

BERR | Department for Business
Enterprise & Regulatory Reform

**REGULATORY ENFORCEMENT
AND SANCTIONS ACT 2008**

Consultation on the Primary
Authority Scheme

SEPTEMBER 2008

CONSULTATION ON THE PRIMARY AUTHORITY SCHEME

<i>Who should read this document?</i>	Anyone with an interest in the Government's approach to better regulation. This may include, in particular, large and small businesses, national regulators, trade associations, local authorities, fire and rescue authorities and professional bodies.
<i>Making your views heard</i>	We are keen to gather all views on the subject of the Primary Authority scheme and any supporting evidence. You should not feel constrained by the specific questions or feel obliged to offer responses to all of them. Concentrate on those in which you have most interest.
<i>Additional ways to feed in your views</i>	Stakeholder events will be arranged to discuss this consultation and the accompanying draft statutory instruments. If you are interested in participating in such an event please contact Sydney Nash via the email address or phone number below.
Views are requested by 3rd December 2008	
<i>Phone enquiries to</i>	Sydney Nash on 020 7215 0397
<i>Email enquires and responses to</i>	primary.authorities@berr.gsi.gov.uk
<i>Responding in writing</i>	Primary Authority Scheme Consultation, Better Regulation Executive, Department for Business, Enterprise and Regulatory Reform, 3 rd Floor, 1 Victoria Street London. SW1H 0ET
<i>Your details</i>	Representative groups may wish to give a summary of the views of the people and organisations they represent, and where relevant how they consulted with those people or organisations. You may wish to include contact details for follow-up (e.g. name, phone number, email address).
<i>Confidentiality</i>	The position regarding the confidentiality of information provided is set out at the back of this document. Unless you state otherwise (and an automatic disclaimer generated by your IT system will not be taken as such), we will assume you are happy for us to publish your response and to share it with other Government officials.
<i>Additional copies</i>	Printed copies of the Consultation Document can be obtained from: BERR Publications Order Line Admail 528 London SW1W 8YO Tel: 0845 015 0010 Fax: 0845 015 0020 Minicom: 0845 015 0030 Website: www.berr.gov.uk/publications

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FOREWORD BY SHRITI VADERA

Regulations help to protect citizens, consumers, workers, and the environment as well as ensuring fair competition amongst businesses. The way in which regulation is enforced can make a major difference to each of these groups, and local authorities play a critical role in the way that this is done.



Effective local authority regulatory enforcement can ensure that compliant businesses operate freely in an increasingly competitive market, while resources are targeted at the rogues that present the greatest threat to consumers and citizens. I am pleased, therefore, to introduce this consultation on the Primary Authority scheme.

One of the most significant obstacles to delivering effective local authority regulatory enforcement is the lack of communication between local authorities.

For businesses that operate across a number of local authorities this can result in inconsistent and uncoordinated advice and enforcement. Ultimately, this leads to unnecessary duplication of effort and wasted resources.

I believe that the Primary Authority scheme will play a critical part in addressing this, and we need to make sure that the scheme works effectively. This is why we are seeking your views on the detailed operation of the Primary Authority scheme and the statutory instruments that will shape this.

A handwritten signature in black ink that reads "Shriti Vadera".

Shriti Vadera
Parliamentary Under-Secretary of State, BERR

September 2008

INTRODUCTION

The Regulatory Enforcement and Sanctions Act 2008 (RESA) received Royal Assent on 21 July 2008. It is the Government's intention that Part 1 of RESA, which establishes the Local Better Regulation Office (LBRO) as a statutory body, Part 3, which makes provision for regulators to adopt a variety of civil sanctions as an alternative to criminal prosecution and Part 4, which allows the Secretary of State to place a duty on regulators not to impose unnecessary burdens, will come into force on 1 October 2008. Part 2 will come into force on 6 April 2009.

Part 2 of RESA establishes the Primary Authority scheme, and its effective operation requires statutory instruments to be made dealing with four key issues:

- i. The application of the scheme to Scotland and Northern Ireland;
- ii. The definition of enforcement action;
- iii. Exclusions from the requirement to notify the Primary Authority; and
- iv. Determination by LBRO.

This consultation sets out a number of questions relating to these statutory instruments where the Government seeks your views. It is accompanied by drafts of these instruments. These are not meant to be final but have been published to allow for more explicit comment on the detailed approach that should be taken.

This consultation will be of particular interest to large and small businesses, national regulators, trade associations, local authorities, fire and rescue authorities and professional bodies.

EXECUTIVE SUMMARY

The Primary Authority Scheme

1. Businesses, charities and other organisations that operate across more than one site can be subject to regulation and enforcement action by multiple local authorities. As a result, these organisations can find themselves subject to inconsistent regulatory enforcement.
2. The voluntary Home and Lead Authority schemes seek to address this problem and they have brought benefits to regulators, businesses and consumers alike. However, these benefits have not been as wide ranging as they should, as it has not always been possible to deliver the agreements consistently or effectively. Subsequently, inconsistent regulatory enforcement remains a problem.
3. Part 2 of RESA establishes the statutory Primary Authority scheme, which is specifically designed to build on the successes and address the deficiencies of these voluntary schemes.
4. A Primary Authority is a local authority registered by LBRO as having responsibility for giving advice and guidance to a particular business or organisation that is subject to regulation by more than one local authority.
5. Under section 26 of RESA, LBRO may register a local authority as the Primary Authority with responsibility for advising an organisation that operates across more than one local authority in relation to trading standards, environmental health, and some fire safety functions.
6. Where LBRO has registered a local authority as an organisation's Primary Authority, any other local authority (known as an 'enforcing authority' for the purposes of the scheme) that proposes to take enforcement action against that organisation must contact the Primary Authority first. The Primary Authority can then block the proposed enforcement action if it believes that it is inconsistent with advice or guidance that it has previously given the organisation concerned.
7. The scheme is designed to ensure that local authorities communicate early, agree a regulatory approach, and are consistent and coordinated in the way that they regulate organisations that operate across more than one local authority.
8. Where a local authority and Primary Authority are unable to agree a regulatory approach, a proposed enforcement action can be referred to LBRO for determination. LBRO is then required to consider whether:
 - i. The proposed enforcement action is inconsistent with advice or guidance that the Primary Authority has given to the organisation concerned; and

- ii. The advice or guidance of the Primary Authority was ‘correct’ and ‘properly given’. This is to help ensure that proposed enforcement actions are not blocked on the basis of inconsistency with advice or guidance that should not have been given.
9. During this process, LBRO must consult any relevant regulator where appropriate and may consult any other person that it thinks is appropriate.
 10. If, after consideration, LBRO is satisfied that the proposed enforcement action is inconsistent with the advice or guidance given by the Primary Authority to the regulated organisation, and that the advice was correct and properly given, it must confirm the direction of the Primary Authority that enforcement action should not be taken.
 11. If LBRO is not satisfied on any of the points in paragraph 8 above it must revoke the direction of the Primary Authority and enforcement action can then be taken. LBRO must reach its decision within 28 days.
 12. Further details about the way the Primary Authority scheme will operate is given in the Guidance to the Act¹ and throughout this consultation document.

The Statutory Instruments

13. Part 2 of RESA allows the Secretary of State to make statutory instruments regarding the operation of the Primary Authority scheme. The following table sets out the purpose of each statutory instrument.

Reference	Purpose of the Order-making power	Policy objective
Section 24(1), RESA 2008	To define “relevant function” in relation to local authorities in Scotland and Northern Ireland	To apply the Primary Authority scheme to local authorities in Scotland in respect of reserved matters and Northern Ireland in respect of non-transferred matters (i.e. to apply the scheme to local authorities in Scotland and Northern Ireland in respect of matters that have not been devolved to the Scottish Executive or the Northern Ireland Assembly).

¹ <http://www.berr.gov.uk/files/file47135.pdf>

Reference	Purpose of the Order-making power	Policy objective
Section 28(6), RESA 2008	To define those activities undertaken by local authority regulatory services that should, or should not be regarded as enforcement action for the purposes of the Primary Authority scheme.	To ensure that routine activities of local authority regulatory services such as giving advice, inspecting and gathering intelligence can be carried out without the need for an enforcing authority to contact the relevant Primary Authority.
Section 29, RESA 2008	<p>To exclude those activities undertaken by local authority regulatory services which, while they should be regarded as enforcement action, should also be carried out without delay.</p> <p>To specifically exclude those circumstances where:</p> <ul style="list-style-type: none"> - enforcement action is required urgently to avoid a significant risk of serious and imminent harm to human health or the environment (including the health of animals or plants); - enforcement action is required urgently to avoid a significant risk of serious harm to the financial interests of consumers; - the application of the consultation provisions in Part 2 of RESA would be wholly disproportionate. 	To ensure that where necessary local authorities can take enforcement action immediately without prior consultation with the relevant Primary Authority. For example, when a local authority is taking enforcement action against a business so as to address a serious threat to human health or the environment.
Paragraph 6(1) of Schedule 4 RESA 2008	To set out procedures to be followed when a proposed enforcement action is referred to LBRO for determination.	To allow for effective and efficient decision-making by LBRO.

14. This consultation document sets out the Government's proposals for these statutory instruments and seeks your views on the proposals. Specific questions are set out throughout the document where the Government is particularly keen to have your view. For convenience, a summary of the questions is included in the body of the consultation document below.
15. Responses to the consultation should be sent to primary.authorities@berr.gsi.gov.uk.
16. The Department for Business, Enterprise and Regulatory Reform will also organise a series of events where the draft statutory instruments and this consultation will be discussed. If you are interested in participating in such an event please contact sydney.nash@berr.gsi.gov.uk.

Summary of consultation questions

Question 1 - Is there any legislation on these lists that you believe relates to matters which are not reserved matters in relation to Scotland or transferred in Northern Ireland or should for any other reason not be included?

Question 2 - Is there any legislation or are there any functions that *are not* on these lists that you believe should be included? This may include Acts of Parliament, statutory instruments or European obligations. Please be as specific as possible.

Question 3 - Do you agree that sanctions listed in the draft statutory instrument at Annex D should be regarded as enforcement action for the purposes of the Primary Authority scheme?

Question 4 - Are there other sanctions that should be included in this list?

Question 5 - Do you agree that oral advice should not be regarded as enforcement action for the purposes of the Primary Authority scheme?

Question 6 - Do you agree that written advice, even where it includes a warning regarding the possibility of a sanction, should not be considered enforcement action for the purposes of the Primary Authority scheme? If not, how might this be done without causing unnecessary bureaucracy?

Question 7 - Do you agree that the investigative actions listed in paragraph 46 should not be considered enforcement action for the purposes of the Primary Authority scheme?

Question 8 - If so, can you specify any statutory powers under which such investigative action can be taken?

Question 9 - Are there any other actions that you believe should not be regarded as enforcement action for the purposes of the Primary Authority scheme?

Question 10 - Do you agree with the proposed approach to removing licensing under the Licensing Act 2003 and the Gambling Act 2005, and fire safety under the Regulatory Reform (Fire Safety Order) 2005, from the definition of enforcement action to be used for the purposes of the Primary Authority scheme?

