs/uksiem_20100772_en.pdf).

2. Purpose of the instruments

These affirmative and negative instruments amend the regulations which set out the practical arrangements associated with automatic enrolment in order to-

(a) give effect to the changes made to Part 1 of the Pensions Act 2008 by the Pensions Act 2011 in order to implement the recommendations of the independent Making Automatic Enrolment Work (MAEW) review, the recommendations of which have been accepted by the Government;

(b) put in place new arrangements to apply automatic enrolment to special occupations;

(c) specify the persons who are able to advise on compromise agreements in relation to the limitation of rights under employment law; and

(d) make other technical changes to ensure that the regulations give effect to the original policy intention.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None

4. Legislative Context

4.1 The MAEW review, which was conducted during 2010, proposed a number of changes to the arrangements in place for workplace pension reforms. The review considered whether the scope for automatic enrolment struck the right balance between the costs and benefits to both individuals and employers. It made a number of recommendations to the Government intended to reduce the burdens of automatic enrolment on business. These recommendations were welcomed by the Government and, in response, a number of changes were made by the 2011 Act.

4.2 Seafarers and offshore workers were excluded from automatic enrolment under Sections 96 and 97 respectively of the Pensions Act 2008. This exclusion was to allow time for full consideration of a series of complex issues surrounding those groups. Seafarers and offshore workers will now be covered by the reforms if they are working or ordinarily working in the United Kingdom.

4.3 The key changes:

(a) introduce a new earnings trigger for automatic enrolment and re-enrolment;

(b) allow the very largest of employers to choose an earlier automatic enrolment staging date;

(c) introduce an optional waiting period of up to three months before the automatic enrolment duty commences;

(d) allow employers greater flexibility in their re-enrolment date (so that it can be up to three months before, or within three months beginning with, the third anniversary of the staging date or last re-enrolment date); and

(e) allow an employer to certify that its defined contribution pension scheme will meet a specified requirement based on earnings from “pound one” rather than a requirement based on qualifying earnings; and

(f) provide a power to specify the form, timing and content of a notice provided under section 30(3) of the Act.

4.4 The Explanatory Memorandum prepared for the regulations being amended sets out in detail the rationale for workplace pension reforms. The explanatory text below is focussed on the effect of the amendments to those regulations and technical amendments.

5. Territorial Extent and Application

5.1 The two sets of Regulations and the negative Order extend to Great Britain (the provision on seafarers in the affirmative Regulations also extends to Northern Ireland). The Department for Social Development in Northern Ireland will be producing its own legislation replicating these instruments for Northern Ireland, apart from the provision on seafarers.

5.2 The Automatic Enrolment (Offshore Employment) Order 2012 extends to the whole of the United Kingdom and makes provision by reference to the United Kingdom sector of the continental shelf.

6. European Convention on Human Rights

6.1 The Minister of State, Steve Webb, has made the following statement regarding human rights:

> "In my view the provisions of the Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2012 and the Automatic Enrolment (Offshore Employment) Order 2012 are compatible with the Convention rights."

6.2 As the Automatic Enrolment (Miscellaneous Amendments) Regulations 2012 and the Compromise Agreements (Pensions Act 2008) (Description of Person) Order 2012 are subject to negative resolution procedure and they do not amend primary legislation, no statement is required.

7. Policy background

- ***What is being done and why***

7.1 The Pensions Act 2008 ("the 2008 Act") gives the Secretary of State power to make regulations in order to give full effect to the employer duties and the compliance regime in the 2008 Act. Three statutory instruments were made under the powers set out in the 2008 Act that were intended to form the basis of workplace pension reform-

The Employers' Duties (Implementation) Regulations 2010 (S.I. 2010/4)

The Employers' Duties (Registration and Compliance) Regulations 2010 (S.I. 2010/5)

The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (S.I. 2010/772)

7.2 Part 2 of the Pensions Act 2011 ("the 2011 Act") amended the 2008 Act to implement the recommendations of the MAEW review that were accepted by the Government, and to ensure that the automatic enrolment scheme met the original policy intention. The provisions that are relevant to this Memorandum -

(a) enable employers to postpone the automatic enrolment date of their workers (section 6);

(b) give the Secretary of State power to provide for greater flexibility over the timing of the re-enrolment of jobholders who are not saving (section 7);

(c) give the Secretary of State power to provide for a certification test for defined contribution schemes (sections 12 and 13);

(d) provide for an employer duty to automatically re-enrol a jobholder into a replacement qualifying scheme if the individual ceases to be an active member of a qualifying one, as a result of an act or omission of the employer (section 4).

