EXPLANATORY MEMORANDUM TO

THE DEBT RESPITE SCHEME (BREATHING SPACE MORATORIUM AND MENTAL HEALTH CRISIS MORATORIUM) (ENGLAND AND WALES) REGULATIONS 2020

2020 No. 1311

1. Introduction

1.1 This explanatory memorandum has been prepared by HM 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 This instrument establishes the first part of a debt respite scheme for people in problem debt. This part gives eligible people in problem debt who receive professional debt advice access to a 60-day period in which interest, fees and charges are frozen and enforcement action is paused. This moratorium period is often referred to as 'Breathing Space'. For people receiving mental health crisis treatment, this instrument establishes an alternate route by which the protections of a moratorium may be accessed and ensures that the protections are in place for the duration of their crisis treatment.

2.2 The second part of the scheme is the Statutory Debt Repayment Plan (SDRP), a statutory agreement that will enable a person in problem debt to repay their debts to a manageable timetable, with legal protections from creditor action for the duration of their plan. As set out in the June 2019 consultation response the Government intends to implement the SDRP over a longer timeframe and has not yet set a specific implementation date for this part of the scheme.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This is the first use of the power provided by sections 6 and 7 of the Financial Guidance and Claims Act 2018.

3.2 This instrument will apply to qualifying debts and will prevent creditors from taking enforcement action and will prevent debtors being liable for certain interest, fees and charges in relation to their qualifying debts during the moratorium period.

3.3 Various parts of this instrument therefore have retrospective effect. The authority to make provisions with retrospective effect is contained in section 7(5)(d) of the Financial Guidance and Claims Act 2018.

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)

3.4 This entire instrument applies to England and Wales only because the instrument has effect in England and Wales only (see regulation 1(8)) and applies in respect of debtors ordinarily resident or domiciled in England and Wales (see regulation 1(9)).

3.5 The instrument has effects outside of England and Wales which the Department considers to be minor or consequential. This is because the instrument could apply in respect of debts incurred or creditors based outside this jurisdiction.

3.6 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

3.7 The Department has reached this view because it considers that the purpose of the instrument is the establishment of a debt respite scheme, which is within the devolved legislative competence of the Northern Ireland Assembly and the Scottish Parliament. In relation to Northern Ireland, the instrument does not deal with an excepted matter in Schedule 2 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act). In relation to Scotland, the instrument does not relate to a reserved matter in Schedule 5 to the Scotland Act 1998 and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act).

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

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

"In my view the provisions of The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 This is the first use of the power provided by section 7(2) of the Financial Guidance and Claims Act 2018 for the establishment of a debt respite scheme. This instrument is being made to establish the first part of that scheme: a Breathing Space moratorium on enforcement action and the charging of interest and fees for eligible individuals. This instrument also provides for a moratorium in respect of individuals receiving mental health crisis treatment.

6.2 In an Oral Statement on the scheme delivered in June 2019, the Economic Secretary to the Treasury committed to implementing the moratorium in early 2021.[1] These regulations confirm that the scheme will start on 4 May 2021.

7. Policy background

What is being done and why

What is the problem under consideration?

7.1 Sections 6 and 7 of the Financial Guidance and Claims Act 2018 make provision for a debt respite scheme by secondary regulations. This instrument represents the first part of that scheme through the establishment of two types of moratorium on debt-related enforcement action and interest, fees, and charges.

7.2 People who need debt advice often do not seek to access it. Those who do receive advice often experience sub-optimal outcomes due to the circumstances in which they seek advice. Advice is often sought at a late stage, when debtors are at crisis point.[2] They are often driven to receive advice by creditor action, such as starting court proceedings or taking enforcement action. This creditor action compounds the stress and anxiety that problem debt causes.[3] Under this level of stress, debtors often take the quickest rather than the most appropriate solution, contributing to sub-optimal debt advice outcomes.

What is the policy objective and how will it be achieved?