Question 11 - Do you agree with this approach to defining emergencies in the statutory instrument?

Question 12 - Are there other forms of enforcement action which you believe should be excluded so as to allow urgent action to prevent significant risk of serious harm? Please include full references to the relevant legislation if possible.

Summary of consultation questions

Question 13 - What enforcement actions do you believe should be excluded, on the grounds of proportionality, from the requirement to consult the Primary Authority before taking the action?

Question 14 – What should enforcement officers take into account when taking a decision as to whether a prenotification of enforcement action would be wholly disproportionate?

Question 15 - Do you agree that exclusions should be made where enforcement action is required urgently to prevent or stop relatively minor harm? If so, which enforcement actions should be excluded on this basis?

Question 16 - Do you agree that where an organisation enters into an enforcement undertaking there should be no requirement placed on the enforcing authority to contact the Primary Authority prior to taking enforcement action?

Question 17 - Do you agree with our proposed approach to excluding Part 8 of the Enterprise Act from the requirement to consult a Primary Authority before taking enforcement action?

Question 18 - Do you consider there are other occasions where undertakings may be given, for example voluntarily, which should also be excluded from the requirement to consult with the Primary Authority?

Question 19 - Do you agree that ten working days is a reasonable amount of time for a proposed enforcement action to be referred to LBRO? If not, how many days do you think would be reasonable?

Question 20 - Do you agree that relevant information should be provided to LBRO when a proposed enforcement action is referred to it? If so, what information do you believe LBRO should be given?

Question 21 - Do you agree that the information we have specified should be given to LBRO before it consents to a referral? Is there any other information that you believe should be provided?

Question 22 - Do you agree that LBRO should be able to take consistency with its own guidance into account when making a decision on an enforcement action referred to it?

Question 23 - Are there any other matters relating to the statutory instrument at Annex E, which you want to raise? Please give details, and where possible, specify any alternative approach that you believe should be explored.

Question 24 – Do you believe the assessment of costs and benefits in the Impact Assessment are realistic? If not, is there any further evidence that you can provide that should be taken into account?

APPLICATION TO SCOTLAND AND NORTHERN IRELAND

17. The Primary Authority scheme applies in Scotland and Northern Ireland to local authority trading standards, environmental health, and some fire safety functions where they are exercised under legislation where the competence to legislate has not been devolved to either the Scottish Executive or the Northern Ireland Assembly.
18. To apply the Primary Authority scheme to local authorities in Scotland and Northern Ireland, we need to list the relevant regulatory functions they exercise which the scheme is to apply. This list must be a subset of schedule 3 of RESA, although it may also include legislation specific to Scotland or Northern Ireland which sets out functions equivalent to those in schedule 3 of RESA.
19. The list at Annex C includes legislation under which we believe local authorities in Scotland and Northern Ireland carry out relevant non-devolved functions, and the Government seeks your views on these lists.

Question 1

Is there any legislation on these lists that you believe relates to matters which are not reserved matters in relation to Scotland or transferred in Northern Ireland or should for any other reason not be included?

Question 2

Is there any legislation or are there any functions that *are not* on these lists that you believe should be included? This may include Acts of Parliament, statutory instruments or European obligations. Please be as specific as possible.

20. The effect of applying the Primary Authority scheme to Scotland and Northern Ireland will be that, in relation to the legislation listed, local authorities in Scotland and Northern Ireland will be subject to the Primary Authority scheme in the same way as local authorities in England and Wales.
21. This means that a Scottish or Northern Irish local authority could be nominated as a Primary Authority for a particular organisation. It also means that where a Scottish or Northern Irish local authority proposes to take enforcement action in relation to the legislation that is listed, it will have to contact the relevant Primary Authority first unless exclusions apply.

DEFINING ENFORCEMENT ACTION

22. Under the Primary Authority scheme, where LBRO has registered a local authority as an organisation's Primary Authority and an enforcing authority proposes to take enforcement action against that organisation, it must contact the Primary Authority first.
23. The Primary Authority can then block the proposed enforcement action (subject to determination by LBRO), if it believes that it is inconsistent with advice or guidance it has previously given the organisation concerned.
24. The definition of enforcement action is critical to the operation of the scheme as it determines the circumstances in which an enforcing authority must contact a Primary Authority regarding a proposed enforcement action, and therefore the circumstances in which the opinions of the Primary Authority, and potentially LBRO, must be taken into account.
25. Section 28(5) of RESA defines enforcement action as:
 - (a) any action which relates to securing compliance with any restriction, requirement or condition in the event of breach (or putative breach) of a restriction, requirement or condition;
 - (b) any action taken with a view to or in connection with the imposition of any sanction (criminal or otherwise) in respect of an act or omission;
 - (c) any action taken with a view to or in connection with the pursuit of any remedy conferred by an enactment in respect of an act or omission.
26. This is a wide definition. Section 28(6) of RESA allows it to be refined by making a statutory instrument specifying what is, or is not to be regarded as enforcement action for the purposes of the Primary Authority scheme.
27. The draft statutory instrument at Annex D specifies all the matters that are to be regarded as enforcement action for the purposes of the Primary Authority scheme, rather than relying on the definition in section 28(5) of RESA. Our view is that this approach will provide clarity for local authorities and businesses alike. However, we would be grateful for your views, including any alternative approaches regarding this.

What should be regarded as enforcement action?

28. The Primary Authority scheme is designed to ensure that, where an organisation has followed the advice or guidance it has received from its Primary Authority, it should be able to rely on that advice when operating across the country. In other words where an organisation has followed the advice of its Primary Authority it should not be penalised for doing so.
29. The Government therefore believes that those forms of enforcement action that constitute a sanction, such as, serving an improvement notice, commencement of court proceedings (whether civil or criminal) or a fine must be regarded as enforcement action for the purposes of the Primary Authority scheme.
30. The draft statutory instrument at Annex D seeks to capture this type of enforcement action by listing a number of specific sanctions that we believe should be within the scope of the scheme.
31. We are aware that the list in the draft statutory instrument at Annex D does not specify all the potential statutory notices that local authorities can serve and there may be other sanctions that are not specified which consultees believe should be. The Government is seeking consultees views as to what else should be regarded as enforcement action.

Question 3

Do you agree that sanctions listed in the draft statutory instrument at Annex D should be regarded as enforcement action for the purposes of the Primary Authority scheme?

Question 4

Are there other sanctions that should be included in this list?

What should not be regarded as enforcement action?

32. We believe that purely informal enforcement action should not be included in the scope of the Primary Authority scheme. The following sections address those activities which we believe should fall outside the scope of the scheme. By excluding these, we do not mean to imply that it would be inappropriate for an enforcing authority and a Primary Authority to discuss a regulatory issue before formal action is taken - in fact, this will often be a sensible course of action which will benefit all parties – but that the full statutory consultation framework would be disproportionate in these cases and could undermine the effectiveness of the scheme.

Oral advice

33. Local authority regulatory services publish enforcement policies which commonly describe what is sometimes called a hierarchy of enforcement action. These set out the range of options that are open to an enforcement officer when confronted with a case of non-compliance. They will include a range of options including doing nothing, giving oral or written advice, using statutory notices, and ultimately prosecution and other forms of sanction.
34. The Government believes that the more informal actions towards the bottom of the enforcement hierarchy should not be considered as enforcement action for the purposes of the Primary Authority scheme. This is essential to ensure that, for example, informal oral advice by local authorities can go ahead uninhibited. Businesses and other organisations often welcome the advice that local authority regulatory services give them about regulation, and the steps they need to take to comply with it. This is often a light touch way of ensuring compliance where a failure to comply results from a simple misunderstanding of the law or a lack of awareness that a particular regulation exists.
35. Our initial proposal is that an enforcing authority should not be required to contact a Primary Authority before giving oral advice to an organisation, and therefore believe that oral advice should not be regarded as enforcement action for the purposes of the Primary Authority scheme.

Question 5

Do you agree that oral advice should not be regarded as enforcement action for the purposes of the Primary Authority scheme?

Written advice

36. It is common for local authority regulatory services, after an inspection, to send a written note setting out the issues that were revealed during that inspection. In 2006 alone, the Chartered Institute of Public Finance and Accountancy (CIPFA) noted that some 99,000 notes of this sort were issued by trading standards officers in Great Britain.² This is not only a commonly adopted practice in trading standards, but across local authority regulatory services, including environmental health, licensing and fire safety.
37. The Government believes that it is important such notes should not be regarded as enforcement action for the purposes of the Primary Authority scheme, as otherwise Primary Authorities would rapidly be overloaded with a requirement to consider purely routine interactions between other local authorities and the organisations that they regulate.

² CIPFA Trading Standards Statistics 2006

38. In addition, letters of this sort offer local authorities the opportunity to build upon oral advice that has previously been given to an organisation, and they are often welcomed by businesses as a valuable source of information and guidance. The Government does not wish to inhibit the ability of local authorities to issue this type of advice and therefore believes that these letters should not be regarded as enforcement action for the purposes of the Primary Authority scheme.
39. Letters following up an inspection, as well as providing information, advice and guidance, can also include warnings to the organisation concerned that if they do not take a particular type of action (for example, displaying prices or cleaning its premises), the local authority may issue a sanction or take some further action.
40. The Government does not believe that letters of this sort should be regarded as enforcement action for the purposes of the Primary Authority scheme. While letters of this sort may lead to an organisation believing that it *has to* follow the recommendations of a local authority, they are not in themselves a formal sanction, but instead inform an organisation that there is the possibility of a sanction.
41. However, it may be felt that there is a case for including written warnings to an organisation stating that unless particular action is taken within a specified time period, the local authority will take formal enforcement action within the Primary Authority scheme.

Question 6

Do you agree that written advice, even where it includes a warning regarding the possibility of a sanction, should not be considered enforcement action for the purposes of the Primary Authority scheme? If not, how might this be done without causing unnecessary bureaucracy?

Investigative activities

42. When attempting to check for or secure compliance with regulations, local authorities can carry out a number of essentially investigative activities. Many of these do not, in themselves, involve the application of a sanction, although they may prove to be preparatory to one.
43. The Government does not believe that a Primary Authority should have to be contacted before such activities are undertaken. This could unnecessarily prevent local authorities from acting quickly to investigate or secure evidence relating to potential breaches of the law.

44. Such activities might include:

- (a) inspection of goods, records, and documents;³
- (b) exercise of powers of entry onto premises;
- (c) seizure of goods, records, and documents for evidential purposes;
- (d) test purchasing of goods;
- (e) sampling of goods;
- (f) deployment of surveillance or covert human intelligence sources under Part 2 of the Regulation of Investigatory Powers Act 2000;
- (g) interviewing suspects under caution.

45. We welcome comments as to which investigative and evidence gathering activities should not be regarded as enforcement action, so that we can ensure that the finalised statutory instrument does not interfere with such activities.

Question 7

Do you agree that the investigative actions listed in paragraph 46 should not be considered enforcement action for the purposes of the Primary Authority scheme?