7.3 The Automatic Enrolment (Miscellaneous Amendments) Regulations 2012 amend the Employers' Duties (Implementation) Regulations 2010 (S.I. 2010/4). In line with the MAEW recommendations, these amendments introduce greater flexibility for the very largest employers brought into the automatic enrolment duties at the outset of automatic enrolment by allowing them to choose, like all other employers, an earlier staging date.

7.4 The Automatic Enrolment (Miscellaneous Amendments) Regulations 2012 also amend the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (S.I. 2010/772) in order to provide for the content of notices with respect to the new waiting periods, and to allow employers greater flexibility in their re-enrolment date (so that it can be up to three months before, or within three months beginning with, the third anniversary of the staging date or last re-enrolment date).

7.5 In addition, the Automatic Enrolment (Miscellaneous Amendments) Regulations 2012 amend the Employers' Duties (Registration and Compliance) Regulations 2010 (S.I 2010/5). These amendments ensure that the compliance regime for automatic enrolment reflects the changes made by the 2011 Act.

7.6 The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2012 amend the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (S.I. 2010/772). The Regulations insert new regulations providing for details of the certification test that an employer may use; where an employer certifies that its scheme meets this test, the scheme is treated as meeting the quality requirements for defined contribution schemes. The regulations also insert new regulations bringing within the automatic enrolment duties certain Scottish police, and persons working on vessels.

7.7 Section 97 of the 2008 Act provides powers for the making of an Order in Council

to bring offshore workers within the automatic enrolment provisions. The Automatic Enrolment (Offshore Employment) Order 2012 provides that the 2008 Act and the Pensions (No. 2) Act (Northern Ireland) 2008 apply to persons in offshore employment. Offshore employment is defined in the Employment Rights Act 1996, section 201.

7.8 Section 58(6)(d) enables the Secretary of State to specify who may advise on a compromise agreement (a binding agreement between parties to settle a dispute out of tribunal or court) involving rights and responsibilities arising under the Pensions Act 2008. The Compromise Agreements (Automatic Enrolment) (Description of Person) Order 2012 includes Fellows of the Institute of Legal Executives in the list of persons in the Pensions Act 2008 who may advise on compromise agreements.

The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2012

7.9 A simple certification process was recommended by the MAEW review. Certification is designed for employers which use defined contribution pension schemes in order to meet their automatic enrolment duties. Employers who calculate their pension contributions from the first pound, rather than using the qualifying earnings band, will be able to use certification to ensure that their scheme is to be treated as meeting the quality requirements. The regulations set out three certification tests that employers may use and the details for checking that a test is met, including definitions of “pensionable pay” and “basic pay”. They provide that a scheme is not to be treated as satisfying quality requirements where there were not reasonable grounds to give the certificate and certain other conditions are not satisfied. They also specify the types of scheme based in an EEA State other than the United Kingdom that may be used for certification purposes .

7.10 These Regulations also provide that the provisions of Part 1 of the 2008 Act applies to police officers directly appointed by the Scottish Police Services Authority (SPSA) to work for the Scottish Crime and Drug Enforcement Agency (SCDEA) who would not otherwise fall within the definition of worker, such that they are treated as a worker by the SPSA under a worker's contract. Police officers seconded to work to the SPSA itself are in the same situation. The new provision extends the definition of 'worker' to these two groups of police officers.

7.11 In addition, seafarers are included in the automatic enrolment provisions if they are working or ordinarily work in the United Kingdom. As with land-based workers, this is a broad test which would ultimately rest on case law. The regulations achieve this policy intention by providing that Part 1 of the 2008 Act and the corresponding provisions in force in Northern Ireland apply to seafarers as if seafarers were workers for the purpose of those provisions.

