These notes refer to the Regulatory Reform Act 2001 (c.6) which received Royal Assent on 10th April 2001

REGULATORY REFORM ACT 2001

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 2: Meaning of "burden" and related expressions

62. This section is key to the understanding of what the order-making power is designed to achieve. *Subsection (1)(a)*, which reflects section 1(5)(b) of the 1994 Act, is intended to ensure that a "burden" includes:

- restrictions on the carrying on of particular activities. This allows the order-making power to deal not only with cases where there is an explicit ban on something being done (a "thou shalt not" provision such as was addressed in the Deregulation (Long Pull) Order (SI N$^{o.}$ 1996/1339) as detailed at paragraph 12 of **Annex B** below), but also with cases where there is a restriction in the sense that the legislation contemplates a possibility and then sets a limit (referred to as the "implicit restriction" cases - please see **Example 1** and **Example 2** below). A further example would be the legislation which allowed building societies to borrow non-retail funds and deposits up to a maximum of 40% of the society's share and deposit liabilities – this was increased to 50% by the Deregulation (Building Societies) Order (SI N$^{o.}$ 1995/3233) as detailed at paragraph 2 of **Annex B** below).

- requirements, including procedural requirements. For example, the requirement for purchasers of corn to submit weekly returns to central government, which was addressed by the Deregulation (Corn Returns Act 1882) Order (SI N$^{o.}$ 1996/848) (paragraph 6 of **Annex B**).

- conditions, for example, the 48-hour waiting period before a person can become a member of a gaming club, which was reduced to 24 hours by the Deregulation (Casinos) Order (SI N$^{o.}$ 1997/950) (paragraph 26 of **Annex B**). "Condition" catches a different category of measure from "requirement" because it refers to procedures which affect people only if they wish to achieve a certain result (such as becoming a member of a gaming club) rather than a requirement which must be met in all cases;

- sanctions (whether criminal or otherwise) for failure to observe a restriction or to comply with a requirement or condition. This provision makes clear that a sanction alone may be a burden for the purpose of this Act, even if the requirement, restriction of condition to which it relates is not being modified by the order. An order could thus, for example, leave a restriction unchanged but impose a civil rather than a criminal penalty. Equally, but in practice likely to be exceptionally, an order could replace a civil penalty with a criminal one provided the tests were met. Criminal sanctions can in practice be less burdensome than civil sanctions, particularly where civil liability then does not attach. In addition, the higher burden of proof needed to justify the imposition of criminal sanctions may give greater protection to the accused.

EXAMPLE 1

The very first deregulation order, the Deregulation (Greyhound Racing) Order (SI N$^{o.}$ 1995/3231), made new provision for inter-track totalisator betting. There was no explicit restriction in statute prior to the order being made (i.e. nothing which expressly prohibited inter-track totalisator betting on greyhound races), but there was an implicit restriction in that provision was made for inter-track totalisator betting on horse races but not on greyhound races. The order set out that inter-track totalisator betting on greyhound races was permissible, and set out a new regulatory regime governing it.

EXAMPLE 2

The Deregulation (Bills of Exchange) Order (SI N$^{o.}$ 1996/2993) made new provision empowering bankers to present cheques for payment by notification of their essential features by electronic means, rather than by their physical presentment. Here there was clearly no explicit or implicit restriction on electronic notification in the relevant legislation; electronic transmission was an alien concept when the Bills of Exchange Act was passed in 1882 and the idea that there was any possibility other than physical presentment was simply not contemplated. The burden of the requirement for physical presentment and the inability to take full advantage of advances in technology was removed. New provision was made to enable the electronic system (which was already operating alongside physical presentment) to take the place of physical presentment for legal purposes.

63. Restrictions, requirements and conditions in legislation can make it burdensome. However, it is important to understand that even legislation which includes restrictions, requirements or conditions may be enabling in that it allows people to do things but at the same time sets the boundaries within which they can do it. In such cases if the legislation were not there at all, they would not be able to do it at all. The legislation only becomes burdensome when the boundaries are not wide enough, and perceptions of that are likely to change over time and with circumstance.

64. The definition of "restrictions, requirements and conditions" which appeared in the 1994 Act is extended by subsection (1)(a) to cover those which prevent the incurring of expenditure. This would enable, for example, the reforms planned to the Vaccine Damage Payments Scheme. Currently, payments may be made to people who have been vaccinated and are 80% disabled, if they claim within six years. The Department of Work and Pensions proposes to allow those who are 60-80% disabled to be able to claim and to extend the time limit to age 21 for minors. This reform would widen eligibility to payments under the scheme and so would involve expenditure.