7.3 The policy objective is to incentivise more people in problem debt to access professional debt advice, to do so sooner, and to enable them to enter the debt solution that is most appropriate in view of their individual circumstances.

7.4 These protections are accessible only via professional debt advice providers (i.e. an authorised person who has Part 4A permission to carry on any regulated activity of the kind specified in article 39E (debt-counselling) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001[4], or by exempt persons in relation to that activity (such as a local authority). Any debt adviser meeting this description could offer a moratorium, via an online, telephone or face-to-face service, provided the debtor meets the eligibility criteria for the scheme. This will encourage more people to seek debt advice and to do so at an appropriate time.

7.5 The debt adviser cannot charge a fee for this service or for any service in connection with a moratorium.

7.6 A moratorium under the scheme will freeze charges, fees and certain interest as well as pausing enforcement action. This will give debtors time to engage fully with professional advice by reducing the stress caused by spiralling debt and impending enforcement action. Enhancing the engagement between debtors and their advisers

[1] Official Report, 19 June 2019, Vol. 662, c. 246. Available at: https://hansard.parliament.uk/Commons/2019-06-19/debates/252B8ABA-F40D-4848-8D59-DFB0734A78AC/BreathingSpaceScheme
[2] Christians Against Poverty (2019) *Client Report: Changing Perceptions*. Available at: https://capuk.org/fileserver/downloads/general/cap-clientreport-2019-dp.pdf
[3] Money Advice Service (2017) *Better debt advice: from a moment of crisis to a lifetime of resilience* Available at: https://www.fincap.org.uk/en/insights/better-debt-advice-from-a-moment-of-crisis-to-a-lifetime-of-resilience
[4] S.I. 2001/544.

will promote more positive debt advice outcomes, including by increasing creditor recoveries.

7.7 All of a person's debts can be included in a breathing space, unless it is a non-eligible debt. Non-eligible debts are set out in regulation 5(4). Arrears owed to central and local government, including council tax arrears, personal tax debts and benefit overpayments are generally included in a moratorium.

7.8 Some specific public sector debts are excluded by regulation 5(4), mirroring the position in bankruptcy (e.g. debts incurred as a result of fraudulent behaviour; fines imposed by a court, including criminal fines; confiscation orders; child maintenance payments and debts that arise after an order made in family proceedings; social fund loans; student loans and personal injury liabilities).

7.9 Universal Credit advances and Universal Credit third party deductions are currently excluded, but will be included in the protections on a phased basis as early as possible following the start of the policy in early 2021, to ensure that IT changes required align with other requirements of the wider Universal Credit programme.

7.10 A person's business debts are not eligible if the debtor's business is registered for VAT, or if they are in partnership with anyone else and the debt they have accrued relates solely to the business. There is no limit on the amount of any individual debt, or total debts, that can be protected in a moratorium.

7.11 A moratorium is not a payment holiday. The person should keep paying their debts during a moratorium. In particular, a debtor is required to keep paying certain ongoing liabilities (defined in regulation 2, including mortgage, rent, insurance, taxes and utility bills) as they fall due. If they do not keep up paying on these specific ongoing liabilities, and the debtor has the means to do so, the debt adviser must cancel their moratorium at the midway review unless the debtor's personal circumstances would make cancellation unfair or unreasonable.

7.12 Campaigners originally requested a six-week moratorium, which the Government proposed to extend to 60 days in its 2018 consultation. As set out in the 2019 consultation response, almost all consultation respondents welcomed the extension of the length of breathing space to 60 days, suggesting that this was a realistic length of time to enable an individual to seek debt advice and enter a sustainable debt solution.

7.13 Breathing space cannot be extended, as the fixed period provides certainty to creditors. The only exception to this is in the mental health crisis moratorium (see paragraph 7.14 below.)

Mental health crisis moratorium

7.14 People receiving mental health crisis treatment will receive the protections of the scheme but through a different entry mechanism. This reflects the fact that while this group could benefit from the protections in the standard scheme, they may face challenges in meeting the requirement to engage with debt advice in order to meet the eligibility criteria. There is no difference in the types of debts that are eligible for a mental health crisis moratorium.