7.12 Finally, the Regulations also include amendments to the existing regulations concerning the conditions under which a scheme is a “qualifying scheme” or an “automatic enrolment scheme”. These amendments make technical changes to ensure that the original policy intention is met and also make changes to allow a provider

providing an average salary scheme to revalue benefits under the scheme in line with the general level of prices, in line with other changes being made to pensions legislation.

The Automatic Enrolment (Miscellaneous Amendments) Regulations 2012

7.13 The amendments made by these Regulations give full effect to the remaining recommendations being taken forward from the MAEW review.

Amendment of the Employers' Duties (Implementation) Regulations 2010

7.14 The reforms are being staged in gradually, with large employers being brought under the duties from October 2012 and medium and then small employers being brought in over a five-year period. Employers are able to bring forward their staging date to 1 October 2012 at the earliest, to ensure that the date suits them. Regulation 5 amends the Employers' Duties (Implementation) Regulations 2010 to give very large employers the flexibility to bring their staging date forward to 1 July 2012 at the earliest so that they have similar flexibility to other employers, as recommended by the MAEW review.

Amendment of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010

7.15 Regulation 27 specifies the information that must be provided in a notice by an employer to a jobholder informing them that the employer intends to defer automatic enrolment in their case to the end of a waiting period. This includes information regarding the right of the jobholder to opt into workplace pension saving if they wish to do so.

7.16 In addition, regulation 30 provides for the form, timing and content of the notice to be provided to an eligible jobholder under section 30(3) of the 2008 Act where the employer intends to defer the individual's automatic enrolment date until the end of a transitional period.

7.17 The automatic enrolment information provisions in the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 have been simplified and clarified by creating an 'information schedule' to these regulations to which reference is then made by various regulations imposing requirements to provide information.

7.18 The Regulations also amend both the cyclical and the immediate automatic re-enrolment provisions. As noted, regulation 22 allows employers greater flexibility in choosing their re-enrolment date (so that it can be up to three months before, or within three months beginning with, the third anniversary of the staging date or last re-enrolment date).

7.19 Section 5 of the 2008 Act contained an exemption from automatic re-enrolment in certain circumstances. This exemption would have simultaneously prohibited the immediate automatic re-enrolment obligation just created in the 2011 Act to cater for an

interruption in scheme membership. The Secretary of State has the power to provide for exemptions by regulations. Regulation 24 creates exemptions in relation to the cyclical re-enrolment obligation and also in relation to re-enrolment where scheme membership is interrupted by reason of an action or omission of the employer but where this was at the request of the jobholder.

7.20 The "Person A" rule in the pay reference period provisions was developed before the MAEW recommendation as an income smoothing measure to counteract the possibility that pay spikes would trigger automatic enrolment for the very low paid. The separation of the automatic enrolment trigger from the threshold of the qualifying earnings band, made by the 2011 Act, reduces the possibility of an isolated pay spike causing someone 'accidentally' to acquire jobholder status. Regulation 20 abolishes the 'Person A' requirement.

7.21 Regulation 5 of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 provides for pay reference periods for the purpose of determining whether a scheme is a qualifying scheme. Regulation 21 amends regulation 5 so that pay reference periods are expressed in generic terms and cover the full range of circumstances that bring a jobholder into active scheme membership of a qualifying scheme under the Act or cause a jobholder to lose such membership.

7.22 The MAEW review recommended that automatic enrolment process should be aligned with existing tax and national insurance contributions processes where practicable in order to streamline employer processes. Regulations 41 and 42 amend the Occupational Pension Schemes (Scheme Administration) Regulations 1996 and the Personal Pension Schemes (Payment by Employers) Regulations 2000 to extend the period by which an employer must pay over pension contributions deducted from earnings to a pension scheme. This new period applies only to electronic payments of contributions deducted on behalf of active members of a scheme. The prescribed period in these circumstances is the 22nd day of the month following the month in which the contribution is deducted from the jobholder's earnings. The 19-day rule remains unchanged for non-electronic payments. The regulation also inserts a definition of electronic communication.

7.23 Regulation 44 provides that the "due date" for the purposes of unpaid contributions notices is now the 22nd day of the month following the month during which contributions payable to a scheme were either not deducted by an employer or were due but not made by an employer.

