EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (PENALTY AS ALTERNATIVE TO PROSECUTION) (MAXIMUM AMOUNT) ORDER 2015

2015 No. 202

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

The purpose of the instrument is to increase from £2,000 to £5,000 the maximum amount of an administrative penalty that may be offered as an alternative to prosecution for a benefit fraud offence under section 115A (3)(b) of the Social Security Administration Act 1992 ("the 1992 Act") (as opposed to the amount of the administrative penalty as an alternative to prosecution for an attempt to commit such an offence which is dealt with separately in section 115A).
http://www.legislation.gov.uk/ukpga/1992/5/contents/enacted

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

None.

4. Legislative Context

Administrative penalties are financial penalties which may be offered to individuals in certain cases as an alternative to prosecution for a benefit fraud offence or an attempt to commit such an offence. Section 115A, of the 1992 Act specifies when an administrative penalty may be offered and the amount of administrative penalty to be paid.
http://www.legislation.gov.uk/ukpga/1992/5/contents/enacted

In particular an administrative penalty can be offered if it appears to the Secretary of State or an authority administering housing benefit that, an overpayment of benefit is attributable to an act or omission on the part of an individual and that there are grounds for instituting proceedings against that individual for a benefit fraud offence.

If the person agrees to pay an administrative penalty, no proceedings will be instituted against them for the offence in question.

Section 115A(3) of the 1992 Act allows for a penalty of £350 or 50% of a recoverable overpayment, whichever is the greater, subject to a maximum penalty of £2,000. This Order increases that maximum to £5,000.
http://www.legislation.gov.uk/ukpga/2012/5/contents/enacted/data.htm. This is being changed as part of a range of measures, announced on 8 April 2014, designed to be tougher on those who commit benefit fraud and to act as a greater deterrent to prevent it in the first place.

5. Territorial Extent and Application

This instrument applies to Great Britain.

6. European Convention on Human Rights

Mark Harper, the Minister of State for Disabled People, has made the following statement regarding Human Rights:

In my view the provisions of the Social Security (Penalty as Alternative to Prosecution) (Maximum Amount) Order 2015 are compatible with the Convention rights**.**

7. Policy background

What is being done and why

The administrative penalty has been part of the Department's measures to tackle social security fraud since it was introduced in the Social Security Administration (Fraud) Act 1997 which amended the 1992 Act. It is just one of a number of measures used by the Department to both deter and punish benefit fraud. The Welfare Reform Act 2012 (the '2012 Act') made several changes to the administrative penalty provisions contained within the 1992 Act. In particular, the changes allowed for a maximum administrative penalty of £2,000 to be offered where it appears to the Secretary of State or an Authority that, a recoverable benefit overpayment of £4,000 or more is attributable to the act or omission of the person in question and that there are grounds for prosecuting a benefit offence.

When setting the maximum penalty amount in the 2012 Act, it was considered that from time to time the Government might want to review this amount to ensure that it remained appropriate and meaningful.

In 2009/10, 7,249 DWP fraud investigations and 7,455 Local Authorities' investigations resulted in an administrative penalty. In 2012/13, 3,863 DWP fraud investigations and 5,520 LA fraud investigations resulted in an administrative penalty and in 2013/14, 1,501 DWP fraud investigations and 4,855 Local Authority fraud investigations resulted in an administrative penalty.

The £2,000 maximum has been in force for nearly two and a half years, since 8 May 2012, but the Government considers there are still too many people committing benefit fraud. An estimated £1.2billion a year is lost through overpaid benefits as a result of fraud compared with an estimated loss of £1.1billion in 2010. https://www.gov.uk/government/collections/fraud-and-error-in-the-benefit-system.

For this reason the Government is taking prompt action to increase the maximum amount of the administrative penalty by increasing it to £5,000. At the same time, it is introducing a package of other new measures announced on the 8 April 2014, all intended to help tackle benefit fraud. https://www.gov.uk/government/news/new-measures-to-protect-the-integrity-of-the-benefits-system.

This change will further support the measures previously outlined by the Government in its strategy to tackle fraud and error and protect the integrity of the benefit system, published in October 2010.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214334/tackling-fraud-and-error.pdf The Government's policy intention to seek tough punishments for benefit fraud was also re-affirmed in the strategy refresh document published in February 2012.
http://www.dwp.gov.uk/docs/tackling-fraud-and-error.pdf
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62522/HMG-Fraud-and-Error-Report-Feb-2011-v35.pdf

In setting the new maximum amount, £5,000 was considered appropriate to reflect the serious nature of benefit fraud and would act as a better deterrent by emphasising the significant financial consequence which can result from such action. £5,000 was also considered to be an amount that a person may still be prepared to pay rather than be prosecuted for a benefit fraud offence.

The Department's policy is generally to offer administrative penalties as an alternative to prosecution where the case is deemed not to be so serious that prosecution should be considered in the first instance, where the overpayment is lower in value, and this will continue.

