EXPLANATORY MEMORANDUM TO

THE FIREFIGHTERS' PENSION SCHEME (AMENDMENT) (No.2) (ENGLAND) ORDER 2013

2013 No. 1392

AND

THE FIREFIGHTERS' PENSION SCHEME (ENGLAND) (AMENDMENT) (No.2) ORDER 2013

2013 No. 1393

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Firefighters' Pension Scheme (Amendment) (No.2) (England) Order 2013 (No. 1392) amends the Firefighters' Pension Scheme 1992, "*the 1992 Scheme*" (set out in Schedule 2 to the Firemen's Pension Scheme Order 1992 (No. 129)) to:

- remove Rule A14 that provides the means to compulsory retire a member on grounds of efficiency;
- provide for additional pension benefits to be uprated in accordance with the Pensions (Increase) Act 1971;
- provide discretion for employers to uplift commutation limit;
- amend the definition of pensionable pay to ensure that temporary allowances are not treated as pensionable pay and to introduce new discretionary additional pension benefit arrangements for temporary allowances and emoluments;
- provide a means whereby Independent Qualified Medical Practitioners and the Board of Medical Referees can review previous decisions;
- make provision for appeals on non-medical issues to be dealt with by means of arrangements implemented by them pursuant to the requirements of section 50 of the Pensions Act 1995;
- increase in the scope of the Fire and Rescue Authority discretion to abate a retired member's pension on re-employment and to require the employer to reimburse the pension fund in the instance where they do not exercise the discretion in full;
- update the scheme's terminology to be consistent with current tax legislation;

- update the statutory references within the scheme.

2.2 The Firefighters' Pension Scheme (England) (Amendment) (No.2) Order 2013 (No. 1393) amends the New Firefighters' Pension Scheme (England), "*the 2006 Scheme*" (set out in Schedule 1 to the Firefighters' Pension Scheme (England) Order 2006 (No. 3432)) to:

- provide for additional pension benefits to be uprated in accordance with the Pensions (Increase) Act 1971;
- introduce new discretionary additional pension benefit arrangements for temporary allowances and emoluments;
- to require the employer to reimburse the pension fund in the instance where they do not exercise the discretion to abate a member's pension on re-employment;
- enable employers to fully comply with the "auto-enrolment" requirements as set out in the Pensions Act 2008 and the Occupational and Personal Pension Scheme (Automatic Enrolment) regulations 2010.

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

3.1 None

4. Legislative Context

4.1 The Firefighters' Pension Scheme (Amendment)(No.2) (England) Order 2013 is made under section 26(1) to (5) of the Fire Services Act 1947 and under section 12 of the Superannuation Act 1972 as applied by section 16(3) of that Act. Section 26 enables the Secretary of State by order to bring into operation the Firefighters' Pension Scheme enabling fire authorities to pay pensions, allowances and gratuities to persons employed as members of fire brigades. The section also enables the Scheme to be varied by a subsequent order made by the Secretary of State. The Firefighters' Pension Scheme 1992 was made under that power. Section 12 enables retrospective provision to be made. The Fire Services Act 1947 has been repealed with savings to enable amendments to be made to a scheme established under section 26. This instrument amends the provisions in that Scheme.

4.2 The Firefighters' Pension Scheme (England) (Amendment)(No.2) Order 2013 is made under sections 34 and 60 of the Fire and Rescue Services Act 2004. Section 34 enables the Secretary of State to make an order bringing into operation a scheme making provision for the payment of pensions, allowances and gratuities in respect of persons who are employed by a fire and rescue authority or who have died while so employed. The section also enables the Scheme to be varied by a subsequent order made by the Secretary of State and for retrospective provision to be made. The New Firefighters' Pension Scheme (England) was made under section 34 and 60 of the Fire and Rescue Services Act 2004. This instrument amends the provisions made in that Scheme.

5. Territorial Extent and Application

5.1 These instruments apply to England.

6. European Convention on Human Rights

6.1 As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

7.1 These amending instruments make amendments to both the 1992 and 2006 firefighter pension schemes and are part of an ongoing programme of modernisation of the firefighter pension schemes.

