

Draft Regulations laid before Parliament under section 2(9) and 7(11) of the Enterprise Act 2016, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2017 No. XXXX

ENTERPRISE

**The Small Business Commissioner
(Scope and Scheme) Regulations 2017**

*Made - - - - - ***
Coming into force in accordance with regulation 1(2)*

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 2(2), (5)(a), (5)(b), (7)(b) and section 7(1) to (3), (5), (7), (8)(a) and (8)(c) of the Enterprise Act 2016(1).

In accordance with section 7(9) of that Act, before making these Regulations, the Secretary of State has consulted such persons as the Secretary of State considers appropriate.

In accordance with sections 2(9) and 7(11) of that Act, a draft of these Regulations has been laid before Parliament and approved by a resolution of each House of Parliament.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Small Business Commissioner (Scope and Scheme) Regulations 2017.

(2) These Regulations come into force on the day after the day on which they are made.

(3) In these Regulations “the 2016 Act” means the Enterprise Act 2016.

Further provision about the meaning of “small business”

2.—(1) For the purpose of Part 1 of the 2016 Act, a relevant undertaking(2) is a small business(3) if it meets any of the following criteria—

(a) it has a headcount of staff of less than 50 on Assessment Date A;

(b) where the relevant undertaking is seeking a determination of a complaint under the SBC complaints scheme(4), it has a headcount of staff of less than 50 on Assessment Date B; or

(1) 2016 c.12.

(2) See section 2(10) of the 2016 Act for the meaning of “relevant undertaking”.

(3) See section 2(1) of the 2016 Act for the meaning of “small business” about which this regulation makes further provision.

(4) See section 4(1) of the 2016 Act for the meaning of “SBC complaints scheme”.

- (c) it has an average headcount of staff of less than 50 during any assessment period.
- (2) Assessment Date A is the date on which the relevant undertaking makes contact with the Commissioner.
- (3) Assessment Date B is the date on which the matter to which the complaint relates took place or started to take place.
- (4) The assessment periods are—
- (a) the last financial year of the relevant undertaking that ended prior to Assessment Date A;
 - (b) where the period beginning with the date on which the current financial year of the undertaking began and ending with Assessment Date A is longer than 6 months, that period; and
 - (c) where the period beginning with the date on which the relevant undertaking began carrying on business and ending with Assessment Date A is 6 months or less, that period.
- (5) For the purposes of subparagraph (1)(c) of this regulation, the average headcount of staff is calculated by—
- (a) determining the number of individuals who are members of staff on each reference date in the assessment period in question (“the reference date numbers”);
 - (b) calculating the total of the reference date numbers by adding together all the reference date numbers; and
 - (c) dividing the total of the reference date numbers by the number of reference dates in the assessment period in question.
- (6) For the purposes of this regulation—
- “headcount of staff” means the total number of individuals who are members of staff of the relevant undertaking;
- a “member of staff” means an individual who—
- (a) works for the relevant undertaking under a contract of employment;
 - (b) does not work for the relevant undertaking under a contract of employment but is a director or other office-holder of the undertaking;
 - (c) where the relevant undertaking is a partnership, is a partner of that partnership (but not where the undertaking is a limited partnership, a limited partner) who does not work for the undertaking under a contract of employment;
 - (d) where the relevant undertaking is an LLP, is a member of that LLP who does not work for the undertaking under a contract of employment; or
 - (e) where the relevant undertaking is an unincorporated association other than a partnership, is a member of that association who does not work for the undertaking under a contract of employment;
- “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;
- “financial year” means—
- (a) where the relevant undertaking is a company, within the meaning given by section 1(1) of the Companies Act 2006⁽⁵⁾, its financial year determined in accordance with sections 390 to 392 of that Act;
 - (b) where the relevant undertaking is an LLP, its financial year determined in accordance with sections 390 to 392 of the Companies Act 2006, as applied and modified by

(5) 2006 c.46.

regulation 7 of the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008⁽⁶⁾; or

- (c) in all other cases, a year, beginning on 6 April and ending on the following 5 April, for which the relevant undertaking is charged income tax;

“LLP” means a limited liability partnership registered under the Limited Liability Partnerships Act 2000⁽⁷⁾;

“limited partner” means an individual who carries on a trade as a limited partner in a limited partnership formed under the Limited Partnerships Act 1907⁽⁸⁾;

“partnership” means—

- (a) a partnership within the Partnership Act 1890⁽⁹⁾; or
(b) a limited partnership formed under the Limited Partnerships Act 1907;

“reference date” means—

- (a) the last working day of a month; or
(b) where the assessment period ends before the last working day of a month, the last working day which falls before the end of the assessment period;

“working day” means a day on which a member of staff of the relevant undertaking works for the undertaking under a contract of employment.