7.24 Regulation 35 provides that for the purpose of determining whether a defined benefits scheme meets the test scheme standard in section 22 of the 2008 Act, the "appropriate age" from which a pension must be provided is increased to reflect the accelerated timetable for increasing state pension age.

7.25 Regulation 40 provides that the alternative requirements to UK tax registration for non-UK schemes apply to defined benefits schemes and hybrid schemes in addition to

money purchase schemes and personal pension schemes. Regulation 41 prescribes the meaning of the term “provider” in relation to non-UK qualifying personal pension schemes.

7.26 Other minor amendments deal with the practical arrangements for automatic enrolment and are aimed at ensuring that the arrangements work in practice and meet the policy intention. In particular, section 11 of the 2011 Act amended sections 22 and 23 of the 2008 Act to provide for a test scheme for a type of defined benefits scheme that provides for a sum of money to be made available for the provision of benefits to a member. It had previously been thought that this sort of scheme was a hybrid scheme but on further reflection the Government have come to the view that it is a type of defined benefits scheme. Regulations 36 to 39 provide for the detailed requirements for such a test scheme.

Amendment of the Employers’ Duties (Registration and Compliance) Regulations 2010

7.27 An employer compliance regime is being put in place to ensure that employers meet their duties and individuals earning over the earnings trigger are given the opportunity to save into a pension scheme. The amendments made by regulations 8 to 16 ensure that the compliance regime reflects the introduction of the optional waiting period and is aligned with the new arrangements being put in place. Regulations 15 and 16, provide that the Pensions Regulator must, when making determinations concerning escalating and ‘Prohibited Recruitment Conduct’ penalties, take all the relevant information that it has into account.

The Automatic Enrolment (Offshore Employment) Order 2012

7.28 Offshore workers are brought within automatic enrolment if they are working, or ordinarily work in the United Kingdom sector of the continental shelf. This Order treats offshore workers as if they are ordinarily working in the United Kingdom if they are working in the UK territorial sea, UK continental shelf, or in the UK sector of a cross-boundary field. It also provides that employment and industrial tribunals and the first tier tribunal are able to hear complaints, appeals and references made to them in connection with offshore employment in the English, Scottish and Northern Irish continental shelf in the same way as they would if the relevant events had take place in the UK.

The Compromise Agreements (Automatic Enrolment) (Description of Person) Order 2012

7.29 A compromise agreement is a binding agreement between the parties to a dispute to settle it out of tribunal or court. One of the conditions regulating compromise agreements under the Pensions Act 2008 is that (as per s58(5)(c)) the worker must have received advice from a 'relevant independent adviser' on the implications of the proposed compromise agreement, in particular the effect of the agreement on a worker's ability to pursue their rights before an employment tribunal. This order specifies that for the purposes of s58(5)(c), a Fellow of the Institute of Legal Executive is a 'relevant

independent adviser' and is able to give advice on compromise agreements.

- ***Consolidation***

7.30 This is the first amendment to the instruments and consolidation is not appropriate at this time.

8. Consultation outcome

8.1 Draft instruments covering the above amendments and also a proposed moratorium for micro-employers were the subject of a formal consultation exercise which ran from 18 July to 11 October 2011. In total, 59 responses to the consultation were received, from a wide range of industry, employer, employee and pension profession representative organisations.

8.2 Overall, stakeholders responded favourably to the proposals, with detailed comments and criticisms directed at specific features of the instruments rather than at the fundamental principles of the MAEW recommendations.

8.3 Respondents generally welcomed the introduction of the moratorium for micro-employers and the abolition of the 'Person A' requirement in respect of low paid workers. Support for the introduction of waiting periods was also strong, although many respondents suggested that employers should be given longer to issue the necessary notices and that the rules for the first and second waiting period should be aligned.

8.4 Respondents suggested that although proposals for the revised certification test were an improvement on the original requirements, there was still scope for further relaxation of the rules for employers certifying under Tier 1 or Tier 3. There was concern that the definition of pensionable pay should not include a range of pay items such as car allowances, shift allowances and incentive pay, which are not ordinarily pensionable.

