

DORMANT ASSETS BILL

Memorandum from the Department for Digital, Culture, Media & Sport to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Dormant Assets Bill (“the Bill”). The Bill was introduced in the House of Lords on 12th May 2021. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The purpose of the Bill is to bring forward provisions to deliver on the Government’s commitment to expand the Dormant Assets Scheme (“the Scheme”). This Scheme enables unclaimed funds to be reinvested for the benefit of social or environmental purposes while protecting the rights of the individual customer. The expansion of the Scheme, via the provisions in this Bill, has the potential to make available substantial funds for good causes.
3. The Scheme is underpinned by three principles:
 - a. Reunification first: participants’ first priority is to reunite owners with their assets.
 - b. Full restitution: dormant assets owners are able, at any point, to reclaim the amount that would have been due to them had the transfer to the reclaim fund not happened.
 - c. Voluntary participation: industry participation in the Scheme is voluntary.

The Scheme

4. The Dormant Bank and Building Society Accounts Act 2008 (“the 2008 Act”)¹ set up the framework for a Scheme under which money in dormant bank and building society accounts could be distributed for social or environmental purposes, whilst protecting the rights of owners to reclaim their money at any point. Under the Scheme, the balances in dormant bank and building society accounts can be transferred to a reclaim fund. The fund holds a proportion of

¹ The DPRRC Reports on the Bill that became the 2008 Act can be accessed here:<https://publications.parliament.uk/pa/ld200708/ldselect/lddelreg/11/11.pdf> (First Report of Session 2007-08) and here:<https://publications.parliament.uk/pa/ld200708/ldselect/lddelreg/194/194.pdf> (15th Report of Session 2007-08).

the balances to meet repayment claims from dormant account holders; the remainder of the money is made available for distribution by the Big Lottery Fund (operating under the name of The National Lottery Community Fund, “the Lottery Fund”) for certain purposes.

5. The provisions in the Bill expand the scope of the Scheme to include additional dormant assets from the insurance and pensions, investment and wealth management, and securities sectors. The Bill sets out the definitions of dormancy in relation to each type of asset. In line with how the Scheme operates for dormant bank and building society accounts, where the proceeds of an asset are transferred to the reclaim fund by a participant, any liability of the participant to repay the customer is cancelled. Instead, the customer is able to claim repayment from the reclaim fund.
6. The Bill also includes provision to enable unwanted assets of the same asset types to be transferred to the reclaim fund. Where an unwanted asset is transferred to the reclaim fund, the customer will not have a right to repayment from the reclaim fund.
7. The Bill provides a power for the Secretary of State or the Treasury to expand the scope of the Scheme in the future to cover other assets, by making secondary legislation which would amend the Bill (or the 2008 Act).

The alternative scheme

8. The 2008 Act also provides for an alternative scheme for smaller banks and building societies with assets of less than £7 billion. Under the alternative scheme, such a bank or building society can transfer an agreed proportion of a dormant account to the reclaim fund and transfer the balance to one or more charities which meet certain criteria, for example the charity undertakes to apply the money for the benefit of communities local to the participant’s branches. The liability of the bank or building society to repay the customer is cancelled. Instead, the customer is able to claim repayment from the reclaim fund. The Bill amends the 2008 Act so that the reclaim fund can choose to return a portion of the amount transferred to it by a bank or building society back to that bank or building society for onward transmission to an eligible charity.

The reclaim fund

9. Section 5 of the 2008 Act sets out the functions of a reclaim fund, which include meeting repayment claims, managing dormant asset funds and transferring money to the Lottery Fund (which is responsible for distributing money under the general Scheme).
10. Currently there is only one reclaim fund, Reclaim Fund Ltd. Reclaim Fund Ltd is a Treasury-sponsored Non-Departmental Public Body.

11. The Bill makes various provisions relating to the reclaim fund, including naming Reclaim Fund Ltd as the only current reclaim fund for the purposes of the Scheme.
12. Reclaim Fund Ltd enters into agency agreements with participants; these agreements set out details necessary for the operation of the Scheme. Clause 23 of the Bill provides that an authorised reclaim fund may only accept transfers from an institution if the reclaim fund and the institution have made arrangements which the reclaim fund considers to be a satisfactory basis for accepting such transfers. Clause 23(2) provides that the arrangements must include provision requiring the taking of steps by the institution for reuniting assets with their owners; subsection (3) makes further provision about this. Subsections (2) and (3) do not apply in relation to transfers of unwanted assets, as these are assets where the person has confirmed that they are content for the asset to be transferred to an authorised reclaim fund (clause 21). Clause 23(5) provides a non-exhaustive list of things that may be covered by the arrangements that the reclaim fund makes with the institution. This includes providing for the person to act as the reclaim fund's agent for particular purposes, such as managing reclaims.
13. It is considered appropriate for this detail to be set out in arrangements between the reclaim fund and the institution as this will concern operational details; these may need to change over time, or different approaches will need to be taken in relation to different assets. For example, the intention is that the steps that a person must take to try to trace, verify and reunite an owner with their asset should reflect what is good practice within the particular sector; this may change over time and therefore it is appropriate for this level of detail to be dealt with in the arrangements between the reclaim fund and the potential participant, rather than being fixed in legislation.