Requirements before presenting a complaint to the Commissioner

3.—(1) Before presenting a complaint to the Commissioner, the person making the complaint must (unless the circumstances specified in paragraph (2) apply)—

- (a) communicate the substance of the complaint to the person against whom the complaint is made; and
(b) give that person a reasonable opportunity to deal with it.

(2) The specified circumstances are where the Commissioner considers for this particular complaint, there is sufficient information to suggest that communicating it to the person against whom it is made would have a significant detrimental effect on the commercial interests of the person making it.

(3) Where the requirements in paragraph (1) are not complied with the Commissioner must dismiss the complaint or the part of the complaint that did not comply with paragraph (1).

Requirements as to the form and content of the complaint

4.—(1) The person making the complaint must present the complaint in writing to the Commissioner.

(2) The complaint must include the following—

- (a) the date on which the matter to which the complaint relates took place or started to take place;
(b) the details of the complaint, including—
(i) whether the person making the complaint has an agreement to supply, has supplied or may supply goods or services to the person against whom the complaint is made;
(ii) whether the complaint relates to a payment matter (see paragraph (3));

⁽⁶⁾ S.I. 2008/1911.

⁽⁷⁾ 2000 c.12.

⁽⁸⁾ 1907 c.24.

⁽⁹⁾ 1890 c.39.

- (iii) whether the complaint relates to a provision made or proposed to be made which restricts or purports to restrict any right of the person making the complaint to make a complaint under the SBC complaints scheme;
 - (iv) whether the complaint relates to the appropriateness of the price payable or proposed to be payable under a contract for the goods or services supplied or to be supplied by the person making the complaint; and
 - (v) whether the complaint concerns matters that are currently the subject of legal or adjudication proceedings; and
- (c) a declaration—
- (i) that the person making the complaint has previously communicated the substance of the complaint to the person against whom it was made; or
 - (ii) setting out the reasons why the substance of the complaint has not been previously communicated to that person.
- (3) A complaint relates to a payment matter if it relates to a request or other act, or a failure to pay or other omission, in relation to a payment—
- (a) for or in connection with the supply of goods or services; or
 - (b) in connection with the relationship or possible relationship between the person making the complaint and the person against whom the complaint is made so far as relevant to the supply.

Time limit for presenting a complaint

5.—(1) The person making the complaint must present the complaint to the Commissioner in accordance with regulation 4 (requirements as to the form and content of complaint) within 12 months from the date on which the matter to which the complaint relates took place (or started to take place).

- (2) A complaint under these Regulations is taken to have been presented—
- (a) if sent by electronic communication, on the day of transmission; and
 - (b) if sent by post in an envelope which is properly addressed to the Commissioner’s published address for SBC complaints scheme purposes and sent by prepaid post, on the day on which it is posted.
- (3) Where in the opinion of the Commissioner it is fair and reasonable to do so, the time limit set out in paragraph (1) may be extended in any of the following circumstances—
- (a) where the Commissioner considers that the complaint was not made within the time limit set out in paragraph (1) because of the physical or mental incapacity of the person making the complaint or a member of staff of that person;
 - (b) where the person against whom the complaint is made has given consent to the extension of the time limit;
 - (c) where—
 - (i) the matter to which the complaint relates has previously been the subject of legal proceedings which have been discontinued before a determining judgment was made; or
 - (ii) the matter to which the complaint relates has previously been the subject of adjudication proceedings (other than where the complaint is excluded from the SBC

complaints scheme by section 4(5)(c) or (d) of the 2016 Act(10)) which have been discontinued before a determination was made; and

- (iii) in either case, the person making the complaint has acted promptly after the discontinuation of those proceedings in presenting it to the Commissioner;
 - (d) where in the Commissioner’s view, the main reason the complaint was not made within the time limit is because the person making it and the person against whom it is made have agreed a resolution to the complaint but that resolution has not been satisfactorily put into effect; or
 - (e) where, in the Commissioner’s view, there is information to suggest that the person against whom the complaint is made has acted with the intention of ensuring the time limit in paragraph (1) was exceeded.
- (4) Where the complaint or part of the complaint is not made within the time limit set out in paragraph (1), the Commissioner must not entertain the complaint.