7.2 Prior to publishing the consultation, the Department formally engaged key stakeholders including Employer and Union representatives through the Firefighters' Pension Committee, where the key proposed changes were discussed. The amendments also take account of an earlier 2009 consultation undertaken by the Department on proposed changes to the definition of pensionable pay.

The removal of rule A14, compulsory retirement on the grounds of efficiency

7.3 The Order removes Rule A14 from the 1992 Scheme which currently enables an employer to retire a scheme member on the grounds of efficiency. This ensures that in the future any decision by an employer to compulsorily remove a firefighter from employment is undertaken in accordance with employment and equalities law rather than the terms of the pension scheme. This does not affect the 2006 Scheme as it does not have a corresponding provision. This amendment will apply from the date the enabling legislation comes into force.

Changes to the indexation of additional pension benefits

7.4 The Orders amend Rules B5B(3) of the 1992 Scheme and Rule 7A(3) of Part 3 of the 2006 Scheme so as to change the method of indexation used for uprating Long Service Increment additional pension benefit (LSI APB) from the Retail Price Index to the amount which would have applied under the Pensions (Increase) Act 1971 if the LSAPB had been a pension to which that Act applied. As consulted on, this will be applied retrospectively to April 2011, to reflect the change in Government policy to switch the basis of uprating public service pensions took effect as announced in the 2010 Emergency Budget.

7.5 The Orders replace paragraph (3) in rule B5C of the 1992 Scheme and rule 7B of Part 3 of the 2006 Scheme to change the method of indexation used for uprating additional pension benefits during the accrual phase from the Retail Price Index to the amount of the increase which would have applied under the Pensions (Increase) Act 1971 if the additional pension benefit had been a pension to which that Act applied. Again, this will be applied retrospectively to April 2011, to reflect the change in Government policy to switch the basis of uprating public service pensions took effect as announced in the 2010 Emergency Budget.

Changes to the maximum commutation payment

7.6 The Order inserts a new paragraph (5A) in Rule B7 of the 1992 Scheme to confer a new discretion enabling employers to raise the commutation limit for those members who are aged under 55 with less than 30 years' pensionable service so that they can commute up to the maximum of a quarter of their annual pension. This followed representations made by Fire and Rescue Authorities asking for a discretion to disregard the current limit. The 2006 Scheme already permits a member to commute a quarter of their pension.

7.7 The Order amends Rule LA2 of the 1992 Scheme to require the employer to pay the increased lump sum costs into the pension fund when they exercise the discretion to raise the commutation limit. No equivalent amendment is needed for the 2006 Scheme.

7.8 These amendments will take effect from the date that the enabling legislation comes into force.

Changes to the definition of pensionable pay

7.9 The Orders replace Rule B5C of the 1992 Scheme and Rule 7B of Part 3 of the 2006 Scheme to introduce new powers for employers to make certain temporary allowances and emoluments, which satisfy the prescribed requirements, pensionable under additional pension benefit arrangements. This was in response to concerns about the pension costs associated with employers introducing new temporary allowances under final salary arrangements.

7.10 The Order amends Rule G1 in the 1992 Scheme to provide protection for those members of the 1992 Scheme that are in receipt of temporary emoluments and allowances which are being treated as pensionable pay under the 1992 Scheme on the day before the enabling legislation is made so these will continue to be treated as pensionable pay. This particular protection is not required for the members of the 2006 Scheme as the definition of pensionable pay excludes emoluments and allowances that are temporary.

7.11 These amendments will take effect from the date that the enabling legislation comes into force.

Amendments to the medical appeals processes

7.12 The Order introduces new Rule H1A of the 1992 Scheme to provide new arrangements where, with the agreement of both the employer and the appellant, an Independent Qualified Medical Practitioner can review a previous decision where new medical evidence is presented. This will help reduce instances and costs where a medical appeal is unnecessary. This is not required for the 2006 Scheme which already contains equivalent provisions.

7.13 The Order introduces a new paragraph 2B of Schedule 9 of the 1992 Scheme to provide a mechanism whereby a reviewing member of the Board of Medical Referees can make an initial decision as to whether there is sufficient information to enable the Board to undertake an appeal hearing.

