EXPLANATORY MEMORANDUM TO THE

SERVICE CHARGES (CONSULTATION REQUIREMENTS) (AMENDMENT) (ENGLAND) REGULATIONS 2004

2004 No. 2665

1. This explanatory memorandum has been prepared by the Office of the Deputy Prime Minister and is laid before Parliament by Command of Her Majesty.

2. DESCRIPTION

2.1 These Regulations amend regulation 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the principal Regulations"). The principal Regulations relate to the amount that tenants can be required to contribute, by the payment of service charges, to relevant costs incurred by landlords in carrying out works to a building or other premises or under certain agreements. Unless a landlord complies with the consultation requirements prescribed in the principal Regulations or obtains a dispensation from a leasehold valuation tribunal in respect of all or any of those requirements, his tenants' contributions by way of service charges are limited.

2.2 The Regulations to which this memorandum relates concern only those provisions of the principal Regulations that are relevant to what are known as qualifying long term agreements. Subject to the exclusions mentioned in regulation 3 of the principal Regulations, a qualifying long term agreement is an agreement entered into by a landlord (or a person acting on his behalf) for a term of more than twelve months. In practice, many of these agreements will be about the provision by the other party to the agreement of goods, services or works that the landlord himself would otherwise provide or undertake.

2.3 Regulation 4 of the principal Regulations imposes a limit of £100 in any accounting period in respect of service charges attributable to the provision of goods or services, or the carrying out of works, under a qualifying long term agreement. That limit will apply unless the landlord complies with the consultation requirements prescribed by regulation 5 or obtains a dispensation from a leasehold valuation tribunal in respect of all or any of those requirements. For this purpose, the first accounting period relevant to the principal Regulations is defined in regulation 4(2) as a period of twelve months from "the relevant date". Regulation 4(3) of the principal Regulations defines "the relevant date" in different ways according to whether or not the landlord's accounts relating to service charges are made up for periods of twelve months. Regulation 4(4) provides that subsequent accounting periods run from the end of the previous accounting period.

2.4 The Regulations to which this memorandum relates introduce a different method of calculating the start date for the first accounting period relevant to

qualifying long term agreements that are entered into on or after the date on which the amending Regulations come into force.

3. MATTERS OF SPECIAL INTEREST TO THE JOINT COMMITTEE ON STATUTORY INSTRUMENTS

None.

4. LEGISLATIVE BACKGROUND

4.1 The principal Regulations were made under sections 20 and 20ZA of the Landlord and Tenant Act 1985, as substituted by section 151 of the Commonhold and Leasehold Reform Act 2002. They came into force on 31 October 2003, on the same date as section 151 was commenced in full. It had been commenced on 26 July 2002 for the purpose of enabling regulations to be made.

4.2 The provisions relevant to qualifying long term agreements (defined in section 20ZA(2)) are regulations 3 and 4. The former relies, in particular, on section 20ZA(3), and the latter on section 20(4)(b) and (5). In accordance with section 20(1), the relevant contributions of tenants under qualifying long term agreements to which section 20 applies are limited in accordance with section 20(7).

5. EXTENT

5.1 This instrument applies to England.

5.2 The principal Regulations apply in relation to dwellings in England only (regulation 1(2) of those Regulations).

6. EUROPEAN CONVENTION ON HUMAN RIGHTS

Not applicable.

7. POLICY BACKGROUND

7.1 When the principal Regulations were drafted it was ODPM's intention that, on the commencement of section 152 of the Commonhold and Leasehold Reform Act 2002, ('the 2002 Act'), which substitutes section 21 of the Landlord and Tenant Act 1985, the principal Regulations should be amended so as to bring the accounting period for section 20 purposes into line with that for section 21 purposes. Section 21(9) and (10) defines "accounting period" for the purposes of section 21 only.

7.2 On reflection, the view has been taken that it would be unduly burdensome for landlords to have to adjust their accounting systems in this way. For landlords who made up their accounts for periods of 12 months, the principal Regulations aligned the accounting period for the purposes of section 20 with those 12- month accounting periods. Such periods will

generally be in line with the relevant accounting provisions that will be contained in the leases of the tenants concerned. Landlords who did not make up their accounts on this basis were required to adopt a specified 12-month accounting period. It would be more convenient for such landlords to be able to continue to operate such accounting periods for the purposes of section 20.