8.5 With regard to the proposals in respect of seafarers and offshore workers, stakeholders offered a range of views on the "ordinarily working in Great Britain" test. Some recommended a more specific test, or the provision of more clarity and guidance on who would be captured by the test, and on enforcement issues. Stakeholders also asked for shipping companies to be staged in later in the timetable, to reflect the fact that they had not expected to be covered by the employer duty and therefore needed more time to prepare.

8.6 A number of relatively modest changes have been made to the draft instruments in order to reflect the views and suggestions of stakeholders.

8.7 Since the consultation closed, the Government have announced their intention to extend the timetable for staging employers into automatic enrolment, so that no small

employer will be brought in before May 2015.

9. Guidance

9.1 The Department for Work and Pensions (DWP) will make information available about the reforms using Government websites. For individuals, there will be user-friendly and easy to understand information about automatic enrolment from early 2012 supported by a telephone contact centre.

9.2 The Pensions Regulator (TPR) is responsible for the delivery of communications, education and guidance to employers, intermediaries and industry to support the compliance regime. This will include direct communications to employers prior to the commencement of their duties. Guidance is being provided by TPR to ensure that employers, and their intermediaries, know what they must do, how, and by when to comply with the employer duties and safeguards. The Department will support TPR by developing and making material available to help employers communicate the reforms to their workers and to meet their statutory information requirements.

9.3 DWP has also prepared guidance for employers choosing to use certification, as enabled by the regulations. A link to this guidance will be provided as part of TPR's more generic guidance for employers.

10. Impact

10.1 The legislation extending automatic enrolment will affect employers of eligible seafarers and offshore workers. They will incur the cost of making minimum contributions for their eligible workers and the administrative cost of enrolling their eligible workers into a qualifying scheme. The legislation introducing the waiting period notice will affect all employers who choose to use the waiting period of up to three months.

10.2 The impact on the public sector of the reforms is related to the costs of extending the workplace pension reforms to seafarers and offshore workers.

10.3 A full impact assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the OPSI website.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 While small firms employing eligible seafarers or offshore workers will have to comply with the requirements, as will small firms choosing to use a waiting period, they will benefit from the easements specially designed in order to help small employers.

Small firms are subject to the automatic enrolment duties later than large firms.

12. Monitoring & review

12.1 The programme will fully evaluate the effects of the reforms against the policy objective of getting more people to save more for retirement. It is estimated that 5-8 million people will be newly participating or saving more in workplace pensions, and additional savings of up to £9 billion per year will be generated in steady state.

12.2 The impact of the reforms on employers and the pensions industry will be assessed to evaluate the extent to which this policy objective is met, whilst minimising burden on employers and maintaining current good pension provision.

12.3 The effects of the reforms will be evaluated through analysing a range of data, including management information from TPR and the National Employment Savings Trust pension scheme, existing continuous surveys of individuals and employers run by DWP and other government departments such as the Office for National Statistics and where appropriate, research commissioned by DWP. As such, the evaluation will be conducted by a combination of external research organisations, academics and DWP analysts. The evaluation will be carried out on an on-going basis to gauge progress throughout the implementation of the reforms and beyond, and findings will be available publicly at key stages.

12.4 In addition to the evaluation of the reforms, in 2017 the Department will review those features of the National Employment Savings Trust pension scheme that are designed to focus it on the target market, specifically the annual contribution limit and the prohibition of pension fund transfers to and from the scheme. The evaluation of the reforms will feed into this review, as appropriate.

12.5 Subject to exceptions, the provisions of the affirmative instruments relating to persons working on vessels and persons in offshore employment will cease to have effect on 1 July 2020. The exceptions are those persons who are jobholders and active members of a qualifying scheme and those persons whose employer is required to make arrangements under sections 5(2) (by virtue of section 5(1A) or 1(B)), section 7(3) and 9(2) of the Act. Before 1 July 2018, the Secretary of State must review the operation of the provisions and publish a report of his conclusions.

13. Contact

Fiona Walker at the Department for Work and Pensions (Tel: 020 7449 5686 or email: Fiona.walker3@dwp.gsi.gov.uk) can answer any queries regarding the instrument.