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## Briefing:

# Deregulation

## Deregulatory measures introduced in response to the ONS reclassification of housing associations

### Summary of key points:

The Government has introduced a suite of measures to address the regulatory issues which led to the statistical reclassification of housing associations as public bodies. These include:

- Removal of the consents regime for the disposal of stock
- Abolition of the Disposal Proceeds Fund
- Removal of the regulator's powers over constitutional changes
- Limitation of the regulator's powers to appoint managers and officers
- Restrictions on influence by local authorities over housing associations (particularly, stock transfer organisations)
- Introduction of a new special administration regime to protect social housing assets in the case of insolvency

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## 1. Introduction

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In October 2015, the Office for National Statistics (ONS) announced that housing associations would be reclassified as public bodies. The Government made an immediate commitment to bring in changes to reverse this decision. These deregulatory changes will be brought in through the Housing and Planning Bill.

The Government has tabled a suite of amendments to the bill to address the regulatory issues which led to the statistical reclassification of housing associations. In addition, the Government has tabled further amendments to deal with a specific issue regarding local authority control, which, if not addressed, might lead ONS to retain LSVTs as 'public' even if the rest of the sector were reclassified as 'private'.

In general, the deregulatory measures outlined in the Bill will be positive for housing associations, putting Boards back in control of decision-making. In particular, the Federation has for many years been making a strong case about the damaging effects of the consents regime for disposals, so the proposed abolition of this regime is very welcome. We are pleased too that Government chose to preserve the voluntary status of the Pay to Stay policy for housing associations, and the fact that associations retain the freedom to grant lifetime tenancies is also very positive.

## 2. The ONS decision

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In 2015 the ONS undertook a review of the statistical classification of "private registered providers" of social housing in England (PRPs). The conclusion of this review, announced on 30 October 2015, was that PRPs should be reclassified as Public Non-Financial Corporations rather than Private Non-Financial Corporations as formerly.

The review focused on the existing legislative and regulatory environment, specifically measures introduced in the Housing and Regeneration Act 2008. The reclassification applies with effect from 22 July 2008, the date of enforcement of the HRA 2008.

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The ONS judgement identified five areas of concern. Each area of concern must be addressed in order to return housing associations to being classed as private bodies. The issues identified by the ONS are summarised below.

- Government consent powers over, and power to set conditions on, disposals of social housing assets.
- Government powers to direct the use of disposal proceeds.
- Government consent powers over disposals of housing stock following a registered provider's deregistration with the HCA.
- Government consent powers over the voluntary winding-up, dissolution, and restructuring of a registered provider.
- Government powers over the management of a registered provider, in particular the power of the HCA to appoint managers and officers to the provider.

### 3. Government deregulatory proposals

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*"We will bring forward measures that seek to allow housing associations to become private sector bodies again as soon as possible."*

DCLG spokesperson

The Government tabled a group of amendments to the Housing and Planning Bill that are designed to address the ONS's concerns. In addition, amendments have been brought to address a specific concern relating to LSVTs. We expect these changes to come into force during 2016 after the Housing and Planning Bill achieves Royal Assent.

In general, the Federation supports the changes proposed by Government, and is pleased they have been brought forward so quickly. While we may have reservations on some specific points, the overall package of changes represents a full and timely response to the ONS decision.

#### *Consent over disposals*

Currently, housing associations must obtain consent from the regulator in relation to any disposals of social housing. The regulator may also attach conditions to consent over disposals. Powers of consent over disposals are retained by the regulator even when an organisation has deregistered.

The Government proposals remove the consents regime. This applies to both registered and deregistered providers and to both empty and tenanted stock. There is a new requirement for housing associations to notify the regulator as soon as reasonably practicable of disposals.

The Federation welcomes the removal of the consents regime. The operation of the regime has been intrusive and burdensome and it has often served to place obstacles in the way of housing associations' efforts to make the most effective use of their assets to deliver their social purpose. We recognise that, in order to address the concerns raised by the ONS, it is necessary to abolish the consents regime entirely and accordingly, we support this move even though it goes beyond the substantial easing of the regime that we had previously called for.