7.15 This group will be able to enter a mental health crisis moratorium without engaging with debt advice. Approved Mental Health Professionals (AMHPs) will be the professional group able to produce an assessment that an individual is receiving mental health crisis treatment. AMHPs may themselves provide this evidence to a

debt adviser, or they may do so following a request by the debtor or someone else involved in the debtor's care. This assessment will be the evidence that debt advisers then use when determining an individual's eligibility for a mental health crisis moratorium and enter them into the protections of the scheme.

7.16 The policy protections will apply for the duration of their crisis treatment and then for a further 30 days. If eligible, debtors may then have access to the 60-day Breathing Space moratorium accessed via professional debt advice. As mental health problems often recur, there will be no limit on the number of times that people receiving mental health crisis treatment may enter a moratorium via this mechanism, whereas debtors in the 60-day Breathing Space moratorium will have access once in each 12-month period.

7.17 This instrument also provides for the administration of the scheme by the Secretary of State. The Secretary of State's functions will be carried out by the Insolvency Service, which is an executive agency, sponsored by the Department for Business, Energy & Industrial Strategy. The Insolvency Service will operate an electronic system to administer the scheme, including a private register of persons in moratoria. Regulation 35(4) sets out entitlements to information held on the register, and regulation 35(5) limits the information a creditor may access about debtors.

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.

9. Consolidation

9.1 This regulation will not consolidate other instruments.

10. Consultation outcome

10.1 The government has issued two consultations on the debt respite scheme. First, a call for evidence ran between October 2017 and January 2018. The government's response was published in June 2018. Over 80 unique responses were received.[5] Most respondents were supportive. Many respondents suggested that individuals in problem debt should have to seek debt advice before entering a Breathing Space, although some noted that there were certain, unique cases where this could be inappropriate, with individuals experiencing mental health crises highlighted as an example.

10.2 The Government consulted on a policy proposal informed by responses to this call for evidence between October 2018 and January 2019, publishing its response in June 2019. Over 130 responses were received. Respondents included creditors, trade bodies, local authorities, charities, debt advice providers, credit reference agencies, utility companies, telecoms providers, and others.[6]

10.3 The key points raised by these respondents are summarised in the Government's consultation response document.[7] A wide range of views were expressed on a very large number of issues such as: the duration of a moratorium, the initial eligibility

[5] HM Treasury (2018) *Breathing space: call for evidence.* Available at: https://www.gov.uk/government/consultations/breathing-space-call-for-evidence
[6] HM Treasury (2019) *Breathing space scheme: consultation on a policy proposal.* Available at: https://www.gov.uk/government/consultations/breathing-space-scheme-consultation-on-a-policy-proposal
[7] *Ibid.*

criteria, ongoing eligibility criteria, which debts should be included in the policy, whether there should be a public register of people in breathing space, the treatment of business debts, and other questions. Most respondents were supportive, for example of the eligibility criteria and of the proposed protections for debtors.

10.4 Further engagement with specific expert stakeholders from the creditor and debt advice sectors was undertaken in support of the drafting of this instrument. This informal exercise generated many helpful comments on the draft regulations.

11. Guidance

11.1 Departmental guidance will be prepared in due course to assist creditors, creditor agents, AMHPs and debt advice providers as they apply the regulations.

11.2 Reporting on the original version of the regulations which were withdrawn on 9 September and replaced with this revised version, the Secondary Legislation Scrutiny Committee recommended that the Government should consider establishing a register of authorised professional debt advisers.[8] The Government will work with the Money and Pensions Service, other Government departments, creditors and debt advice providers to raise awareness of the scheme, but does not intend to establish a register of debt advisers.

