EXPLANATORY MEMORANDUM TO

THE NATIONAL EMPLOYMENT SAVINGS TRUST (AMENDMENT) ORDER 2013

2013 No. 597

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

2. Purpose of the instrument

This instrument amends the National Employment Savings Trust Order 2010[1]. Its purpose is to align the statutory framework of the National Employment Savings Trust (NEST) with recent changes to automatic enrolment legislation, and to make some minor and technical changes that will provide clarity and certainty to NEST and to the employers and members who use NEST.

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

None.

4. Legislative Context

4.1 The Pensions Act 2008 (c.30) ("the 2008 Act"), at section 67, imposed a duty on the Secretary of State to establish, by Order, an occupational pension scheme, to be treated as if established under an irrevocable trust. The scheme's function is to support automatic enrolment and to ensure that all employers have access to a suitable, low-cost workplace pension in order to meet their duty to automatically enrol all eligible workers. The National Employment Savings Trust Order 2010 (S.I. 2010/917) ("the NEST Order") established the scheme, and provides that the National Employment Savings Trust Corporation is the Trustee of the scheme.

4.2 The NEST Order sets out the broad framework for the scheme, including:

- Establishment, constitution of the scheme and appointments
- The role of the Trustee and the Secretary of State
- Employer participation
- Scheme membership and contributions, and
- The scheme fund

4.3 Under the 2008 Act, the Trustee is responsible for maintaining the Scheme Rules. The Rules are made under the 2008 Act but not subject to Parliamentary procedure. The NEST Rules set out the lower level of detail about how the scheme will operate in practice. Nothing in the Rules can contradict the NEST Order. A number of amendments in this instrument will allow the Trustee – in accordance with the requirements under section 72 of the 2008 Act - to amend the scheme Rules as a consequence of the proposals.

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[1] NEST order S.I. 2010/917 http://www.legislation.gov.uk/uksi/2010/917

5. Territorial Extent and Application

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

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

"In my view the provisions of The National Employment Savings Trust (Amendment) Order 2013 are compatible with the Convention Rights."

7. Policy Background

What is being done and why

7.1 The National Employment Savings Trust (NEST) has been operating since July 2011 in advance of automatic enrolment and this period has enabled NEST to test its business processes and to understand associated employer and member behaviours. This has identified that some of the more standard provisions in the NEST Order do not operate as intended or create ambiguity for participating employers or members.

7.2 Additionally, since the National Employment Savings Trust Order 2010 (NEST Order) was made, there have been a number of changes to automatic enrolment legislation, including regulations to extend the implementation period. These changes impact on the NEST Order and it needs to be updated to reflect current automatic enrolment requirements.

7.3 The amendments in this instrument provide for:

7.3.1 An extension to the Trustee discretion to admit self-enrolling members (self-employed persons and single person directors) until 1 March 2018 to align with revised legislation[2] which extends the staging period for automatic enrolment. This will help NEST to focus on enabling employers to meet their new duties during the implementation of automatic enrolment, and

7.3.2 A discretionary power to allow the Trustee to decide whether to accept contributions relating to individuals defined as 'qualifying persons' or 'qualifying self-employed persons'[3] to align with regulations[4] that exempt certain European employments from automatic enrolment. This will enable NEST to remain a low-cost proposition for its target market of low to moderate earners.

7.3.3 Employers to voluntarily terminate their participation in the National Employment Savings Trust (NEST) by giving notice to the Trustee in

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[2] Employers' Duties (implementation) (Amendment) Regulations 2012 (S.I. 2012/1813) and the Employers Duties (Implementation) (Amendment) Regulations (Northern Ireland) 2012 (S.R. 2012 No.332) http://www.legislation.gov.uk/uksi/2012/1813/contents/made

[3] Qualifying person" and "qualifying self-employed person" are defined in regulation 2 of the Occupational Pension Schemes (Cross-border Activities) Regulations 2005 (S. I. 2005/3381) and regulation 2 of the Occupational Pension Schemes (Cross-border Activities) Regulations (Northern Ireland) 2005 (S.R. 2005 No. 581) http://www.legislation.gov.uk/uksi/2005/3381/contents/made

[4] Regulation 5A of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (S.I. 2010/772) and regulation 5A of the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations (Northern Ireland) 2010 (S.R. 2010 No.122) http://www.legislation.gov.uk/uksi/2010/772/contents/made

accordance with the Scheme rules, as in practice, employers may wish to cease to participate in the scheme if they no longer pay contributions in respect of any members – this includes a consequential amendment to the definition of participating employer.

7.3.4 A technical amendment removing the requirement for self-enrolling members (self-employed and single person directors) to agree to Member Terms and Conditions to gain admittance to NEST as this works against the obligation in the National Employment Savings Trust Order 2010 (NEST Order) for the Trustee to admit them.

7.3.5 A minor change to the description of who can contribute to a member's account to make clear that a third party (for example a relative) can make contributions to a member's account - the current description could be interpreted as not allowing third party contributions in some circumstances.