However as currently, on occasions it may also be appropriate to allow an administrative penalty to be offered in other cases involving higher value overpayments and this will continue. Raising the maximum amount gives the Department greater flexibility to offer a more suitable administrative penalty in such cases, with the amount of the penalty *remaining* proportionate when a higher value of overpayment is involved.

The effect of the Order would be, for example, that where there was a benefit overpayment of £6,000 and there are grounds for instituting proceedings for a benefit related offence, a penalty of £3,000 could be offered (previously the maximum penalty restriction of £2,000 would have applied).

Importantly a person can decline the offer of an administrative penalty in which case they may be prosecuted for the offence.

The number of cases where a penalty over £2000 will be considered is likely to be fewer than 250 a year.

The main effect of this change is to allow the Department greater flexibility in finding a suitable penalty for each case, without necessarily needing to bring cases to prosecution simply because the level of administrative penalty available is insufficient.

Whilst we cannot estimate the deterrent impact of the measure in terms of the number of frauds committed in the future, the measure still remains an important part of our overall package of measures to ensure an appropriate range of options available to deal with benefit fraud.

The number of those who accept an administrative penalty and then reoffend is low. Accordingly it is important to ensure that the use of administrative penalties is not overly restricted by the maximum rate available. Increasing the maximum penalty also fits with the strong deterrent message being given by the Department overall on benefit fraud.

In all cases, as currently, a person who accepts an administrative penalty will be required to pay the penalty together with the full amount of any recoverable overpayment. They will also face a 4 week loss of benefit.

As detailed in the Order, the increased maximum administrative penalty will only be applicable in cases where the act or omission which gives rise to grounds for instituting proceedings for the offence to which the penalty relates, occurs on or after the coming in to force of the Order.

Consolidation is not considered appropriate at this stage as this is a very simple amendment and the first use of the power. However an informal consolidated text of instruments is available to the public free of charge via 'The Law Relating to Social Security' (Blue Volumes) on the Department for Work and Pensions website at http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-social-security/
or the National Archive website legislation.gov.uk. An explanation as to which instruments are maintained on each site is available here.

8. Consultation outcome

Although no formal public consultation on the new maximum penalty amount was undertaken the Department did announce in a Press release its intention to make this change on the 8th April 2014. No comments on the issue of the new maximum penalty amount were received following the announcement.

The Order does not fall within the terms of the Social Security Advisory Committee's statutory remit as detailed in Section 172(1) of the 1992 Act. However, the Committee were provided with a copy of the draft Order for information and informed about the change.

The Department carried out a 6 week period of consultation with Local Authority representatives about the Order, but no concerns were raised. Local Authority IT suppliers were also informed about the proposed Order with no concerns raised.

9. Guidance

Implementation of the new maximum administrative penalty amount is considered by the Department to be a small and minor change to a well established operational process developed to support the existing administrative penalty regime. This change only affects the maximum amount and not the circumstances in which an administrative penalty is available.

As currently, the Department will continue to consider the individual circumstances of a case when deciding whether to offer a penalty or refer a case to the Crown Prosecution Service or the Procurator Fiscal (Scotland) for prosecution.

The Department also has a well established debt recovery process which includes recovery of administrative penalties. This allows for administrative penalties to be paid by: deductions from on-going benefits; instalments; a lump sum or through the courts or by a direct earnings attachment. As currently the maximum amount that can be deducted from most benefits is set in legislation. Where it can be demonstrated that the maximum deduction amount from benefit would have a significant impact on the welfare of any children in the family then, after discussion with the person, the Department can consider reducing the recovery rate for repayment.

Information relating to the revised maximum amount of an administrative penalty will be incorporated into operational guidance and the written notices and forms provided to the claimant relating to the operation of the administrative penalty. Information relating to the increased maximum amount will also be included in, relevant press releases, updates on www.gov.uk and through the Department's website www.dwp.gov.uk.

10. Impact

This instrument has no impact on business or civil society organisations.

A full impact assessment has not been published for this instrument.

The impact on the public sector is negligible as the Order simply substitutes one monetary value for another. As a result there is no overall change to the current situation where local authorities may and do offer administrative penalties as an alternative to prosecution for housing benefit offences. The only practical difference is the monetary value of the maximum penalty has increased.

11. Regulating small business

The legislation does not apply to small businesses.

12. Monitoring & review

The amended maximum administrative penalty amount will be monitored to ensure both the effectiveness of the measure and equality of treatment. In addition, the Department will include the change to the maximum administrative penalty amount as part of its overall monitoring and evaluation of all of the Department's fraud and error strategy initiatives.

The evidence for this will be drawn from a range of Departmental information and data sources as they become available for penalties using the new maximum amount.

Work continues within the Department to establish a formal process and timetable for the (short and long term) co-ordination and analysis of information in relation to the use of the new maximum penalty amount.

13. Contact

Judith Hicks at the Department for Work and Pensions Tel: 020 7449 5311 or email: Judith.Hicks@dwp.gsi.gov.uk who can answer any queries regarding the instrument.