Power of the Commissioner to fix time limits for other procedural aspects of the proceedings

6.—(1) Once a complaint has been presented to the Commissioner in accordance with regulation 4 (requirements as to form and content of complaint) and regulation 5 (time limit for presenting complaint), for all other aspects of the proceedings the Commissioner may—

- (a) fix a time limit for any of those aspects of the proceedings; and
 - (b) extend that time limit.
- (2) The aspects of the proceedings referred to in paragraph (1) include—
- (a) the period during which the Commissioner—
 - (i) must give the respondent the opportunity to make representations about the complaint;
 - (ii) may give the complainant an opportunity to make representations about the complaint;
 - (iii) must give the respondent and the complainant an opportunity to make representations about the proposed publication of a report to be made under section 6 of the 2016 Act (reports on complaints);
 - (iv) must give the respondent an opportunity to make representations about any proposal to identify the respondent in such a report; and
 - (b) the period at the end of which the Commissioner must make a written statement of any determination of a complaint.

Power of the Commissioner to dismiss a complaint

7. The Commissioner may dismiss a complaint if, or to the extent that—
- (a) the Commissioner considers—
 - (i) that the complaint is frivolous or vexatious;
 - (ii) that the complaint concerns matters which are more appropriately dealt with in another way;

(10) Section 4(5)(c) of the 2016 Act provides that a complaint is excluded from the SBC complaints scheme if it falls within the jurisdiction of an ombudsman, regulator or public authority (other than the Commissioner, a court or a tribunal) and section 4(5)(d) of the 2016 Act provides that a complaint is excluded from the SBC complaints scheme if the complainant has a statutory right to refer the complaint for adjudication by a person other than a court or tribunal.

- (iii) that the complainant has not suffered, and is not likely to suffer, any financial loss, material distress, material inconvenience or other material adverse effect, as a result of the matter to which the complaint relates;
- (iv) that the matter to which the complaint relates has been remedied;
- (v) that the complainant is seeking an outcome other than a recommendation of the kind that can be made under the SBC complaints scheme;
- (vi) that the complaint concerns matters that have been the subject of legal proceedings or adjudication proceedings;
- (vii) that the matter to which the complaint relates has previously been considered under the SBC complaints scheme or by another complaints-handling body, ombudsman or regulator; or
- (viii) that there are other compelling reasons why it is inappropriate for the complaint to be dealt with under the SBC complaints scheme;
- (b) it becomes the subject of legal proceedings or adjudication proceedings; or
- (c) the complainant withdraws the complaint or the complainant otherwise indicates that the complainant no longer wishes to pursue the complaint.

Notification of dismissal or non-entertainment of complaint

8.—(1) The Commissioner must notify in writing the person making the complaint of the reasons why the complaint has been dismissed or is not being entertained under the scheme.

- (2) In particular, the Commissioner must inform the person making the complaint whether—
 - (a) it cannot be considered by the Commissioner because it is not a relevant complaint within the meaning of section 4(3) of the 2016 Act;
 - (b) it is being dismissed because—
 - (i) it falls within regulation 3(3) (complaint not previously communicated);
 - (ii) it falls within one of subparagraphs (a) or (b) of regulation 7 (dismissing a complaint); or
 - (c) the complaint is not being entertained under the scheme because it was not made within the time limits set out in regulation 5(1).

(3) If the Commissioner dismisses a complaint, the Commissioner may notify the person against whom the complaint was made.

Matters to be taken into account when determining under the scheme whether an act or omission was “fair and reasonable”

9. In determining whether an act or omission by the respondent to a relevant complaint was fair and reasonable, the Commissioner must take the following matters into account—

- (a) any relevant law;
- (b) any relevant facts established by the Commissioner during the enquiry into the complaint;
- (c) any relevant conduct, behaviour or practice of the respondent;
- (d) any relevant conduct, behaviour or practice of the complainant;
- (e) the relative bargaining positions of the respondent and the complainant and, where applicable, the use by the respondent of a stronger bargaining position to the detriment of the complainant; and
- (f) the impact of the act or omission on the respondent, the complainant or any third party.