Question 8

If so, can you specify any statutory powers under which such investigative action can be taken?

Question 9

Are there any other actions that you believe should not be regarded as enforcement action for the purposes of the Primary Authority scheme?

³ This does not mean that the Primary Authority scheme will have no application to such action – section 30 RESA allows a Primary Authority to draw up an inspection plan within which recommendations can be made regarding the frequency of inspections or what an inspection should consist of. See paragraph 23 of the Guidance to the Act

The Licensing Act 2003, the Gambling Act 2005 and Regulatory Reform (Fire Safety) Order

46. There are a number of circumstances where regulatory frameworks are deliberately local in character and allow for local discretion. Under these frameworks, the national consistency that the Primary Authority scheme aims to introduce would be inappropriate. With this in mind, the Government proposes to make specific exclusions in relation to activities under the Licensing Act 2003 (Licensing Act), the Gambling Act 2005 (Gambling Act) and the Regulatory Reform (Fire Safety) Order (Fire Safety Order).
47. Decisions made under the Licensing Act often take into account particular local circumstances. As such, the advice of the Primary Authority would be of limited value in relation to decisions regarding:
- (a) what is included in a licence;
 - (b) reviewing of a licence; or
 - (c) withdrawing a licence.
48. The Government does not propose that any local authority actions in relation to licensing under the Licensing Act should be regarded as enforcement action for the purposes of the Primary Authority scheme.
49. While the offence provisions in Part 7 of the Licensing Act arguably address national issues such as the sale of alcohol to minors, when pursued they form part of the local response to a local problem. Prosecuting authorities for these offences, such as a local authority licensing authority or trading standards service, have to consider which approach they believe is suitable for particular local circumstances of the area.
50. Offences in Part 7 of the Licensing Act are rarely used, partly because of other means of dealing with problems, such as licence review (or voluntary action under threat of review).⁴ Where local authorities pursue offences under the Licensing Act, it is often an extreme step against businesses that have failed to respond to warnings and licence reviews. It would therefore seem odd to afford the benefits of a primary authority approach to already non-compliant businesses.

⁴ For example, in 2006 there were no prosecutions and only two cautions for knowingly allowing consumption by individual aged under 18 of alcohol on a licensed premises (an offence under S150(2) of the Licensing Act). In addition, there were only two prosecutions for sales to drunks or obtaining alcohol for someone who is drunk (offences under S141 (a), S141 (b) and S142 of the Licensing Act).

While there were 1199 prosecutions for sales to those under the age of 18 (offences under S142(1) and S147(1) of the 2003 Act), these represent about 0.7% of premises licensed to sell alcohol and will include prosecution by the Crown Prosecution Service as well as local authority licensing and trading standards services.

51. Irrespective of whether the local authority pursues criminal prosecution, the circumstances of the case will always be dependent on local issues. For example, the public nuisance objective under the Licensing Act does not define the levels at which noise becomes a nuisance. Instead, the local authority has to consider the impact (or likely impact) of the noise in each individual case. To differentiate between the regulatory and prosecution measures in the Licensing Act is therefore artificial and potentially distorts the local objectives of these regimes.
52. The structure of the Gambling Act 2005 is similar to that of the Licensing Act in many respects, creating a licensing regime agreed between businesses and local authorities and the Gambling Commission.
53. It is the responsibility of the Gambling Commission to regulating all commercial gambling sectors in Great Britain, except the National Lottery and spread betting. The Commission monitors licence holders and has wide enforcement powers.
54. Local authorities are responsible for the licensing of premises for gambling, including enforcement action in respect of offences under the Gambling Act. Local authorities are required to consult and publish a three-year licensing statement describing the principles they intend to apply in exercising their various functions, which includes the approach they believe is suitable for the local and individual circumstances of the area.
55. Given this, we do not believe that enforcement action relating specifically to licenses and their conditions under the Gambling Act should be considered enforcement action for the purposes of the Primary Authority scheme. Therefore, we propose that all aspects of the licensing and gambling regimes under the Licensing and Gambling Act should not be considered enforcement action for the purposes of the Primary Authority scheme.
56. For a combination of reasons, we believe that applying the Primary Authority scheme to functions under the Fire Safety Order would also be inappropriate.
57. The nature of the risks presented by fire means that Fire and Rescue Authorities (FRAs) must take into account local and premise specific issues when ensuring compliance with the Fire Safety Order. Therefore, two FRAs may legitimately take a different approach to two branches of the same organisation in respect of the extent of compliance with the Fire Safety Order. For example, two authorities may require different fire protection measures to be in place to address the differing nature of risk caused by differences in a building's construction, layout, site or occupancy, or the time it would take an authority to respond to an emergency.
58. Given this, a Primary Authority would not be in a position to agree an enforcement approach to the Fire Safety Order that could then be applied to all its branches across the country.

59. There is also a risk that applying the Primary Authority scheme to the Fire Safety Order would divert the resources of FRAs from high risk premises to multi-site businesses, many of which tend not to be considered to present significant risks. Such an outcome would conflict with the core principles of the better regulation agenda and this is not the Government's intention.
60. We therefore propose that none of the functions under the Fire Safety Order be consider as enforcement action for the purposes of the Primary Authority scheme.
61. In light of our proposals, it is likely that the nomination of a local authority as a Primary Authority with responsibility for advice and guidance regarding licensing under the Licensing or Gambling Acts, or an FRA with responsibility for advice and guidance regarding fire safety under the Fire Safety RRO would have little practical effect. This is because any such Primary Authority would not be able to carry out its key roles.
62. Firstly, the Primary Authority, would not be able to give advice or guidance because, as stated in the paragraphs above, we do not believe that this would be appropriate given the local approach that must betaken under these regulatory frameworks. Secondly, the effect of not regarding these regulatory frameworks as enforcement action is that a Primary Authority would not be able to play a role in checking for consistency in regulatory enforcement. This is because enforcing authorities will not be required to contact a Primary Authority prior to taking enforcement action under these regulatory frameworks.
63. Given this, there will be few benefits to having a Primary Authority in relation to licensing under the Licensing or Gambling Acts, or fire safety under the Fire Safety RRO. The Government therefore does not expect LBRO to nominate any Primary Authorities in relation to these regulatory frameworks.

Question 10

Do you agree with the proposed approach to removing licensing under the Licensing Act 2003 and the Gambling Act 2005, and fire safety under the Regulatory Reform (Fire Safety Order) 2005, from the definition of enforcement action to be used for the purposes of the Primary Authority scheme?

EXCLUSIONS FROM THE REQUIREMENT TO NOTIFY THE PRIMARY AUTHORITY

64. There will be circumstances where a local authority needs to proceed swiftly with enforcement action, but where it would not be desirable for an enforcing authority to have to contact the relevant Primary Authority before taking enforcement action against an organisation. In particular, there may be circumstances where action needs to be taken urgently to avoid serious injury, damage to the environment or damage to the financial interests of consumers.
65. RESA requires the Secretary of State to prescribe in a statutory instrument those circumstances in which the requirement placed on an enforcing authority to consult a Primary Authority should not apply. In such cases, the enforcing authority is obliged to notify the relevant Primary Authority of its enforcement action as soon as it reasonably can after the action has been taken.
66. RESA (sections 29(3)) also requires that the statutory instrument must seek to secure the requirement to consult with the Primary Authority does not apply to the following cases:
- (a) where the enforcement action is required urgently to avoid a significant risk of serious harm to human health or the environment (including the health of animals or plants) or the financial interests of consumers;
 - (b) where requiring an enforcing authority to consult a Primary Authority prior to taking enforcement action would be wholly disproportionate.

Urgent action to prevent significant risk of serious harm

67. The Government proposes that the statutory instrument should specifically exclude cases where action is urgently required or is so required in the opinion of the enforcement authority. The intention here is to ensure that where serious harm is imminent and quick action is essential, local authorities are free to proceed with the necessary enforcement action.
68. The inclusion of this provision reflects the fact that enforcement officers have access to a number of statutory powers which allow for fast action in the case of serious risks. For instance, **Prohibition Notices** (under s. 22 of the Health and Safety at Work Act 1974) may be used with a view to preventing “serious personal injury” and **Emergency Prohibition Notice** may be used in relation to activities which pose an “imminent risk of injury to health” under the Food Safety Act 1990. Part 3 of the RESA will also allow for the use of **Stop Notices** (section 46) under enactments it is applied to, where there is a person is causing, or presents a significant risk of causing, serious harm to human health, the environment or the financial interests of consumers.

69. We propose therefore that the statutory instrument should:

- include the general language included in section 29(3)(a) of RESA; and
- list, for clarity, specific powers under which an enforcing authority can take enforcement action without having to first contact the Primary Authority (see the draft statutory instrument at Annex D).

70. This would mean that local authorities will have the discretion to decide whether a situation did involve “urgency” of the sort described in section 29(3)(a) while also making clear that they can also proceed with existing statutory enforcement actions which are designed for use in emergency circumstances without first consulting the relevant Primary Authority under powers specifically listed in the statutory instrument.

Question 11

Do you agree with this approach to defining emergencies in the statutory instrument?

Question 12

Are there other forms of enforcement action which you believe should be excluded so as to allow urgent action to prevent significant risk of serious harm? Please include full references to the relevant legislation if possible.

Where the application of the Primary Authority provisions would be wholly disproportionate

71. The statutory instrument creating exclusions from the requirement to notify the Primary Authority **must** exclude actions where requiring an enforcing authority to consult a Primary Authority prior to taking enforcement action would be wholly disproportionate.

72. The Primary Authority scheme is designed to give organisations that operate across more than one local authority certainty that enforcement action will not be taken against them by a local authority where they have followed the advice or guidance of their Primary Authority.

73. This is geared to reducing the costs that can follow for these organisations from inconsistent enforcement between local authorities. In some cases, however, the costs of a particular enforcement action may be minimal, and the costs involved in consulting the relevant Primary Authority may outweigh them. It is for this reason that RESA requires that such cases be excluded from the requirement to notify the Primary Authority. This is designed to ensure proportionality.

74. The draft statutory instrument at Annex D sets a subjective test for enforcing officers that requires them to judge where applying the provisions of the Primary Authority scheme would be wholly disproportionate.
75. However, it may be difficult in practice for local authority enforcement officers to make a decision as to the likely costs of an enforcement action for the organisation involved or whether or not consulting with the Primary Authority would be disproportionate. The costs to an organisation of enforcement action being taken against them can clearly exceed those involved in the specific sanction (for instance, where the sanction is a large fine). However, where an organisation operates across multiple local authorities, even limited action at one particular branch can put that organisation in a position where they need to review a whole product line or national policies designed to ensure compliance in all their branches. This could be extremely costly. In addition to this, there can be wider costs that may be significant, for example, reputational costs.
76. Therefore, what may seem to one enforcement officer to be a purely local matter where enforcement will cost less than consulting the relevant Primary Authority may in fact reflect advice that the Primary Authority has given to a retailer and be of significant cost for the organisation nationally. In practice, many of the cases where the full Primary Authority consultation process would be disproportionate will in effect be exempted under provisions elsewhere in the SIs discussed in this consultation. For instance, routine advice which poses no real cost to the business will not be regarded as enforcement action at all (see paragraphs 36–44), removing any requirement whatsoever to contact the Primary Authority. Others will be exempted in relation to minor harm (see paragraph 78 and 79 below). However, it is still necessary to make a specific exemption where the application of the Primary Authority provisions would be wholly disproportionate.