7.14 The Order introduces a new paragraph 6A, Schedule 9 of the 1992 Scheme and paragraph 8A, Annex 2 of the 2006 Scheme to provide a new arrangement so that where the appellant

and authority agree that an error of fact has occurred which has a material significance to the decision, the case can be referred back to the Board of Medical Referees for reconsideration.

7.15 These amendments will take effect from the date that the enabling legislation comes into force.

Amendments to the non-medical appeals' processes

7.16 The Order amends Rule H3 of the 1992 Scheme to replace the current arrangement whereby an appeal in respect of a non-medical matter is made to the Crown Court with amendments to enable internal dispute resolution procedures to be set up pursuant to requirements under the Pensions Act 1995. This amendment will ensure that the most appropriate mechanism for appeal is used; ultimately reducing reliance on the Courts and making the appeals process easier to undertake for both scheme member and employer. The 2006 Scheme already makes equivalent provision.

7.17 This will take effect from the date that the enabling legislation comes into force.

Abatement of pensions

7.18 The Order amends Rule K4 of the 1992 Scheme to increase the scope of the employer's discretion to abate a member's pension where they are re-employed following retirement. The new provision will enable the employer to abate the whole or part of a member's pension where they are re-employed in any capacity by any fire and rescue authority. This change will help implement longstanding Government policy that pension payments should be abated where a member is re-employed in the public sector and receives a pension and salary exceeding earnings before retirement. This will not apply to the 2006 Scheme as it already includes an equivalent provision. This amendment will apply retrospectively to cases where a retired member is employed on or after 25 September 2009.

7.19 The Orders amend Rule LA2 of the 1992 Scheme and Rule 2 of Part 13 of the 2006 Scheme to introduce a new requirement for employers to reimburse the pension fund in the instance where they do not exercise the discretion to abate a member's pension on re-employment. This requirement to pay the additional pension costs will apply to new cases where a retired member becomes re-employed on or after the date the enabling legislation comes into force.

Technical amendments and alignments with tax legislation and general updating amendments

7.20 The Order also makes a number of amendments throughout the body of the 1992 Scheme so as to align the scheme's terminology with current tax legislation and to generally update the scheme's statutory references. Full details are set out in the Government response.

7.21 Equivalent amendments do not need to be made to the 2006 Scheme.

Auto-enrolment

7.22 The Order amends Rule 1(2A) of Part 2 of the 2006 Scheme to make additional provision to enable employers to comply fully with the "auto-enrolment" requirements. There is no corresponding amendment to the 1992 Scheme required as it closed to new memberships from 6 April 2006.

Consolidation

7.24 There are no current plans to consolidate the legislation governing either the 1992 Scheme or the 2006 Scheme.

8. Consultation outcome

8.1 On the 3 August 2011, the Department published the consultation paper *Amendments to the Firefighters' Pension Scheme (1992) and the New Firefighters' Pension Scheme (2006) – consultation.* The formal consultation ran for 12 weeks from 3 August to the 26 October 2011.

8.2 The consultation paper set out a number of policy proposals in respect of suggested changes to both the 1992 and 2006 Schemes.

8.3 On publication, the Department drew the consultation paper to the attention of members of the Firefighters' Pension Committee, which includes Trade Unions, the Local Government Association and other key representative bodies. The Department also announced the consultation in the 'Fire and Rescue Monthly Bulletin', which was sent on 5 September 2011 to the Chairs and Chief Fire Officers of, and Clerks to, all Fire and Rescue Authorities, the Chief Executive of the County Council and the London Commissioner.

8.4 Sixty one responses were received. A summary of the responses which prompted a change in the proposals consulted on are set out below. More detailed information on the responses can be viewed in the Government's response to the consultation which can be accessed at: https://www.gov.uk/government/consultations/firefighters-pension-scheme

8.5 *Changes to the definition of pensionable pay* – 32 responses in total were received in respect of this proposal. 24 of the 32 responses highlighted concerns that flexible duty allowance (FDA) was not a temporary allowance and, as such, should continue to be treated as pensionable pay for both current and prospective recipients. The Department considered the responses and is content that the flexible duty allowance should continue to be treated as pensionable under final salary arrangements.