Distribution of money under the general Scheme

14. Part 2 of the 2008 Act makes provision about the distribution of money under the general Scheme. The money is apportioned by the Secretary of State between England, Wales, Scotland and Northern Ireland. The Lottery Fund is responsible for distributing the money and may only distribute the money for social and environmental purposes and in accordance with the detailed spending purposes that apply in relation to each nation's apportioned share of the money. In relation to England, these spending purposes are currently set out in section 18 of the 2008 Act. The spending purposes for each of the devolved administrations' respective share of the money are not set out in the 2008 Act; rather, each devolved administration has the power to set out their spending purposes by order (sections 19-21 of the 2008 Act). The Secretary

of State and the devolved administrations also have the power to issue directions to the Lottery Fund (section 22).

15. The Bill amends the 2008 Act to provide the Secretary of State with a power to set, by order, the spending purposes for which the English portion of dormant assets money can be distributed (in line with the powers the devolved administrations have under the 2008 Act in relation to their portions of the money). As with the devolved administrations, the spending purposes provided for in any order made by the Secretary of State will need to fall within the general requirement of a “social or environmental purpose”.

Consultation

16. In 2016 the government set up an independent Dormant Assets Commission to consider, amongst other things, what additional classes of dormant assets could be brought into the Scheme. The Commission’s report was published in March 2017². The government’s response to the Commission’s report was published in February 2018³. The response confirmed the government’s commitment to support efforts to expand the Dormant Assets Scheme, and to bring together a group of senior industry champions to report on how to implement an expanded Scheme. The industry champions produced a report in April 2019, “*The Dormant Assets Scheme: A Blueprint For Expansion*”⁴. In February 2020, the Department for Digital, Culture, Media and Sport and the Treasury launched a consultation on expanding the Dormant assets Scheme; the response to that consultation was published on 9 January 2021⁵. The consultation response confirmed that the government intends to legislate to expand the Scheme to include additional assets from the insurance and pensions, investment and wealth management, and securities sectors.

C. DELEGATED POWERS

17. The Bill is divided into three Parts.
 - a. Part 1 (the Dormant Assets Scheme) deals with the classes of assets that can be transferred to the reclaim fund where they are dormant and contains a number of provisions to support this. It sets out what these assets are and when they will be considered dormant for the purposes of the Scheme. Where a transfer has been made to the reclaim fund in relation to a dormant asset, the customer will have a right to claim

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/596228/Tackling_dormant_assets_-_recommendations_to_benefit_investors_and_society_1.pdf

³ <https://www.gov.uk/government/publications/government-response-to-the-commission-on-dormant-assets-report>

⁴ <https://www.gov.uk/government/publications/the-dormant-accounts-scheme>

⁵ Both the consultation document and the government response can be accessed here:

<https://www.gov.uk/government/consultations/consultation-on-expanding-the-dormant-assets-scheme>.

compensation from the reclaim fund and Part 1 makes provision for how this is calculated in relation to the various types of assets. Part 1 has no delegated powers.

- b. Part 2 contains various miscellaneous provisions, including amendments to the 2008 Act relating to the alternative scheme for smaller banks and building societies, provision about unwanted assets, provision about disclosure of information, provisions relating to a reclaim fund, and provision about the distribution of dormant account money. Part 2 also requires the reclaim fund to make arrangements with a potential participant before accepting a transfer; such arrangements may cover various operational requirements and matters between the reclaim fund and the institution. Any arrangements must include provision requiring the taking of steps by the institution for reuniting assets with their owners (clause 23(2)) (see paragraphs 12-13 above). Part 2 contains three delegated powers (two of which are Henry VIII powers):
 - i. Clause 19, which enables the Secretary of State or the Treasury to make regulations to extend the Scheme to cover new dormant assets (a Henry VIII power).
 - ii. Clause 26, which enables the Treasury to amend the Bill to provide that another company is able to act as the authorised reclaim fund and to remove a company (including Reclaim Fund Ltd) from being named in the Bill as the reclaim fund (a Henry VIII power).
 - iii. Clause 29, which enables the Secretary of State to make an order to set out the specific purposes for which the English portion of dormant assets money can be distributed.