Under the existing consents regime, disposals of tenanted stock only happen in exceptional circumstances, are usually inside the social rented sector from one housing association to another and have existing tenants' rights attached to them. We anticipate that housing associations will continue to operate in this way with regard to tenanted stock.

#### *Use of disposal proceeds*

Housing associations are required to show the net proceeds of certain types of disposal, payments of grant, and repayments of discount separately in their accounts as a Disposal Proceeds Fund (DPF). The regulator has powers to direct how disposal proceeds are used.

The Government proposals abolish the DPF for future disposals. Current funds held in the DPF will be preserved. This change only applies to DPF and does not affect the continuation of the Recycled Capital Grant Fund (RCGF). RCGF does not raise the same issues for classification purposes as it applies only to grant rather than proceeds more generally, as is the case for DPF.

#### *Powers over constitutional changes*

Housing associations must generally get consent from the regulator before undertaking certain organisational changes, including mergers, acquisitions and restructures.

The government proposals remove this requirement. There will be a requirement for housing associations to notify the regulator of significant changes. The regulator can give directions about the timeframe within which notifications should be made.

#### *Powers over management*

The current legislation gives the regulator broad powers to appoint or remove managers and officers. We recognise that the existence of these powers can provide reassurance to lenders, but in practice the regulator exercises them very sparingly. The Government's proposals modify the powers, limiting them to where there are possible breaches of legal requirements.

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*Local authority influence (N.B. These changes chiefly affect LSVTs)*

In considering its response to the ONS decision, the Government identified concerns relating particularly to large-scale voluntary transfer organisations (LSVTs). The risk is that if these issues are not addressed, it is possible that ONS may continue to regard these associations as public even if the rest of the sector is reclassified as private.

Accordingly, the Government has brought forward an amendment to the Housing and Planning Bill to address its concerns. Although the amendment applies in theory to the sector as a whole, it is unlikely to have any practical impact except on LSVTs.

The amendment would give the Secretary of State power to make regulations in the following areas.

- 1. Reservation of board places for persons nominated by the local authority.** This is significant because one of the main tests applied by ONS is whether a state body (such as a local authority) can make appointments to the board. The Government's amendment would allow the Secretary of State to issue regulations restricting the ability of local authorities to make appointments (or preventing them from doing so altogether). This would not prevent associations from recruiting members or officers of local authorities to the board, but anyone recruited in this way would serve on the board purely in an individual capacity like any other board member. The power relates to appointments (including reappointments), so it would not stop a local authority appointee from serving out his or her current term of office, but the Secretary of State would have a further power to make regulations allowing an association to remove a local authority appointee before the end of his or her term.
- 2. Local authority voting rights and constitutional veto.** Some LSVT constitutions confer special voting rights on the local authority, potentially including a veto on constitutional changes. The Secretary of State would have power to require local authorities to reduce or eliminate these rights, and to refrain from obtaining them in future.

Regulations under these powers can override any relevant rights for the local authority, whether created by contract or by the housing association's rules, but would not allow the regulations to override other local authority rights, e.g. to nominate tenants for vacant properties. The amendment also allows the Secretary of State to impose changes on an association's constitution, but again, only in respect of the issues identified above. In practice, however, if certain provisions in an association's constitution have ceased to have practical effect because the local authority is no longer able to exercise the rights conferred on it, the

Federation is likely to advise members that they should take action to remove the redundant provisions from their constitutions.

The Federation agrees that it is essential that the whole sector, including LSVTs, be reclassified as 'private' as soon as possible, and therefore understands the Government's reasoning in bringing forward this amendment. However, it is important to recognise the strength and continuing importance of the relationship between LSVTs and their local authority partners, and we shall be working with members affected to develop alternative mechanisms that will allow this relationship to be maintained in a way that avoids calling into question associations' 'private' status for the purposes of public accounting.