11.3 The Government will ensure that its activity includes clear signposting to debt advice providers who are able to enter people into a moratorium, including via the Money and Pensions Service's existing Debt Advice Locator and Money Navigator tools. Other forms of publicity will also be employed to raise awareness of the policy amongst potential users. This activity will take into account the advice provided to the government by the Money and Pensions Service, in accordance with section 6 of the Financial Guidance and Claims Act 2018, on raising awareness of the policy.[9]

12. Impact

12.1 The impact on business, charities or voluntary bodies is forecast to be a total cost over the ten years from 2021-22 of £2.1bn, which includes foregone interest and charges, delayed repayments, and familiarisation, dissemination and administration costs. The economic benefits to businesses, charities and voluntary bodies (that is the business net present value) is forecast to be £6.1bn in 2016 prices, which includes higher recoveries for creditors, productivity benefits for employers and reduced negative mental and physical health outcomes amongst debtors.

12.2 The impact on the public sector is forecast to be lower, estimated at around £7.1m over the same period. The wider benefits on society (that is the net present social value) are forecast to be £9.2bn in 2016 prices.

12.3 A full impact assessment is submitted with this memorandum and published on GOV.UK.[10]

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[8] House of Lords Secondary Legislation Scrutiny Committee (2020) *24th Report of Session 2019-2021.* Available at: https://committees.parliament.uk/publications/2206/documents/20319/default/

[9] Money and Pensions Service (2019) *Breathing space scheme – Money and Pensions Service advice.* Available at: https://www.gov.uk/government/publications/breathing-space-scheme-money-and-pensions-service-advice

[10] HM Treasury (2019) *Breathing space impact assessment.* Available at: https://www.gov.uk/government/publications/breathing-space-impact-assessment

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The basis for the final decision on what action to take to assist small businesses is outlined in full in the Small and Micro Business Assessment in the accompanying Impact Assessment.[11] Exemption or mitigation for small businesses would not achieve the policy intent, so no specific action is proposed to minimise the regulatory burdens on such businesses.

13.4 Full exemption from the protections of a moratorium for small businesses would mean that the respite afforded to debtors by a moratorium was incomplete, particularly where debtors' liabilities were owed mostly or entirely to creditors exempted by virtue of their size. It would also be impractical, imposing an excessive burden on debt advice providers (often themselves small businesses, charities or civil society organisations) to identify whether a creditor qualified as a small business.

13.5 As full exemption would undermine the policy intent and would be impractical, mitigations to minimise the regulatory burden of a moratorium on small businesses were considered. The government considered three options: allowing small businesses more time to prepare for the commencement of the debt respite scheme, in recognition of their high familiarisation costs relative to larger firms; applying the protections to small businesses only in respect of enforcement action rather than enforcement action and interest- and fee-charging, and reducing the duration of a moratorium in respect of debts owed to small businesses.

13.6 All three of these mitigations were discounted. The first mitigatory option was found to be disproportionate: the familiarisation costs of small businesses are only forecast to be 8% higher than those of larger businesses.[12] The second and third were found to undermine the policy intent by providing only incomplete respite from creditor action for debtors. In addition, these options would impose an impractical and excessive administrative burden on debt advice providers in requiring them to determine whether creditors qualified as small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is outlined in regulation 40 of this instrument. HM Treasury will publish a review by 4th May 2026, five years after the commencement of the instrument. In addition, subsequent evaluations will be published at five-year intervals. These evaluations will be carried out with due regard to the advice provided on this topic by the Money and Pensions Service.[13] Further information is set out in the accompanying impact assessment.

14.2 A statutory review clause is included in the Regulation.

15. Contact

15.1 Shannon Cochrane at HM Treasury, Telephone: 020 7270 5621 or email: shannon.cochrane@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.

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[11] *Ibid.*
[12] *Ibid.*
[13] Money and Pensions Service (2019)

15.2 Anna Harvey, Deputy Director for Personal Finances and Funds at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Economic Secretary to the Treasury (John Glen) can confirm that this Explanatory Memorandum meets the required standard.