- c. Part 3 contains provisions on consequential amendments, commencement, extent and other final provisions. Clause 30 makes general provision about the regulation-making powers in the Bill. For example, the power to make regulations under the Bill includes power to make incidental, supplemental, consequential, saving or transitional provision (including provision modifying primary legislation). Part 3 contains one delegated power:
 - i. Clause 33(3) gives the Secretary of State the power to appoint days on which the provisions of the Bill (other than clause 33, which comes into force on the day on which the Bill is passed) are to come into force.

Clause 19(1): Power to extend the Dormant Assets Scheme to cover new dormant assets

Power conferred on: The Secretary of State or the Treasury

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

18. The power at clause 19(1) enables the Secretary of State or the Treasury to make regulations to extend the scope of the Dormant Assets Scheme (by amending Part 1 of the Bill or the 2008 Act) to:
 - a. insert new classes of assets into Part 1 of the Bill, and
 - b. amend Part 1 of the Bill (or the 2008 Act), for example to include new types of products within a class of asset already specified or add in other participants in relation to a particular class of asset.
19. Regulations that insert a new class of asset into Part 1 of the Bill (i.e. regulations made under subsection (1)(a)) must include the provisions listed in subsection (2), for example provision identifying what is meant by dormant in relation to that new class of asset and identifying the amount which the customer will have a right to claim from the reclaim fund after the transfer has happened.
20. The power conferred by clause 19 includes the power to make provision in regulations to convert non-cash dormant assets into cash proceeds so that the cash proceeds may be transferred to the reclaim fund (subsection 4). This is because the reclaim fund can only receive cash.
21. Clause 30 makes further provision about regulation-making powers in the Bill, including the power in clause 19. For example, this includes the power to modify primary legislation. The power to make consequential amendments in regulations made under clause 19(1) includes amending clause 21, which relates to unwanted assets, so that any new assets that are added by regulations under this power can also be transferred to the reclaim fund where they are unwanted by the customer (in which case all rights are extinguished and there is no right to reclaim as this is a situation where the customer has confirmed that they wish to donate their asset). The intention is that any asset that can be transferred to the reclaim fund because it is dormant can also be transferred to the reclaim fund if it is unwanted; being able to make consequential amendments to clause 21 will ensure that this is also the case for any new assets or products brought into the Dormant Assets Scheme as a result of regulations made under clause 19.

22. The regulations will not be able to exclude from the Scheme any assets that are within scope on the day that Part 1 of the Bill comes into force (clause 19(9)).

Justification for taking the power

23. The power enables the government to include additional types of dormant assets in the Scheme over time. It will allow the government to keep up to date with developments especially within the financial services industry. It may be desirable to expand the Scheme's scope more often than Parliament can be expected to legislate for by primary legislation.
24. The power will enable the government to take a phased approach to introducing further changes. It can be used to enable the government to broaden the pool of eligible assets as the reclaim fund builds experience over time of managing new types of dormant assets. Bringing in further assets will unlock additional sources of dormant funds which can be used for social or environmental purposes.
25. The power may be used to incorporate into the Scheme types of assets that are considered potentially suitable but where further work is needed or where the Scheme first needs to build experience (such as with managing market risk), or to bring in new types of assets (for example new products where dormancy has not yet been identified as an issue, or products that do not yet exist).
26. An example of assets that are not being included in the Scheme at this time but where there may be a policy desire in the future to include them are insurance products that do not naturally crystallise to cash. The government response to the consultation explains that assets in the insurance and pensions sector would be included at this time only if they crystallise to cash by operation of a contractual, legal or regulatory event (e.g. the policy converts to cash when it reaches its contractual end date or the participant has received a death claim). Not all insurance and pension products automatically crystallise to cash. For example, a product with no contractual end date and no death notification may not naturally crystallise. However, the insurance and pensions industry has significant experience of dormancy with these product types, and has requested these assets be considered for future inclusion. To include such assets in the Scheme in future, as requested, provision will need to be made to enable the conversion to cash so that they can be transferred to the reclaim fund.

Justification for the procedure

27. It is considered appropriate for the power to be subject to the draft affirmative procedure as it will operate by amending primary legislation.

Clause 26(3): Meaning of “authorised reclaim fund”

Power conferred on: The Treasury

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative resolution

Context and Purpose

28. The 2008 Act refers to an “authorised reclaim fund”. The functions of a reclaim fund are set out in section 5. A reclaim fund is “authorised” if it is authorised for the purposes of the Financial Services and Markets Act 2000 to carry on activities of a reclaim fund. Reclaim Fund Ltd is the only authorised reclaim fund that has operated since the Scheme was set up by the 2008 Act. The Bill names Reclaim Fund Ltd as the only authorised reclaim fund (clause 26(2)).