Question 13

What enforcement actions do you believe should be excluded, on the grounds of proportionality, from the requirement to consult the Primary Authority before taking the action?

Question 14

What should enforcement officers take into account when taking a decision as to whether a prenotification of enforcement action would be wholly disproportionate?

Other exclusions

77. There are other cases where we believe that exclusions should be established from the need to contact the relevant Primary Authority prior to taking enforcement action. These are where:

- urgent action needs to be taken, in relation to relatively minor harm;
- other authorisation processes for enforcement action already exist, making a parallel Primary Authority process unnecessary;
- the character of enforcement action reflects a voluntary undertaking by the business.

Urgent preventative action, in relation to minor harm

78. Situations often occur in enforcement where there is a need for quick action, even if the consequences of failure to do so would not amount to significant harm according to the definition given above. This would for instance include responding to cases of nuisance. For example, use of an **abatement notice** under the **Environmental Protection Act 1990** to silence an intruder alarm would fall into this category.

79. We therefore propose that exclusions be made where urgent action is needed to prevent minor harm.

Question 15

Do you agree that exclusions should be made where enforcement action is required urgently to prevent or stop relatively minor harm? If so, which enforcement actions should be excluded on this basis?

Other Authorisation Procedures: Part 8 of the Enterprise Act 2002

80. In certain cases, there are already statutory arrangements to be followed by a local authority before taking a particular form of enforcement action that may in practice enable the main objectives of the Primary Authority scheme to be fulfilled in relation to such action. In that event, we believe that it would be burdensome to require an enforcing authority to consult the Primary Authority before taking enforcement action in addition to a requirement to consult, for instance, a statutory regulator.

81. Part 8 of the Enterprise Act 2002 (Enterprise Act) requires local authorities to consult the Office of Fair Trading (OFT) before proceeding with an application for an enforcement order under that Act. The OFT may then decide how the matter should be dealt with, and in particular can direct that if an enforcement order is to be applied for, the application should be made by OFT or another authority (which could include the enforcing authority). In exercising their powers, OFT already takes into account the importance of consistency, etc in the exercise of these powers.
82. We believe that this existing mechanism could be aligned with the Primary Authority scheme in a way that obviates the need for an enforcing authority to consult the Primary Authority before applying for an enforcement order where it has followed the process set out in Part 8 of the Enterprise Act.
83. OFT could, for instance, have a policy of consulting with the relevant business's Primary Authority when it is consulted regarding an application for an enforcement order, and to taking consistency with Primary Authority advice and guidance into account when deciding how to exercise its powers under the Enterprise Act.
84. Moreover, OFT and LBRO are required to agree a Memorandum of Understanding under section 12 of RESA and one provision in such an MOU could cover consultation between the OFT and the primary authority and if necessary LBRO, and OFT taking account of their advice in relation to the exercise of their powers under Part 8. On this basis, we propose that local authorities should not be required to notify the Primary Authority before applying for an Enforcement Order under the Enterprise Act.

Enforcement undertakings by a business

85. In many cases of regulatory non-compliance an organisation will agree with a local authority regulator to take restorative action that it is agreed with the local authority regulator will bring them back into compliance. For instance, a business that may have inadvertently broken the law may offer to take certain action which would put right the harm they had caused without the need for the imposition of a sanction.
86. Where an organisation has undertaken to act in such a way, it would not be appropriate for the enforcing authority to have to consult the Primary Authority regarding the consistency of the undertaking with advice it has given the organisation concerned. The Primary Authority should, however, be kept informed of the process on a post hoc basis.
87. We therefore propose that where an organisation enters into such an undertaking under section 219 of the Enterprise Act, or in future, under section 50 of RESA, there should be no requirement for the enforcing authority to contact the relevant Primary Authority before accepting such an undertaking.

Question 16

Do you agree that where an organisation enters into an enforcement undertaking there should be no requirement placed on the enforcing authority to contact the Primary Authority prior to taking enforcement action?

Question 17

Do you agree with our proposed approach to excluding Part 8 of the Enterprise Act from the requirement to consult a Primary Authority before taking enforcement action?

Question 18

Do you consider there are other occasions where undertakings may be given, for example voluntarily, which should also be excluded from the requirement to consult the Primary Authority?

REFERENCES TO LBRO AND ITS DETERMINATION PROCEDURE

88. The Primary Authority's role is to give advice and guidance to the organisation that it partners regarding specific areas of regulatory compliance and to review enforcement actions that other local authorities propose to take against that organisation. Where a Primary Authority believes that a proposed enforcement action is inconsistent with advice or guidance that it has given the organisation it partners, it can direct the enforcing authority not to take that enforcement action. Under these circumstances, the enforcing authority can refer the case to LBRO for determination.
89. Where an enforcement action is referred to a Primary Authority and it does not direct the enforcing authority not to take that action, the organisation concerned may refer the case to LBRO for determination.
90. It is also possible for the Primary Authority, upon receiving notification of a proposed enforcement action, to refer the action to LBRO for determination.
91. Where a proposed enforcement action is referred to LBRO, whether it be by the enforcing authority, the Primary Authority or the organisation concerned, it can only proceed to determination with the consent of LBRO
92. In this section the Government seek your views regarding the procedure that will be set into place for LBRO consenting to the referral of an enforcement action and the procedure for determination.

Schedule 4 of RESA

93. Schedule 4 of RESA sets out the framework for determination by LBRO. In particular, it sets out that where an enforcement action is referred to LBRO for determination, it must consider three issues:
- i. whether the proposed enforcement action is inconsistent with advice or guidance previously given by the Primary Authority;
 - ii. whether the advice or guidance in question was correct; and
 - iii. whether the advice that was given was properly given by the Primary Authority.
94. If LBRO is satisfied on all these counts it may:
- i. Where an enforcing authority refers the action, uphold the Primary Authority's direction to the enforcing authority that it must not take enforcement action;

- ii. Where the organisation involved refers the action, direct the enforcing authority not to take the proposed enforcement action;
 - iii. Where the Primary Authority refers the action, direct the enforcing authority not to take the proposed enforcement action.
95. In addition, LBRO must consult with the relevant national regulator, where appropriate, and any other persons that it thinks fit during determination and it must reach its decision within 28 days.
96. Finally, LBRO may issue guidance or directions to one or more local authorities regarding any enforcement action that is referred to it, and may require the Primary Authority, enforcing authority or organisation involved to provide it with relevant information.
97. The statutory instrument being consulted on here makes additional provision regarding the procedures to be followed leading up to and during determination.

Deadlines for reference to LBRO

98. Enforcing authorities, Primary Authorities and the organisations involved in the Primary Authority scheme will expect that decisions regarding a proposed enforcement action will be taken quickly.
99. We believe, therefore, that all three parties involved in a proposed enforcement action should be under an obligation to refer an action to LBRO as soon as is reasonably practicable. This should ensure that none of the parties use the possibility of referral to LBRO as a means of deliberately delaying a proposed enforcement action.
100. The Government believes that it is essential to strike the right balance between quick action and allowing each party enough time to take a considered decision regarding a particular enforcement action. We believe that a backstop deadline of ten working days is a reasonable amount of time for the Primary Authority, enforcing authority or organisation involved to refer a proposed enforcement action to LBRO.
101. We also believe that where a referral is made after the specified time limit, it would be reasonable for LBRO not to consent to the referral.

Question 19

Do you agree that ten working days is a reasonable amount of time for a proposed enforcement action to be referred to LBRO by (a) the Primary Authority, (b) the enforcing authority and (c) the organisation involved? If not, how many days do you think would be reasonable?

Information that LBRO may require before giving consent

102. Once LBRO consents to a reference, it has only 28 days in which to carry out its determination with regards to a particular enforcement action. It is essential therefore, if LBRO is to reach an effective determination regarding enforcement action that all the important facts are brought to its attention at the outset.
103. In particular, we believe that before giving its consent to a reference, LBRO will need:
- i. Information regarding the proposed enforcement action, including what the action is;
 - ii. Any relevant advice or guidance that has been given by the Primary Authority; and
 - iii. The reasons why the enforcing authority, Primary Authority or organisation involved is referring the case to LBRO.

Question 20

Do you agree that relevant information should be provided to LBRO when a proposed enforcement action is referred to it? If so, what information do you believe LBRO should be given?

104. It is likely that the information LBRO will require from each party before consenting to a referral will vary.

Information required when reference is made by the regulated person

105. We believe that when the regulated person refers a proposed enforcement action to LBRO it should provide LBRO with:
- Details regarding the proposed enforcement action, including what the proposed action is; and
 - Why they believe that the action *is* inconsistent with advice or guidance previously given by the Primary Authority or why the enforcing authority believes that the advice or guidance given by the Primary Authority was incorrect or improperly given.

Information required when reference is made by the enforcing authority

106. We believe that when the enforcing authority refers a proposed enforcement action to LBRO it should provide LBRO with:

- Details regarding the proposed enforcement action, including what the proposed action is; and,
- Why they believe that the action *is not inconsistent* with advice or guidance previously given by the Primary Authority or why the enforcing authority believes that the advice or guidance given by the Primary Authority was incorrect or improperly given.

Information required when a reference is made by the Primary Authority

107. We believe that when the Primary Authority refers a proposed enforcement action to LBRO it should provide LBRO with:

- A copy of the relevant advice or guidance that it has given the regulated person;
- The reasons why it believes that it cannot determine whether or not a proposed enforcement action is consistent with advice or guidance that it has previously given the regulated person.

Question 21

Do you agree that the information we have specified should be given to LBRO before it consents to a referral? Is there any other information that you believe should be provided?

Matters LBRO may take into account when making a determination

108. Before making a determination under schedule 4 of RESA LBRO must satisfy itself that:

- (a) the proposed enforcement action is inconsistent with advice or guidance previously given by the primary authority;
- (b) the proposed advice or guidance was correct;
- (c) the advice or guidance was properly given by the Primary Authority.

109. LBRO's interest in consistency reflects the importance of consistency in the Primary Authority scheme. LBRO will be taking a view as to whether a specific enforcement action is inconsistent with advice the Primary Authority has given.
110. LBRO will also be required to consider whether advice or guidance was 'correct' and 'properly given'. This is essential to ensure that enforcement actions cannot be blocked on the basis of inconsistency with guidance or advice that should not have been given.
111. In satisfying itself whether advice was "correct", LBRO will not be taking the place of the Courts; in particular, it will not be giving the opinion that there is only one correct piece of advice or guidance on a particular matter, but will instead take a view as to whether the advice or guidance is not inconsistent with its understanding of the law.
112. In assessing whether guidance was given "properly", LBRO will have an opportunity to consider the propriety of advice that has been given, and is partly intended to allow it to challenge cases where, although the advice in question may not be "incorrect", the Primary Authority has gone beyond the proper limits of its advisory role. There may be cases, for instance, where the Primary Authority has given advice which may have disregarded the need for some local variation in the application of a certain type of regulation where this is appropriate.
113. To give further clarity on the intentions behind this point, we propose to specify in the order that LBRO may take into account the question as to whether advice has been given in a way that is consistent with any of its own guidance given under Section 33 of the Act when reaching a view on these matters.