7.3.6 A technical change to the provisions which set out when, and to whom, a refund of contributions may be made from a member's account to allow the Trustee to make refunds directly to third parties or members as well as employers.

7.3.7 A technical change to clarify the definition of minimum contributions in relation to a member who has more than one employment, to make clear that the Trustee must accept all statutory minimum contributions[5] made by each employer of the member even if this causes a breach of the annual contribution limit.

7.3.8 A technical change removing the requirement for the Trustee to consider next of kin - as defined by rules applicable in England & Wales, Northern Ireland and Scotland[6] - when determining who lump sum benefits may be paid to on the death of a member and instead, allowing the Trustee - in accordance with the Rules - to determine to whom it will distribute death benefits when an account is under £5,000 and,

7.3.9 Minor drafting corrections to cross-references.

Consolidation

7.4 Consolidated versions of the NEST Order will be included in due course in the Law Relating to Social Security, or "Blue Volumes". The "Blue Volumes" contain the legislation for which the Department is responsible. These can be found at: http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/ These are updated quarterly and are available on the internet at no cost to the public.

8. Consultation Outcome

8.1 The Department undertook a formal consultation on the proposals to amend the NEST Order between 30 October 2012 and 26 November 2012. The consultation was carried out in line with recent Cabinet Office guidance[7] on consultation principles.

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[5] The Pensions Act 2008 (c.30) Part 1 and the Pensions (no.2) Act (Northern Ireland) 2008 (c.13 (N. I.)) section 20 and section 28. http://www.legislation.gov.uk/ukpga/2008/30/contents

[6] In England and Wales, the persons who would take beneficially on an intestacy under the provisions of Part IV of the Administration of Estates Act 1925 (c.23); In Northern Ireland, the persons who would take beneficially on an intestacy under the provisions of Part II of the Administration of Estates Act (Northern Ireland) 1955 (c.24(N.I.)); In Scotland, the persons entitled to moveable estate of the deceased on intestacy http://www.legislation.gov.uk/ukpga/Geo5/15-16/23/contents

[7] MGP letter on consultations-Revised consultation principals-18 July 2012

8.2 The Department received two responses to the consultation. Both supported the proposals for amendments to the National Employment Savings Trust 2010 (NEST Order), commenting that the proposals were sensible as it was essential for the National Employment Savings Trust (NEST) to work efficiently and also important that NEST's statutory framework fits within the automatic enrolment legislation, as it has been amended since 2010.

8.3 No changes were made to the draft Order as a result of the responses to the consultation.

8.4 The Government's response to the consultation is published at: http://www.dwp.gov.uk/consultations/2012/

9. Guidance

9.1 In line with requirements for all occupational pension schemes to make their governing documents available, NEST publishes the NEST Order and scheme Rules on its website -http://www.nestpensions.org.uk. Paper copies are available on request from NEST. These documents will be updated following the introduction of these changes to the NEST Order. In addition, NEST has undertaken to write to any participating employer or member of the scheme who it believes may be substantially affected by any of the changes being made. NEST also publishes a range of guides for members and employers which summarise the NEST Order and scheme Rules, providing key information about NEST in a more accessible format.

9.2 More broadly, it is the responsibility of the Trustee to arrange publicity for the NEST scheme, as it is one option available to employers through which they will be able to discharge their new duties. The NEST Order includes a power for the Trustee to increase awareness and understanding of the scheme in relation to employers and potential members.

10. Impact

10.1 The impact on business and civil society organisations is negligible.

10.2 The impact on the public sector is negligible.

10.3 An assessment of the impact of this Order on the private sector and civil society organisations has been made. A copy of the impact assessment is available alongside the instrument on www.legislation.gov.uk. Copies may also be obtained from the Better Regulation Unit of the Department for Work and Pensions, 2D Caxton House, Tothill Street, London SW1H 9NA.

11 Regulating Small Business

11.1 These articles apply to small businesses. It is expected that the amendments to the NEST Order provided by these articles will benefit NEST, employers (regardless of their size) and members using NEST.

11.2 The consultation on the draft Order did not highlight any specific issues about the effect of these articles on small businesses.

12. Monitoring and Review

12.1 The Trustee is obliged to provide an annual report and accounts on the exercise of its functions to the Secretary of State, who must lay these before Parliament. The Trustee must also prepare a separate annual report and accounts for the National Employment Savings Trust (NEST) scheme, which will be available on the internet.

12.2 The 2008 Act provides that the Secretary of State must appoint a person to review, in relation to NEST, the effect of the maximum amount of contributions and the transfer ban on 1 January 2017. The Secretary of State may also direct for other matters relating to the scheme to be included in that review. The person appointed must prepare a report for the Secretary of State, and that report must be laid before Parliament.

13. Contact

Mira Vyas at the Department for Work and Pensions Tel: 020 7449 7931 or email: Mira.Vyas@dwp.gsi.gov.uk can answer any queries regarding this instrument.