65. *Subsection (1)(b)* provides that, in addition, "burden" includes any limit on the statutory powers of any person. This means that a regulatory reform order may extend the statutory powers of a person, hence enabling them to do something which they could not otherwise do because there is no statutory provision for them to do it. This aspect of the power is aimed at dealing with cases where there is clearly a limit on what someone can do but there is no "restriction" in the sense in which it is used in subsection (1)(a), as described above. Early in the life of the 1994 Act, a number of deregulation orders were made which in practice empowered people to do things they could not otherwise do. These orders drew on the range of statutory concepts which now appear in subsection (1)(a), sometimes in combination.

EXAMPLE 3

The governors of maintained schools, as creatures of statute, only have power to do things for educational purposes. Their powers are limited to those set out in legislation. There is power to enable them to let out their premises in the evenings for activities such as art classes for adults, and such arrangements are common. However, what they do is simply to make their facilities available, often for a fee. They are not permitted to run activities themselves, unless the activity is related to or incidental to providing education, and so the actual provision is not by the school but by someone else.
The Government would like to use a regulatory reform order confer on governing bodies power to provide pure childcare. There is no specific statutory restriction on schools offering childcare. But there is no provision for them to do it either, as set out above. This lack of provision is a limit on what they can do and a restriction in the natural meaning of the word. An order to effect this change would rely on section 2(1)(b).

66. However, difficulties that arise with some statutory provisions can only be resolved by providing for people to have express power to do things.

67. The reference to "any limit" in subsection (1)(b) is designed to provide a straightforward and explicit basis for orders which empower people to do things they are not currently able to do, covering cases in the future of a kind such as after-school childcare (see **Example 3** above) and trustee investments (see **Example 4** below).

EXAMPLE 4

The Trustee Investments Act 1961 provides default powers that, inter alia, enable trustees to invest in some things but not others. The proposed Deregulation (Trustee Investments) Order, laid in February 1997, sought to remove the restriction on what trustees could invest in, thus enabling them to invest in whatever they chose. An argument could be mounted that legally the 1961 Act was in fact a liberating measure, set against the common law and statutory history of gradual easing of investment powers. If the 1961 Act were not in existence, trustees without explicit or sufficiently wide powers of investment in their trust documents would be able to invest in even fewer things. So it could be argued that the 1961 Act legally defined rather than restricted trustees' default powers. But, in reporting on this proposed deregulation order, the House of Lords Delegated Powers and Deregulation Committee, which scrutinises deregulation orders, was satisfied that in present day circumstances the Act constituted a restriction and therefore a burden. However, the proposal was not pursued following cautious advice that there was a risk that the order could be held to be ultra vires on the basis of a narrow view of "restriction". If widows and orphans had lost as a result of trustees reasonably investing on the basis of the order, either the trustees or perhaps the Government could have been liable.
The risks in this case outweighed the benefits of early change which would have resulted from a deregulation order. The change has since been taken forward as part of the Trustee Act 2000.

68. The text in parentheses in subsection (1) paragraph (b) makes clear that an order which enables something to be done may authorise expenditure. This would allow, for example, the statutory definition of physical training and recreation to be amended to include chess and other "mind games" so that, among other things, they would be allowed access to the Lottery Sports Fund in England.

69. The remainder of subsection (1) excludes from the definition of "burden" any burden that only affects a Minister of the Crown or government department. This means that local authorities, schools, hospitals, non-departmental public bodies and other public sector bodies could be the sole beneficiaries of an order. Ministers and government departments cannot be the sole beneficiaries; someone else must also benefit. In debate, Ministers explained that beneficial effects on others could be sufficient to permit the removal of a burden affecting Ministers alone (Lords Committee, 23 Jan 2001, Col. 168):

"One has to consider the effect of the statutory restriction or the statutory matter that one is considering reforming in terms of burden. If that burden affects only a Minister--Clause 2(1)--it cannot be changed. If the effect goes wider, for example because it affects the applicants for compensation, it can be changed.

70. *Subsection (2)* makes clear that any reference to creating, imposing, removing or reducing burdens applies not only to free-standing burdens but also to situations where the law authorises or requires a burden to be imposed. This will allow orders to deal with cases where the primary legislation itself cannot be said to impose a burden because all it does is confer a power, but where what can be done under the power is burdensome. For example, the mergers legislation does not itself prohibit mergers, but it authorises the Secretary of State to do so in certain circumstances.