Question 22

Do you agree that LBRO should be able to take consistency with its own guidance into account when making a decision on an enforcement action referred to it?

Further provisions regarding the determination process

114. The above paragraphs set out those points where the Government seeks your views regarding the general procedure to be followed when referring an enforcement action to LBRO and during determination.

115. We also believe that specific procedures should be set out on a number of more detailed matters. For instance:

- i. that information may be required by LBRO to be submitted in prescribed electronic form, where appropriate;
- ii. further deadlines for reply to LBRO where information is requested once the determination process starts.

116. Consultees are invited to consider the draft statutory instrument at Annex F, and raise any further matters that they consider important.

Question 23

Are there any other matters relating to the statutory instrument at Annex E, which you want to raise? Please give details, and where possible, specify any alternative approach that you believe should be explored.

Question 24 (Impact Assessment Annex A)

Do you believe the assessment of costs and benefits in the Impact Assessment are realistic? If not, is there any further evidence that you can provide that should be taken into account?

ANNEX A - IMPACT ASSESSMENT

Summary: Intervention & Options		
Department /Agency: BERR	Title: Impact Assessment of Statutory Instruments Implementing the Primary Authority Scheme	
Stage: Consultation	Version: I	Date: 10 September 2008
Related Publications: Impact Assessment - Regulatory Enforcement and Sanctions Bill; Regulatory Enforcement and Sanctions Act 2008; Guidance to the Act		

Available to view or download at: <http://www.berr.gov.uk/bre/inspection-enforcement/implementing-principles/sanctions-bills/page44047.html>

Contact for enquiries: Sydney Nash

Telephone: 020 7215 0397

What is the problem under consideration? Why is government intervention necessary?

The diffuse structure of local authority regulatory services mean that businesses frequently face problems associated with inconsistency of enforcement. Part 2 of the Regulatory Enforcement and Sanctions Act 2008 (RESA) creates the framework for the Primary Authority scheme, which is designed to ensure co-ordinated, consistent and proportionate local authority regulatory enforcement for those organisations that operate across more than one local authority. Part 2 of RESA contains a number of order-making powers which are necessary to ensure the practical effectiveness of the scheme.

What are the policy objectives and the intended effects?

Part 2 of RESA allows for a Primary Authority partnership to be created between an organisation and a local authority. The draft statutory instruments under consultation will:

- make provision for the application of the scheme to local authorities in Scotland and Northern Ireland;
- define "enforcement action" for the purposes of Part 2 of RESA;
- create exemptions to the consultation requirements set out in Part 2 of RESA; and
- ensure effective determination by the Local Better Regulation Office (LBRO).

What policy options have been considered? Please justify any preferred option.

The statutory instruments are essential to the effective operation of the Primary Authority scheme. Doing nothing is not, therefore, a realistic option.

The consultation is largely technical in character, as the statutory instruments implement policy intentions set out in the Impact Assessment accompanying RESA.

No other alternatives are proposed, but the Impact Assessment makes it clear where the approach that has been developed here differs from the costs and benefits predicted in the Impact Assessment accompanying RESA.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? October 2011 - A review of the operation of LBRO and the Primary Authority scheme will take place three years after LBRO becomes a statutory body.

Ministerial Sign-off For Consultation Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



.....Shriti Vadera.....Date: 8th September 2008

Summary: Analysis & Evidence

Policy Option: 1	Description: Statutory Instruments Implementing the Primary Authority Scheme
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Business: £7.5 million Local Authorities: £11.7 million to £13.6 million
	One-off (Transition)	Yrs	
	£ 2.2 million	5	
	Average Annual Cost (excluding one-off)		
	£ 19.2 m - £21 m	Total Cost (PV)	£ 188 m – 206.4
Other key non-monetised costs by 'main affected groups' Business: cost recovery by LBRO where the business chooses to make a referral to LBRO.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Business: £24.3 million - £48.6 million Local Authorities: £13.2 million - £17 million
	One-off	Yrs	
	£ 0		
	Average Annual Benefit (excluding one-off)		
	£ 37.5 m - £65.5 m	Total Benefit (PV)	£ 367.6 m – 642.2 m
Other key non-monetised benefits by 'main affected groups' Local Authorities: Economic and development benefits of hosting a Primary Authority partnership.			

Key Assumptions/Sensitivities/Risks Number of Partnerships adopted; hours' work entailed in aspects of Primary Authority schemes; extent to which local authorities use their power to recover costs from business.

Price Base Year 2008	Time Period Years 15	Net Benefit Range (NPV) £ 170.4-445 million	NET BENEFIT (NPV Best estimate) £ 307.7 million
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What is the geographic coverage of the policy/option?	UK-wide			
On what date will the policy be implemented?	2009			
Which organisation(s) will enforce the policy?	n/a			
What is the total annual cost of enforcement for these	£ n/a			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ 0			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	Yes/No			
Annual cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Medium 0	Large 0
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase	£ 0	Decrease	£ 0
Net		£ 0	

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

Introduction

1. This Impact Assessment accompanies a consultation on draft statutory instruments that make provision relating to the Primary Authority scheme established under Part 2 of the Regulatory Enforcement and Sanctions Act (RESA). The Primary Authority scheme will address many of the concerns expressed regarding local authority regulatory enforcement, including inconsistent advice, wasted resources, duplication of effort and the absence of an effective dispute resolution mechanism when two authorities cannot agree to a regulatory approach. The scheme is designed to provide more coordinated, consistent and proportionate regulatory enforcement for those organisations that operate across more than one local authority and it will assist local authorities in increasing their operational efficiency and effectiveness.
2. LBRO, which will be established as a statutory corporation under Part 1 of RESA and become fully operational in October 2008, will have responsibility for the oversight and administration of the scheme.
3. Part 2 and schedule 4 of RESA include a number of order-making powers which allow Secretary of State to make statutory instruments regarding the operation of the Primary Authority scheme. The Government is consulting on the content of these statutory instruments, and this Impact Assessment deals with the likely costs and benefits associated with these.
4. This Impact Assessment accompanies the consultation document on the statutory instruments, as well as the draft instruments themselves. The Impact Assessment also updates, where relevant, the figures given in the Impact Assessment that accompanied RESA. It should be noted that the costs and benefits given in this Impact Assessment update the specific figures regarding the Primary Authority scheme as set out in the Impact Assessment accompanying RESA. These should not be regarded as additional to the figures set out there.

Background – The Primary Authority Scheme

5. The Primary Authority scheme gives organisations that are regulated by more than one local authority (these are most likely to be businesses, but could also be a charity or not-for-profit organisation for example) access to a Primary Authority partnership with one local authority. A local authority can only be a Primary Authority for a particular organisation if it is nominated by LBRO to carry out this role. LBRO may nominate a local authority to act as a Primary Authority where a local authority and an organisation have already agreed in writing to a partnership, or where an organisation has requested that LBRO nominate a local authority to be its Primary Authority.

6. A nominated Primary Authority is responsible for giving the organisation that it partners advice and guidance regarding the relevant function or functions which the partnership is designed to cover. The relevant functions that a Primary Authority partnership can cover are local authority trading standards, environmental health, licensing and fire safety. So, for example, a business could have a Primary Authority that is responsible for giving it advice and guidance regarding local authority environmental health and fire safety functions. Alternatively, a charity could have a Primary Authority that is responsible for giving it advice and guidance regarding local authority trading standards functions.
7. The scheme also makes provisions regarding consultation that must take place between local authorities when a Primary Authority is involved. Where a local authority other than the relevant Primary Authority (described in RESA as “enforcing authorities”) proposes to take enforcement action against an organisation with a Primary Authority, the enforcing authority must consult the relevant Primary Authority first. The Primary Authority will then have the right to direct the enforcing authority not to take the proposed enforcement action if they believe that it is inconsistent with advice or guidance that they had previously given the organisation.
8. Where a proposed enforcement action has been referred to a Primary Authority and the parties involved cannot reach an agreement as to the action that should be taken, the enforcing authority, the Primary Authority or the organisation involved can refer the action to LBRO for determination.

Policy Objective

9. Part 2 and schedule 4 of RESA contains four order-making powers which allow the Secretary of State to make statutory instruments that elaborate on key aspects of the scheme outlined in paragraphs 5-8 above. These powers are listed in the table below.

Reference	Purpose of the Order-making power	Policy objective
Section 24(1), RESA 2008	To define “relevant function” in relation to local authorities in Scotland and Northern Ireland	To apply the Primary Authority scheme to local authorities in Scotland in respect of reserved matters and Northern Ireland in respect of non-transferred matters (i.e. to apply the scheme to local authorities in Scotland and Northern Ireland in respect of matters that have not been devolved to the Scottish Executive or the Northern Ireland Assembly).

Reference	Purpose of the Order-making power	Policy objective
Section 28(6), RESA 2008	To define those activities undertaken by local authority regulatory services that should, or should not be regarded as enforcement action for the purposes of the Primary Authority scheme.	To ensure that routine activities of local authority regulatory services such as giving advice, inspecting and gathering intelligence can be carried out without the need for an enforcing authority to contact the relevant Primary Authority.
Section 29, RESA 2008	<p>To exclude those activities undertaken by local authority regulatory services which, while they should be regarded as enforcement action, should also be carried out without delay.</p> <p>To specifically exclude those circumstances where:</p> <ul style="list-style-type: none"> - enforcement action is required urgently to avoid a significant risk of serious and imminent harm to human health or the environment (including the health of animals or plants); - enforcement action is required urgently to avoid a significant risk of serious harm to the financial interests of consumers; - the application of the consultation provisions in Part 2 of RESA would be wholly disproportionate. 	To ensure that where necessary local authorities can take enforcement action immediately without prior consultation with the relevant Primary Authority. For example, when a local authority is taking enforcement action against a business so as to address a serious threat to human health or the environment.
Paragraph 6(1) of Schedule 4 RESA 2008	To set out procedures to be followed when a proposed enforcement action is referred to LBRO for determination.	To allow for effective and efficient decision-making by LBRO.

10. These statutory instruments are key to the effective functioning of the Primary Authority scheme.

Methodology

11. These statutory instruments implement the Government's policy as outlined in the Impact Assessment that accompanies RESA. This Impact Assessment is, therefore, based to a large extent on the figures given there. However, there are some minor revisions to the figures identified in the Impact Assessment that accompanies RESA regarding the Primary Authority scheme.
12. A number of assumptions were explicitly set out in the Impact Assessment which accompanied the draft RES Bill (published May 2007)⁵ and consultees were explicitly invited to comment on these. Where no comment was received, or no alternative was suggested, the relevant figures were retained in the final Impact Assessment accompanying RESA.⁶
13. The assumptions we have used in quantifying the impact of the statutory instruments being consulted on here are set out at the end of this document, and consultees are invited for their views on these. The assumptions will be reviewed in the light of the consultation and the Impact Assessment accompanying the final statutory instruments will take any comments into account.