29. Clause 26(3) gives the Treasury the power to make regulations to amend clause 26(2) of the Bill to add, substitute or remove a reference to a reclaim fund, or to provide for the kinds of transfer in respect of which a named reclaim fund is an authorised reclaim fund.

Justification for taking the power

30. Given Reclaim Fund Ltd is now a publicly owned, non-departmental public body, the government has no appetite for alternative, competing authorised reclaim funds to be established by private sector organisations. As such, the bill names Reclaim Fund Ltd as the only authorised reclaim fund. However, there is a need to allow the flexibility for the government to establish an alternative authorised reclaim fund. For example, it might be considered desirable in the future to set up an additional fund to manage specific types of assets. Ensuring that the reclaim fund(s) for the Scheme are fit for purpose is essential in maintaining the principle of customer protection, which is at the heart of the Scheme.

31. The power ensures that there is a level of government control over who can operate as an authorised reclaim fund for the purposes of the Scheme; currently any private company could in theory be set up to do this (provided they received the necessary authorisation under the Financial Services and Markets Act 2000). Similarly, this power also gives Parliament a level of oversight as to

what bodies are to act as an authorised reclaim fund, which it does not currently have.

Justification for the procedure

32. It is considered appropriate for the power to be subject to the draft affirmative procedure as it will operate by amending primary legislation.

Clause 29(1): new section 18A(1) (distribution of money for meeting English expenditure)

Power conferred on: The Secretary of State

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Draft affirmative procedure

Context and Purpose

33. As explained in paragraphs 14 and 15, Part 2 of the 2008 Act makes provision about the distribution of money under the Scheme. Section 18 of the 2008 Act currently sets out specific restrictions on how the English portion of dormant account money can be distributed. The Bill inserts a new section 18A into the 2008 Act, which introduces a power for the Secretary of State to make an order to restrict the particular purposes for which, and the kind of person to whom, dormant assets money in England can be distributed (in line with the powers that the devolved administrations have for their respective nations under sections 19-21 of the 2008 Act).

Justification for taking the power

34. There is a strong interest in reviewing how dormant assets money should be distributed and the government has received multiple calls to change the current restrictions on how the English portion of the money is distributed. The power will provide flexibility to consult on and amend these restrictions; it may be desirable to do this more frequently than parliamentary time would allow to amend primary legislation. The power will provide flexibility to keep under review these restrictions and respond to changing needs over time.

35. New section 18A(3) provides that the Secretary of State must consult the Lottery Fund, and any other persons the Secretary of State thinks appropriate, before making an order.

36. The current restrictions in section 18 will continue to apply until (or unless) an order is made. This means that there will not be a change in the current restrictions until there has been a consultation.

37. This power will not affect the additionality principle. The distribution of dormant asset money by the Lottery Fund will need to continue to follow the principle that dormant assets money should be used to fund projects, or aspects of projects, for which funds would be unlikely to be made available by a government department, the Welsh ministers, the Scottish Ministers, or a Northern Ireland department.

38. There is also a precedent for this power, in that the devolved administrations have the power to set out by order the particular purposes for which their respective nation's share of dormant assets money can be distributed.

Justification for the procedure

39. Given the interest in how dormant assets money is distributed, it is considered appropriate for the power to be subject to the draft affirmative procedure. This is also consistent with the procedure that applies to the equivalent powers of the devolved administrations (sections 19-21 of the 2008 Act).

Clause 33(3): Power to commence by regulations

Power conferred on: The Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: None

Context and Purpose

40. Clause 32 comes into force on Royal Assent. Clause 33(3) confers power on the Secretary of State to make regulations to bring the other provisions of the Bill into force.

41. Subsection (4) provides that the Secretary of State may, in such regulations, appoint different days for different purposes and may make transitional or saving provision in connection with the coming into force of any provision of the Bill.

Justification for taking the power

42. Commencement by regulations enables the provisions to be brought into force at an appropriate time.
43. The power to make transitional or saving provision in such regulations ensures that, if necessary, provision can be made to ensure a smooth transition between the old and the new law. It is appropriate to take the power to ensure that any legal uncertainties or gaps that may arise can be addressed.

Justification for the procedure

44. Consistent with common practice, commencement regulations, and regulations making transitional or saving provision in connection with commencement, are not subject to Parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them; it is not necessary for their commencement, and any provision in consequence of their commencement, to be subject to further Parliamentary scrutiny.

Department for Digital, Culture, Media and Sport
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