7.3 Enquiries made by ODPM officials have indeed established that landlords would prefer that the accounting period which is to apply for the purposes of section 20, is not brought into line with the one which will be introduced for section 21. Rather they have a strong preference for being able to continue to use an accounting period that is consistent with the operation of existing accounting systems. .

7.4 Regulations are to be made under section 152 of 2002 Act which will introduce a requirement for landlords to supply tenants with a regular statement of account. The beginning of the first accounting period for this statement is fixed by the new section 20 (9) of the Landlord and Tenant Act 1985 and in most cases will be the date on which the new section 152 of the 2002 Act comes into force. It is the present intention that this date will be 1st April 2006. However section 21(9) enables landlords to have accounting periods for the purposes of section 21 which are less than twelve months. Therefore it will subsequently be possible for the accounting period upon which the regular statement of account is based, to be realigned with the period (where different) being used for the purposes of consultation under section 20 of the 1985 Act. There is then no need to force landlords who are operating accounting periods for section 20 purposes by reference to the definition in the principal Regulations to operate accounting periods for those purposes by reference to the section 21 definition. Conversely, there is no reason to deprive landlords who have to comply with section 21 of the flexibility provided by section 21(9).

7.4 The change of policy referred to in paragraph 7.2 has been taken recently and as a result of work undertaken in connection with the introduction of the new section 21 of the 1985 Act and associated provisions. It is envisaged that a commencement order introducing these provisions will be made in the spring of 2005.

7.5 Although it had been intended that regulation 4 of the principal Regulations would be amended in a particular way to bring accounting periods under sections 20 and 21 into line, other amendments are now necessary as a result of the change of policy.

7.6 It has been decided that accounting periods already established for the purposes of section 20 should be allowed to continue. It has also been decided that, where landlords first make up service charge accounts on or after the date on which the amending Regulations to which this memorandum relates come into force, accounting periods for section 20 purposes should be twelve month periods. This can be achieved on the basis of regulation 4(4) of the principal Regulations. However, the relevant date that establishes the beginning of the first accounting period in such cases

cannot be that referred to in regulation 4(3) of the principal Regulations because it is linked to 31 October 2003.

7.7 The policy in these cases is that the accounting period for section 20 purposes should match that which the landlord uses in practice. The date that best reflects this policy, as regards the first accounting period for section 20 purposes, is the date that begins the period for which service charges are first payable under the lease. In most cases this date will be that on which the term of the lease commences. Because of the variety of provisions about payment of service charges, it was considered inadvisable to use a formula such as "the date on which service charges are first payable under the lease". Such a formula could produce unintended effects where, for example, service charges are payable six monthly in arrears.

7.8 The example set out below illustrates the way in which the amendments may be expected to affect a landlord who, on the commencement of section 152 of the 2002 Act, will be required to comply with the requirements of new section 21.

(a) The landlord currently operates a financial year that runs from 1 January to 31 December and is currently complying with the principal Regulations. He will be able to continue on this basis for the purpose of the section 20 consultation requirements.

(b) A landlord who, after the date of the coming into force of the amending Regulations, wishes to begin operating on the basis of a similar financial year will also be able to do so.

(c) It is presently envisaged that such landlords will be required (on the commencement of section 152 of the 2002 Act) to produce a regular statement of account for the purposes of new section 21 on the basis of an accounting period that begins on 1 April 2006. However because this accounting period can be for a period of less than 12 months, the first such period can terminate on 31 December 2006. Thereafter, for these landlords, accounting periods for the purpose of both sections 20 and 21 can run from 1 January until 31 December.

8. IMPACT

8.1 A Regulatory Impact Assessment has not been produced because the effect of the amendments is unlikely to affect landlords to any appreciable extent. Those who are already operating qualifying long term agreements will keep their existing section 20 accounting periods. The position of those who enter into such agreements on or after the amending Regulations come into force will be no worse than it would have been under the principal Regulations. Many of them will be in a better position than they would have been before the change of policy.

9. CONTACT

9. Ian Fuell at the Office of the Deputy Prime Minister (Tel: 0207 944 3463 or e-mail ian.fuell@odpm.gov.uk) can answer any queries regarding the instrument.

18th October 2004