Costs and Benefits of the Primary Authority Scheme: General

14. The following text draws extensively on the Impact Assessment that accompanies RESA. The specific costs and benefits of the draft statutory instruments are set out at paragraphs 39-51 below.

Background

15. It is estimated that there are 30,000 businesses operating across local authority boundaries in the UK.⁷ However, it is difficult to estimate how many businesses that will enter into a Primary Authority partnership.⁸ Many businesses that operate across local authority boundaries will only operate across two or three local authorities and may not wish to enter into a Primary Authority partnership as a result. Some other businesses may not find the scheme cost effective. On the basis of the consultation on the draft Bill, we believe that there will be 900 registered partnerships after five years.⁹ We estimate that, on average, these would be developed with firms that operate across an average of 200 local authorities each.¹⁰

⁵ <http://www.berr.gov.uk/files/file44594.pdf>

⁶ <http://www.berr.gov.uk/files/file44602.pdf>

⁷ Source: Inter Departmental Business Register, March 2006.

⁸ While any organisation that operates across more than one local authority can enter into a Primary Authority partnership, the vast majority of organisations that will do so will be businesses. For this reason, the analysis of the costs and benefits of the Primary Authority scheme focuses on the costs and benefits to business, as well as those to local authorities.

⁹ Stakeholders were invited to comment on the figure when the Bill was subject to consultation. Few alternative figures were offered by consultees: whatever the final number, the costs and benefits would be proportionate to those set out here.

¹⁰ This assumption has been modified upwards from the 130 in the draft Impact Assessment, reflecting views in the consultation that the number of sites would be considerably larger. However, many schemes will be purely

Costs of the scheme for business

16. There will be some start up costs involved for businesses developing a new partnership with a local authority. This is likely to amount, at most, to a few days' liaison with the authority concerned, above and beyond the amount of routine contact which is necessary under existing arrangements. Throughout this assessment, we have adopted the "senior manager" hourly tariff adopted by the Better Regulation Executive Administrative Burdens Measurement exercise in 2005/6 to measure salary costs in regulation involved for business. We estimated that this would involve approximately three days' work, giving a total cost to business of about £340¹¹ per partnership. For the 900 partnerships, this would mean approximately £300,000 in one-off costs for business.
17. We expect that the level of contact required by a business with its Partnership Authority will be more than compensated by reduced interaction with other local authorities. In other words, the ongoing, annual, work associated with a partnership for businesses will be less costly than the status quo. Some of these benefits are quantified below.

Cost recovery

18. RESA allows Primary Authorities to recover the costs associated with a partnership from the business involved. We estimated in the Impact Assessment that accompanies RESA that this will mean an overall cost to business of up to £7.5 million, based on our estimate of the relevant costs to the local authority, which are set out at paragraph 28 below. The relevant local authority cost is, in effect, directly transferred to the business.¹²

Benefits of the scheme for business

19. Enforcing authorities will be required to contact the relevant Primary Authority before taking enforcement action against a business with a Primary Authority. The intent is to create greater certainty and consistency for businesses operating across more than one local authority. Informal consultation with businesses of different sizes has shown that losses resulting from contradictory advice can be as high as £100,000. This could be due to wasted stock or wasted planning time. Including the associated benefits of the Primary Authority scheme, such as savings in potential court costs as a result of LBRO's determination process, and an increased confidence in planning, we have assumed – conservatively – that LBRO will provide a net saving to business of £15,000 per incident of conflicting

local or regional in scope, and this figure therefore falls short of the 450 local authorities within the scope of the scheme.

¹¹ The senior manager tariff is £16.23 per hour. For the background on Administrative Burdens Reduction, see for instance http://www.dca.gov.uk/pubs/reports/abr_tech_sum.pdf, p. 19. The draft Bill Impact Assessment assumed that 2 days work would be involved; no comments were received, but the figure has been revised upwards for conservatism to three days' work of seven hours each.

¹² This is an estimate and should in no sense be taken as a basis for charging on particular schemes. The costs of individual schemes will vary widely, reflecting factors like the size of the business, the number of local authorities involved, and the business's level of compliance with the underlying regulations.

advice.¹³ Research and informal consultation suggests that there are a range of such incidents, from two to four per year per partnership.¹⁴ We therefore estimate that the annual saving to business would range from between £24.3 million and £48.6 million annually.¹⁵

Costs and Benefits to Local Authorities

20. Local authorities form the other group with most costs and benefits from the Primary Authority scheme. While the scheme will bring some costs to those authorities that act as a Primary Authority, the effect of more systematic communication between local authorities and efficient dispute resolution by LBRO will be a reduction in the time and resources dedicated by all other local authorities to regulating those organisations involved in the Primary Authority scheme. The overall savings resulting from this are likely to be considerable.
21. Other aspects of LBRO's work, including its role in setting national priorities for local authority regulatory services, will support better communication between, and a more strategic approach amongst, central government, national regulators and local government. This will reduce the burdens experienced by local authorities when implementing the policies of central government and national regulators.
22. The following data and assumptions were consulted upon as part of the consultation on RESA, and they are used throughout this part of the Impact Assessment:
 - There are approximately 450 local authorities with enforcement responsibilities across the UK;

¹³ DTI research suggested that businesses found that losses ranged between a few thousand and, in some cases, as much as £100,000, and that these would happen 2-4 times a year.

<http://www.dti.gov.uk/files/file37268.pdf> The assumption here – that a typical incident will cost a business £15,000 – draws on this work and discussions with business throughout the consultation on the draft Bill.

¹⁴ DTI research indicated that cases of inconsistency would typically happen 2-4 times a year. The consultation on the draft Bill did not elicit any alternative figures in the formal response; further discussions with a number of businesses throughout the consultation process have confirmed that losses on this scale and with this level of frequency are common. This figure reflects the experiences of businesses currently in voluntary Home / Lead partnerships; where a business enters a Primary Authority partnership without having been involved in the voluntary schemes beforehand, the benefits of increased consistency are likely to be larger than those given here.

¹⁵ That is, 2-4 incidents per year at £15,000 each over an expected 900 partnerships. The total figures are likely to be higher. A small adjustment downwards (of 10%) from the highest possible savings has been made to reflect the fact that while the statutory contact provision will resolve many issues in line with the initial advice given to the firm, LBRO will not always agree with the Primary Authority in the few cases that will go to determination, so that some of the costs will remain. This is likely to be an underestimate, as it reflects the position of businesses already involved in voluntary schemes; benefits for those with a new Partnership are likely to be considerably greater. The scheme is also likely to bring wider benefits in terms of information and intelligence sharing beyond the strict terms of the statutory requirements.

- The average hourly cost of the work of a Trading Standards or Environmental Health Officer are approximately £27.75¹⁶;
- Businesses operating across more than one local authority operate in, on average 200 local authorities;
- There will be 900 Primary Authority Partnerships after five years of the schemes operation.

Costs

23. The evidence regarding the cost of administering existing voluntary partnerships is not consistent; much relates to experiences with the small number of firms with the largest national presence. Our estimate of costs must reflect the whole range of businesses that might be involved in the Primary Authority scheme, the majority of which operate on a smaller scale.

Start up costs

24. We estimated that setting up a Primary Authority partnership would involve 75 hours of a single officer's time.¹⁷ This equates to a cost of approximately £2100 per scheme. In total, 900 new schemes would cost local authorities approximately £1.9 million. We expect that the majority of these costs to be spread over at least five years.

Annual costs for enforcing authorities

25. The existing research relating to the costs of schemes similar to the Primary Authority scheme deals with referrals. Referrals take place where enforcing authorities refer complaints regarding a business to the relevant Primary Authority for it to follow-up with its partner business. Referrals will not form part of the statutory Primary Authority scheme. Partnerships set up under the provisions in RESA may well have a referrals component but these will be purely voluntary and the associated costs and benefits are not, therefore, dealt with here. However, experience with existing schemes does help establish the likely scale of work that will be required under the Primary Authority scheme. Research undertaken by the then DTI and our own discussions with local authorities established that there is considerable variations in the number of referrals that need to be processed in a year. Officers supporting some partnerships have to field as many as 300 referrals in a year; in other cases only a handful of cases were referred.¹⁸

¹⁶ There was a consensus amongst local authorities that the figure in the draft Bill IA was too low (£18.50). The figure has been revised upwards accordingly, by 50%; this represents the additional marginal salary and on-costs involved, but does not include overheads which would be incurred in any case like building and IT costs.

¹⁷ That is two weeks' full time work; the estimate is based on discussion with local authorities operating a range of schemes. In the consultation, no comment on this specific figure in the draft IA was made.

¹⁸ Source: discussion with business representatives and DTI research published at: <http://www.dti.gov.uk/files/file37268.pdf>

26. The Primary Authority scheme is narrower in scope than the existing referrals-based schemes and the requirement to consult the Primary Authority only has effect where an enforcing authority proposes to take enforcement action against a business with a Primary Authority. Local authority trading standards, environmental health, licensing and fire safety services initiate a large number (tens of thousands at least, depending on definitions)¹⁹ of enforcement actions in a year. Some of these will be against businesses that operate in only one local authority and will not, therefore, have access to the Primary Authority scheme, some of them will relate to private citizens who also will not have access to the scheme. For the purposes of the RESA Impact Assessment we assumed that there will be, on average, 75 incidents per year²⁰ where the statutory requirement for an enforcing authority to consult the Primary Authority regarding a proposed enforcement action will be triggered. The majority of these cases would be routine and reflecting this, we estimated that these will take three hours' additional work for the enforcing authority above and beyond the work that already goes into enforcement in any case. The result would be an annual cost of £5.6 million.²¹
27. We expect that LBRO determination in disputes between Primary Authorities and enforcing authorities will happen in a very small number of cases. We therefore assume an average cost of one week's officer time per local authority per year. On this basis, we anticipate that costs for local authorities should not exceed £500,000.²²

Annual costs for the Primary Authority

28. The Primary Authority will have an ongoing advisory function in relation to the business. Often, this would be an important part of its routine relationship with the business in the ordinary course of events, but under the Primary Authority scheme this work will include follow up from statutory contacts by enforcing authorities and will entail, we assume, an additional 300 hours of officer time per year per partnership (approximately one sixth FTE).²³ This would entail a total cost to Primary Authorities of £7.5 million.²⁴

¹⁹ From CIPFA statistics for 2003-4, as used by Hampton Report.

²⁰ The figure of 100 used in the draft Bill IA has been revised downwards, reflecting the inclusion of a number of additional exemptions (including a de minimis exemption) to be made in the scheme set out in the final Bill. This will reduce the number of actions which require consultation.