8.6 After the end of the consultation period a judgment was handed down in the case Norman v Cheshire Fire and Rescue Service, which further supported the position taken by the Department in that Flexible Duty Allowance should remain pensionable pay within the terms of the existing rule G1. Consequently no further amendment is required to implement the revised policy position that flexible duty allowance should be treated as pensionable pay for the purposes of the 1992 scheme. No further amendment is required to the 2006 Scheme in respect of this.

8.7 One response raised concerns about the retrospective application of the proposed amendment to Rule G1(2b) of the 1992 Scheme which would effectively replace the redundant

pensionable 'earnings cap'. As such, the Department has withdrawn this particular amendment for further consideration.

8.8 *Amendments to the medical appeals processes* – 27 of the 30 responses received supported this proposal with the majority of respondents recognising that the amendments would lead to a more efficient arrangement for dealing with medical appeals. One response, from a member of the Board of Medical Referees, suggested a slight change in drafting of the amendment that would enable a reviewing member to determine whether there was "sufficient" information that would enable an appeal to be undertaken. The Department accepted this suggestion and made the relevant change to the amendment.

8.9 *Amendments to provide exemptions of pension contributions* – 34 responses in total were received in respect of this proposal. 15 of the 34 responses supported the principle of the policy. 9 of those responses questioned the requirement for employers to continue paying the pension contributions during any member contributions holiday. A number of responses suggested that the contributions holiday should be extended to age 55 for those Chief Fire Officers who did not have a Protected Pension Age and, as such, would not be able to retire prior to this age without incurring a substantial tax charge. Two respondents disagreed with the proposal outright and argued that the requirement to pay contributions was a requirement of scheme when these members joined. They also argued that the potential age discrimination only arises following a change to equalities law in 2006 and, as such, would not have been in place when any of the current members joined the 1992 Scheme. In the light of these consultation responses, the Department has reconsidered the legal position and now takes the view that the scheme is unlikely to discriminate on grounds of age. However, in order to obtain legal certainty on the situation, the Department is now seeking a declaration from the Courts. The Department has, therefore, withdrawn the proposed amendment pending a decision by the Courts.

8.10 *Abatement of pensions* – 49 responses in total were received in respect of this proposal. 37 of the responses opposed the proposal. 16 of those respondents opposing the proposal argued that the requirement for employers to pay the additional costs would be unfair on those retired members that had already retired and who had secured re-employment without abatement being applied to their pensions. The Department has further considered the implementation of the proposal following consultation and has amended the original proposal so that the requirement for employers to pay the associated costs will only apply to new cases where a retired member becomes re-employment following the making of the amendment order. The Department has also decided to apply the wider power for an employer to abate a member's pension retrospectively to 25 September 2009. This was the date that employers were initially informed by the Department of the policy intention. However, there is no employer sanction if the pension was not abated.

8.11 *Technical amendments and alignments with tax legislation and general updating amendments* – 38 responses in total were received in response to these proposals. The main concerns related to assurances that the proposed changes would not have an adverse impact on members' pension entitlement. Following these concerns, the Department reviewed the proposals and has withdrawn a number of the amendments due to uncertainty of how these would impact on members' pension entitlement. The Department has also modified a number of the proposed amendments to ensure the amendments fully achieve the policy intention, as consulted on. More information on these changes can be found on the table at paragraph 88 of the Government's formal response to the consultation.

8.12 Other concerns were raised as part of the consultation process which did not prompt a change in the proposals. More detailed information about these concerns can be found in the Government's formal response to the consultation.

9. Guidance

9.1 The Department does not intend to issue any guidance on complying with these statutory instruments.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 There is no impact on the public sector as a whole.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Department will monitor any impact of these instruments as part of their ongoing management of both the 1992 and 2006 Schemes. To help inform this process, the Department will engage with fire and rescue authorities who manage the schemes to ensure that if any problems arise they are brought to the attention of the Department.

13. Contact

13.1 Anthony Mooney at the Department for Communities and Local Government Tel: 030344 42181 or email: anthony.mooney@communities.gsi.gov.uk can answer any queries regarding the instrument.