Factors to be taken into account when deciding whether to identify a respondent in a report made under section 6 of the 2016 Act

10. Where the Commissioner makes a report under section 6(1) of the 2016 Act (report on complaints), the Commissioner must take the following factors into account when deciding whether to identify a respondent in that report—

- (a) any information gathered during the enquiry into the complaint—
 - (i) that the respondent engaged positively with the complaints process and has sought to amicably and fairly resolve the matter to which the complaint relates;
 - (ii) that the respondent intentionally or recklessly provided any statement or information to the complainant that was misleading, false or deceptive in a material particular;
 - (iii) that the respondent intentionally or recklessly provided any statement or information to the Commissioner that was misleading, false or deceptive in a material particular;
 - (iv) that the respondent used any undue influence, pressure or intimidation tactics in its dealings with the complainant or any third party;
 - (v) that the respondent has acted or not acted on any previous recommendations made to the respondent by Commissioner;
 - (vi) that identifying the respondent would risk any personal harm to any member of staff of the respondent or the complainant;
 - (vii) that identifying the respondent would have any other adverse consequences for the complainant or the respondent;
 - (viii) as to the seriousness of any financial loss, distress, inconvenience or other adverse effect caused to the complainant by the respondent as a result of the matter to which the complaint relates;
 - (ix) as to the respondent’s knowledge of any financial loss, distress, inconvenience or other adverse effect caused to the complainant by the respondent as a result of the matter to which the complaint relates;
- (b) any representations made by the respondent or the complainant as to whether the respondent should be identified;
- (c) the impact of identifying the respondent in deterring similar acts or omissions in the future; and
- (d) the impact of identifying the respondent in encouraging other undertakings to adopt any good practice of the respondent.

Name
Parliamentary Under Secretary of State, Minister
for Small Business, Consumers and Corporate
Responsibility
Department for Business, Energy and Industrial
Strategy

Date

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Enterprise Act 2016 (“the Act”) establishes the Small Business Commissioner. The Commissioner’s principal functions are to provide general advice and information to small businesses and to consider complaints from small businesses relating to payment matters in connection with the supply of goods and services to larger businesses, and to make recommendations. The Act provides that a “small business” means a relevant undertaking which has a headcount of staff of less than 50, amongst other things (see section 2). These Regulations provide further detail about which small businesses qualify to access the Commissioner’s services.

In relation to the Commissioner’s complaints handling function, the Act requires the Commissioner to establish, maintain and administer a scheme (“the SBC complaints scheme”) under which the Commissioner enquires into, considers and determines relevant complaints. The Act further requires the Secretary of State to make regulations about the making, consideration and determination of complaints for consideration under the SBC complaints scheme and the making of any recommendations and the preparation and publications of reports under section 6 of the Act. These Regulations fulfil that obligation.

Regulation 2 sets out further provision about the meaning of “small business”.

Regulation 3 provides that the person making the complaint must communicate the substance of the complaint to the person against whom it is made, unless the Commissioner considers there is sufficient information that such communication would have a significant detrimental effect on the commercial interests of the person making the complaint.

Regulation 4 sets out the requirements as to the form of the complaint, including that it must be made in writing. This regulation also sets out various details that must be included in the complaint.

Regulation 5 sets out the time limit for presenting the complaint, which will, in most cases, be 12 months from the date on which the matter to which the complaint relates took place. Regulation 6 provides that the Commissioner may fix and extend time limits for other aspects of the proceedings.

Regulation 7 sets out the circumstances in which the Commissioner may dismiss a complaint and Regulation 8 provides that the Commissioner must notify the person making the complaint and may notify the person against whom the complaint is made when the complaint is dismissed or is not being entertained under the SBC complaints scheme.

The Act provides that a complaint must be determined under the SBC complaints scheme by reference to what is, in the Commissioner’s view, fair and reasonable in all the circumstances of the case. Regulation 9 sets out what matters the Commissioner must take into account when determining whether an act or omission was fair and reasonable.

The Act also provides that the Commissioner may publish a report of the enquiry into, consideration and determination of a complaint under the SBC complaints scheme. It further provides that the Commissioner may identify a respondent in any such report. Regulation 10 sets out the factors that the Commissioner must take into account when deciding whether to identify a respondent in a report.