### *Special administration regime*

The Government proposals also introduce a new special administration regime to protect social housing assets in the case of insolvency. Under this new scheme, the administrator would be appointed by the courts, rather than by Government or the regulator. We recognise that this proposal could play a role to provide confidence in the new regulatory environment.

The new special administration regime would see the affairs, business and property of a PRP managed by a court-appointed 'housing administrator'. The role of the administrator would be to ensure that the registered provider's social housing remains in the regulated housing sector either through rescue or transfer to another registered provider. The housing administrator would be expected to act in a way that best protects the interests of creditors and the social housing stock.

## **4. Other policy changes**

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The ONS decision was based on past changes introduced in the Housing and Regeneration Act 2008. There are also implications for some current Government policies, which could be viewed as introducing new state controls and therefore could impact future ONS decisions.

### *Pay to Stay*

The Government has introduced amendments which will mean that Pay to Stay, although mandatory for local authorities, will remain voluntary for housing associations. The Federation has argued throughout that, as independent social businesses, housing association boards should be free to manage their own revenue and assets. Introducing Pay to Stay on a mandatory basis for housing associations would have interfered with this principle.

### *Ending lifetime tenancies*

At the summer Budget, the Government announced its intention to review the use of lifetime tenancies with a view to limiting their use. Subsequently, new clauses have been added to the Housing and Planning Bill which will prevent local authority landlords from granting new lifetime secure tenancies. All new secure tenancies will be for a fixed term of between two and five years. The legislation will affect local authority landlords but has no direct impact on housing associations. However, the Government could choose to impose similar restrictions on housing associations through changes to regulations.

During the debate on the new clauses, Parliamentary Under Secretary of State, Marcus Jones said:

“We want housing association landlords and tenants to reap the benefits from shorter-term tenancies as well. However, we clearly need to consider any changes to housing associations in the light of the recent decision of the Office for National Statistics on classification. We are working through the ONS reclassification decision and considering the options but, given the complexity of the matter, careful consideration is needed. We will continue to work closely with the housing association sector, the social housing regulator and other stakeholders to finalise the deregulatory package, and we will consider any changes to lifetime tenancies in the context of that work.”

The Federation believes that it is inappropriate for the Government to tell housing associations what kind of tenancy to offer on their own homes. Associations have been free since 2011 to offer fixed-term tenancies where they see fit, and many have chosen to take advantage of this option. We will continue to make the case that associations should retain control over the types and length of tenancies they choose to offer.

## **5. Further changes the Federation would like to see**

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The Federation will continue to make the case for housing associations to have greater control over their businesses. We are calling for the following deregulatory changes.

### *EU procurement requirements*

Housing associations are currently required to comply with EU procurement requirements. Contracts over the value of €200,000 need to be tendered via the Official Journal of the EU (OJEU). Housing associations fall under these requirements because they are viewed to be subject to ‘management control’ by the state.

We would like to see the language in existing legislation, especially in the Housing and Regeneration Act 2008, amended to avoid giving the impression that the regulation of the sector involves a much greater degree of control than is actually the case. This will make it much easier to argue that housing associations are not subject to 'management control' by the state, and therefore should not be required to comply with EU procurement requirements.

### *Rent freedoms*

We are calling for the Government to commit to giving housing associations freedom to set their rents from 2020. This would allow associations to target their rents much more effectively, and would give them greater independence and control over their rental flow.

## **6. Next steps**

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We expect the Housing and Planning Bill to achieve Royal Assent shortly and its deregulatory provisions will take effect later in 2016 on dates to be announced.

It is likely that once these changes have come into force, the Government will ask the ONS to carry out a new review into the classification of the housing association sector. We understand that the timing of such a review would be determined by the ONS.

## **7. Useful links**

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- Housing and Planning Bill: <http://services.parliament.uk/bills/2015-16/housingandplanning.html>
- Deregulatory amendments: [http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0108/amend/housing\\_rm\\_rep\\_1216.pdf](http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0108/amend/housing_rm_rep_1216.pdf)