²¹ That is, 900 partnerships generating 75 "triggers" each, necessitating three hours' work at the local authority tariff set out above. The consultation revealed a consensus amongst local authorities that the half-hour originally assumed was unrealistic – though we would not expect the consultation process to require significantly more information-gathering than is already required for an enforcement action. The time involved reflects the need for a meaningful consultation process.

²² That is, 37.5 hours for each of the 450 authorities at the hourly tariff set out above.

²³ The workload of existing schemes varies considerably. This is based on discussions with authorities hosting multiple voluntary partnerships, which suggest a typical range of between 0.1 – 0.25 FTE for an "average" scheme. Some will involve substantially more work; more will involve substantially less. The figure is intended to include any additional work involved in preparing and publishing Inspection Plans (see paragraph 35 below).

²⁴ 300 hours at the local authority tariff set out above for each of the 900 partnerships.

Local Authority Benefits

Hosting a Primary Authority Scheme

29. The benefits of running a Primary Authority scheme are considerable and include the wider economic advantages that come to the local area through the existence of a strategic partnership with a major firm (which is an important element of the “place shaping” vision for local authority services set out in the Local Government White Paper²⁵). Within regulatory service departments, the benefits also include development opportunities for local staff given the opportunity to engage in ongoing work with a major business. We have not sought to quantify these benefits, but they should be taken into account when considering the overall impact of the Primary Authority scheme.
30. It should be noted that cost recovery for Primary Authorities will directly offset the total cost of administering the scheme: i.e. a transfer of £7.5 million, as set out in paragraph 29 above.²⁶

Enforcing Authorities

31. The costs of the Primary Authority scheme are outweighed by the wider benefits to the local authority regulatory community as a whole. All local authorities will benefit from the application of the expertise of the Primary Authority which will be best placed to take a strategic overview of how regulation should be applied to a particular business. The work of an enforcing authority without the benefits of a Primary Authority partnership involves a number of costs: familiarisation, risk assessment, and follow-up work where there are enforcement issues, up to and including prosecution. The work undertaken under each of these headings by the Primary Authority will reduce the workload of all other local authorities dealing with a particular business.
32. We anticipate that the requirement to contact the Primary Authority (although in itself a cost, as outlined in paragraphs 26-28) will have quantifiable benefits in terms of resources for enforcing authorities.
33. As things stand, local authority enforcement action often proceeds against a business without any consultation with the authority that partners that business. Often, this action contradicts the advice or guidance that the business has been given by its partner authority. By requiring that an enforcing authority contacts the relevant Primary Authority prior to taking enforcement action, the Primary Authority scheme will affect local authority enforcement actions in a number of ways:
- I. A number of routine enforcement queries will be abandoned once reference has been made to the advice or guidance that has been given by the Primary Authority on a particular issue. It is likely that this would save several hours of officer time.

²⁵ *Strong and prosperous communities: the Local Government White Paper*, 2006, pp 5-21.

²⁶ There is a risk that some costs will not be recovered where they go out of business. The Government expects that LBRO will continue to monitor the impacts of the scheme.

- II. With some more difficult issues where there is basic disagreement between local authorities, the matter will go to a time-limited process of determination by LBRO, which will be less costly than prosecution (and without the attendant risks). Such cases - as things stand - would cost a substantial amount of officer time.

34. In the Impact Assessment that accompanies RESA, we estimated – and tested in consultation – that there would be between two and four cases per partnership per year where advice to a regulated person conflicts with a proposed enforcement action. Using this figure across the expected 900 partnerships, this equates to between 1800-3600 cases where it is likely that the Primary Authority scheme will remove inconsistency and make enforcement unnecessary. To capture the wide range of enforcement activities potentially involved (including costs up to and potentially including prosecution²⁷) we assumed that two weeks' total officer time is involved in each of these cases.²⁸ This part of the Primary Authority scheme is likely therefore to result in a range of quantifiable benefits, from at least £3.7 million to £7.5 million.²⁹ There will also be benefits to the enforcing authority following from consultation where there is no basic difference of view, for instance, better intelligence-sharing. For conservatism, we deliberately chose not to quantify these.

Inspection Plans

35. RESA also makes provision for a Primary Authority, in consultation with its business, to prepare and publish an Inspection Plan which makes recommendations regarding the way a business ought to be inspected. Currently, except in the small number of cases where national voluntary agreements exist, local authorities cannot rely on national intelligence about particular multi-site businesses. Consequently, local authorities need to individually engage in intelligence-gathering in order to focus their enforcement efforts. In the RESA Impact Assessment, we estimated that Partnerships would typically deal with businesses that operate across an average of 200 local authorities. There will be time savings for other local authorities as a result. We estimated that for a given local authority in relation to a particular business, 2 hours' work³⁰ per year as a result of the local authority taking advantage of the more targeted approach to regulation suggested by the expert Primary Authority in an inspection plan. Assuming that 180 businesses³¹ (that is, one fifth of our total) take up this part of

²⁷ For an indication of the high costs of prosecution to enforcers, see the Impact Assessment prepared for Part 2 of the Bill, below.

²⁸ The true benefits may however be greater; DTI research noted that cases of disagreement under existing arrangements - where the Primary Authority role does not have a statutory footing - results in considerable work for Primary Authorities as well: <http://www.dti.gov.uk/files/file37268.pdf>. In a complete analysis of the benefits, other significant costs, including legal costs and the risk of failed attempts at prosecution, should also be taken into account.

²⁹ That is 2-4 times in each of the 900 partnerships, times 75 hour's officer time at the local authority tariff set out at paragraph 44 above.

³⁰ The assumption in the draft IA that five hour's work would be involved has been revised downwards for conservatism.

³¹ This assumption was set out in IA accompanying the draft Bill. No convincing alternative figures were received. The number will be significantly smaller than the number of partnerships as a whole, for two reasons: (i) Local

the proposals, the benefits to local authorities from the use of inspection plans is likely to be about £2 million.³²

Costs and Benefits to Central Government

36. The statutory instruments will mean no additional costs to central government. There will be significant but largely unquantifiable benefits of specific value to policy makers (the Primary Authority scheme is likely to promote a more intelligence-led approach to enforcement which will help inform LBRO's advice to Government, in turn promoting better policy-making). No attempt to quantify these benefits has been made.
37. LBRO's anticipated budget, £4.4 million, was included in the RESA Impact Assessment. This included expenditure on all of LBRO's functions under Part 1 of the Act, and is not relevant to this Impact Assessment. It has not therefore been considered here.

Impact of the Statutory Instruments

38. Those aspects of the RESA Impact Assessment dealing with the costs and benefits of the Primary Authority scheme are set out above. The figures will not be fundamentally affected by the orders under consultation, but there are details in the orders which need to be reflected in a revised assessment of costs and benefits.

Legislative Scope in Scotland and Northern Ireland

39. The orders specifying the legislative scope of the scheme in Scotland and Northern Ireland will have no significant impact on the costs and benefits of the scheme as predicted in the Impact Assessment accompanying RESA. The figures given there were based on full application of the scheme to local authorities in Scotland and Northern Ireland in respect of reserved and non-transferred matters respectively.

Definition of enforcement action, and exclusions to the requirement to contact the Primary Authority

40. The statutory instruments relating to enforcement action will elaborate on the definition of enforcement action given in RESA, and create exclusions from the

Authorities will not be required to draw up inspection plans; the measure set out in section 30 is purely permissive in character; (ii) Inspection Plans will not be relevant in many of the relevant regulatory functions where routine inspection is not common. .

³² That is, two hours' work at the local authority tariff over the 200 authorities for each of the 180 partnerships involved.

requirement to consult with the relevant Primary Authority prior to taking enforcement action.

41. In the Impact Assessment accompanying RESA, we used the assumption, tested in consultation, that the “typical” Primary Authority partnership would entail 75 incidents per year which would require formal notification to the relevant Primary Authority of proposed enforcement action.
42. The statutory instruments will make it clear that informal enforcement action, including advice, will not be considered enforcement action for the purposes of the Primary Authority scheme. In addition, where enforcement action is required urgently the statutory instruments will make exclusions from the requirement to notify the Primary Authority except on a post hoc basis. This means that the statutory instruments will, in practice, narrow the meaning of enforcement action that is set out in RESA, and reduce the number of occasions when an enforcing authority will be required to consult a Primary Authority before taking enforcement action. The effect in practice to the operation of the scheme is likely to be substantial.
43. The Chartered Institute of Public Finance and Accountancy (CIPFA) collect statistics on enforcement action taken by Trading Standards officers in Great Britain. In 2006, there were 99,903 occasions where informal cautions and advice were given in writing, as opposed to 5,382 formal cautions and 4,525 prosecutions commenced. Of course, the great majority of these relate to businesses that will not be eligible for a Primary Authority partnership, but the proportion between informal and formal action is approximately 10:1. A similar ratio is evident from Food Standards Agency statistics in relation to environmental health services. These show that in 2006, 95% of all relevant enforcement action took the form of written warnings – many of which would be excluded by the proposed statutory instruments from any consultation requirement.³³
44. The statutory instruments give clarity that informal advice will be excluded from any requirement to notify the Primary Authority. This is likely to mean lower costs for local authorities to those predicted in the Impact Assessment accompanying RESA. Our assumption, tested in the consultation on the draft Bill was that there would be 75 incidents per year, where enforcing authorities would need to formally consult the relevant Primary Authority. A range of costs is more likely to accurately convey the impact of this, reflecting the narrower definition of enforcement action used in the statutory instruments. We propose therefore that it would be better for a range of figures to be used as a basis for this Impact Assessment. We have adopted a range of between 50 formal notifications per year, and the 75 that was originally proposed in the RESA Impact Assessment. This would mean wider costs for local authorities of between £3.7 million and £5.6 million per year. The calculation here is based on the estimates given at paragraph 27 above: three hours’ additional work for each enforcing authority per enforcement action requiring consultation with the Primary Authority.

³³ <http://www.food.gov.uk/multimedia/pdfs/board/info080302.pdf>

45. The related benefits in the Impact Assessment (for business and local authorities alike) accompanying RESA were calculated on a different basis, starting from the likely number of incidents per year (2-4, see paragraph 19 above) where the enforcement action proposed by an enforcing authority would conflict with advice or guidance given by the Primary Authority to its partner business rather than the number of proposed enforcement actions which would generate the need for consultation, and would therefore be unlikely to be affected by this change. The bulk of these benefits derive from cases where formal types of enforcement action – notably prosecution – cannot go ahead where they conflict with advice that has been given by the Primary Authority. It is here that the biggest costs arise for businesses and local authorities alike: for the business, the costs of revising policies, product lines or procedures across the country, and, for the local authority, the expense of investigation and preparation as well as the intrinsic costs (including legal costs) of formal action against a business. The majority of the exclusions set out in the statutory instrument will allow for emergency action in specific cases, but will not affect most of the forms of action involved in the most costly cases of inconsistency. The order is unlikely therefore to significantly reduce the benefits set out in the RESA Impact Assessment, and we anticipate that these will remain within the predicted range.
46. The second order allows for exemptions on the requirement to contact the Primary Authority in a number of cases. These will include emergencies where delay would cause significant risk of serious harm to human health, etc; without such exemptions, the scheme could cause significant social costs. The draft orders however closely reflect long-established policy, and the draft orders will therefore have no material impact on the costs and benefits associated with the scheme as published alongside RESA (see for instance paragraphs 25 to 27 above).

Referrals and determination procedure

47. The statutory instrument relating to LBRO's role in referrals and determination puts forward a slightly different model to that proposed in the Impact Assessment accompanying RESA.
48. The statutory instrument sets out rules, including deadlines, for referral to LBRO for determination. This will have the effect of reducing the number of cases referred to LBRO.
49. In the Impact Assessment accompanying the Act we made and consulted upon, the estimate that each local authority would be involved in one determination case per year. This would require one officer's full time work for a week – in addition to the work that would normally be involved in preparing for a formal enforcement action in any case. In practice, we believe that many of these cases will not reach a stage of formal determination. We estimate that up to 50% of the possible cases will not progress to determination or alternatively will be resolved

informally.³⁴ We have not however revised the anticipated costs downward, as even those cases which are resolved informally, or which are not suitable for determination by LBRO, will still entail costs for the local authority involved: including those of discussion with the Primary Authority, and possibly with LBRO.

50. The costs of determination by business were not quantified in the Impact Assessment that accompanies RESA. This reflects the fact that the decision as to whether to refer an enforcement action to LBRO is purely voluntary. LBRO may recover any costs associated with the referral by a business from that business. On the basis of initial discussion with LBRO, we believe that this *may* cost up to several thousand pounds' worth of LBRO staff time in more difficult cases. However, given the uncertainty (and the fact that the business would only make such a referral if it was likely to be cost effective in terms of likely outcome), we have not factored this into our estimates.
51. The effects of all these developments for the impacts of the Primary Authority scheme as a whole are summarised in the table on the next page.

³⁴ Source: conversations with the Local Better Regulation Office.

Revised costs and Benefits of Primary Authority scheme: Summary ³⁵	
<u>Business annual costs</u> (Primary Authority cost recovery)	£7.5 million
<u>Business annual benefits</u> (Improved consistency)	£24.3 million - £48.6 million
Net Business annual benefits	£16.8 million - £41.1 million
<u>Local Authority Costs*</u>	£11.7 m – £13.6 m
Enforcing Authority: requirement to contact PA*	£3.7 m - £5.6 m
Primary Authority costs	£7.5 million
Referral and determination	£500,000
<u>Local Authority Benefits</u>	£13.2 m - £17 m ³⁶
Risk Assessment (Inspection Plans)	£2 m
Enforcing Authority: requirement to contact PA	£3.7 - £7.5 million
Cost recovery	£7.5 million
<u>Net local authority annual benefits*</u>	£1.5 m - £3.4 m
NET OVERALL ANNUAL BENEFITS*	£18.3 million - £44.5 million

Note: figures which have changed from the IA accompanying RESA have been marked *.

³⁵ This table gives annually recurring costs and benefits. Net start-up costs, spread over five years, will be £300,000 and £1.9 million for business and local authorities respectively. Figures are rounded to the nearest £100,000.

³⁶ The benefits in the Act Impact Assessment were greater; reflecting the impact of LBRO's other work under Part 1 of the Act. The estimate set out there is still valid, but the specific benefits involved are not relevant to this IA.

52. Our best estimate is that the net overall annual benefits of the scheme for all parties are expected to amount to £31.4 million (the midpoint of the range given in the table above).³⁷ The cover sheet to this Impact Assessment gives Net Present Value estimates of the key costs and benefits associated with the statutory instrument; the midpoint of the net benefit range, estimated over 15 years, amounts to £307.7 million.

Risks and Unintended Consequences

53. The main potential impact on the figures given here was addressed in the Impact Assessment accompanying RESA. The most important of these were: (a) the risk of lack of take-up of the Primary Authority scheme owing to the costs involved for local authorities; (b) the unintended consequences following from too wide-ranging a role for the Primary Authority in scrutinising enforcement actions by other local authorities.

54. The former has been addressed by making a power of cost recovery clear on the face of the Act; the second by giving a more focused power to approve enforcement action on the basis of consistency with advice the authority has already been given. The rationale for this approach is set out in the Government's response to the consultation on the draft Bill.³⁸ The major risks with Part 2 of the Act in its final form are: i) that the requirements for consultation between enforcing authorities damage essential protections; and ii) that of serious divergence between the regulatory systems applying to different sized business; iii) that local authorities fail to take up the opportunity to recover costs for the Primary Authority scheme from the relevant business. LBRO's powers to monitor and modify Primary Authority partnership arrangements will help address this issue.

55. The statutory instruments have a number of less serious, but specific, risks:

- a. the risk that areas of relevant legislation in Scotland and Northern Ireland may have been missed from the listing order;
- b. the risk that the definition of enforcement action is too wide, preventing swift action by local authorities, or too narrow, meaning that all the expected benefits for businesses may not be realised.

56. The Consultation accompanying the draft statutory instruments seeks views from local authorities, businesses and regulators which will help manage these risks.

Post-Implementation Review

57. Part 1 of RESA specifies that there should be a review of LBRO and its work three years after it comes into effect (which we expect to mean October 2010).

³⁷ For comparison, the comparable set out in the RESA Impact Assessment was a net annual benefit of **£30.4 million**.

³⁸ http://bre.berr.gov.uk/regulation/documents/res_bill_responses/res_bill_draft.pdf

58. The review is also likely to address a number of issues which are relevant to the Primary Authority scheme:
- a. the scale of take-up of Primary Authority partnerships;
 - b. the extent of the benefits to business arising from the scheme;
 - c. any unanticipated burdens on local authorities in maintaining Primary Authority partnerships;
 - d. the effectiveness of the cost-recovery mechanism in financing the scheme.
59. The case for any review of the orders under consultation in this consultation will be considered as part of that review.

Key assumptions used in this Impact Assessment

60. The following **new** estimates were used in this Impact Assessment.

Subject	Assumption
Number of enforcement actions triggering requirement to consult the Primary Authority per Primary Authority partnership per year	50-75
Proportion of enforcing authority referrals resolved before formal determination process is started	50%

61. ***Consultees are specifically invited to comment on these figures in the light of the consultation document and the text of the draft statutory instruments.***

Specific Impact Tests

62. **Competition and small firms**: There have been extensive discussions with small businesses and their representatives during the development of RESA. It is expected that small and medium sized businesses will benefit from LBRO's work in creating a more consistent regulatory approach amongst local authorities and reducing the burdens imposed on businesses by local authorities. Those small and medium sized business that enter into Primary Authority agreements will also enjoy the benefits discussed above.
63. **Sustainability**: The statutory instruments support two of the principles of sustainable development as set out in the Government's sustainable development strategy: (i) ensuring we are a strong, healthy and just society; and (ii) achieving a sustainable economy. Both of these principles rely on robust and fair regulation and clear sanctions to back up regulators in their duties.

64. The remaining specific tests are not relevant:

- Legal aid: There will be no impact on legal aid.
- Environment: We do not believe that there will be any impacts on these areas. We have looked at the initial tests and are satisfied that they do not apply; LBRO will be under a duty to promote more effective regulation, including environmental regulation.
- Health: We do not believe that the statutory instruments will have a health impact.
- Equality: We do not believe that there will be an impact on any of the equality strands. We have looked at each of the equality impact initial tests individually and are confident that there is no impact.
- Rural proofing: We anticipate no adverse impact of the proposals on rural communities.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	No	No

ANNEX B - DESCRIPTION OF RELATED GOVERNMENT ACTIVITIES

Consultation on Regulatory Budgets

Effective and well focused regulation plays a vital role in correcting market failures, promoting fairness and increasing competition. Society expects the Government to provide protection for the public, consumers, employees and the environment consistent with the best international standards. However, inefficient regulation can impose significant burdens on the private, public and third sectors affecting our national competitiveness and the quality of public services.

There are two main expected benefits from implementing a system of regulatory budgets which would make the costs and benefits of new regulations explicit:

- first, a system of regulatory budgets could result in a better allocation of resources across the economy, lower burdens for the same or better benefits, by making policy makers aware that regulatory costs are not a “free good”. Regulatory budgets would therefore provide an incentive to use regulatory measures in a cost-effective manner. In order to ensure that decisions are not solely based on the cost of an intervention, the decision on which regulations to introduce would also take account of the scale of the associated benefits to ensure that the most cost-effective policies were prioritised. With regulatory budgets, departments would be able to make better-informed decisions about the detail, prioritisation and timing of new policies, including assessing potential conflicts and exploiting synergies; and
- secondly, a regulatory budgets system could provide greater control over the total costs of regulation, giving the Government greater ability to balance the public benefits with the costs of the private resources used. It would allow Government to look at the potential future impact of regulation on the economy in a more coherent and evidence based way, by strengthening the ability to foresee the total impact of new policies.

The Government is consulting on a system of regulatory budgets (see www.berr.gov.uk/files/file47129.pdf). The consultation will close on 12 November 2008.

Consumer Law Review

The review is looking at whether there are new approaches which could deliver better outcomes for consumers, whilst at the same time reducing unnecessary burdens for business and promoting fair and competitive markets.

In particular, it is looking at:

- whether greater use can be made of principles rather than prescriptive legislation
- what enforcement structures and practices are needed to ensure resources are focussed on areas of greatest detriment; and
- whether enhancing consumer empowerment can provide incentives to help consumers get a fair deal and reduce burdens on business.

The review issued a call for evidence which closed on 31 July. The review is due to report by the end of the year.

Anderson Review of guidance provision

Every year almost half of businesses seek external advice about how to follow regulations, spending at least £1.4 billion. The government has commissioned an independent review led by Sarah Anderson CBE into how it can implement policies to give small businesses greater certainty around guidance.

The review, which will report in late Autumn 2008, will examine the types, origins, status and reliability of government guidance for small businesses on how to follow regulations. It will look at ways to give small businesses greater certainty that when they have followed guidance that they have complied with the law. It will also examine the impact of legal disclaimers in government guidance on small business confidence when following regulations, and identify ways of making improvements.

For further details on the Government's wider regulatory reform agenda, see: <http://www.berr.gov.uk/bre/index.html> .

ANNEX C - RELEVANT RESERVED AND NON-TRANSFERRED LEGISLATION AND LOCAL AUTHORITY FUNCTIONS

In respect of Scotland

Any enforcement functions under or by virtue of the following enactments, or enactments made under them;

Medicines Act 1968 (section 109) ⁽³⁹⁾

Unsolicited Goods and Services Act 1971 ⁽⁴⁰⁾

Poisons Act 1972 (section 9)⁽⁴¹⁾

Consumer Credit Act 1974⁽⁴²⁾(section 161)

Health and Safety at Work, etc Act 1974⁽⁴³⁾ (Part 1, section 18(4))

Video Recordings Act 1984⁽⁴⁴⁾ (section 16A)

Copyright, Designs and Patents Act 1988⁽⁴⁵⁾ (sections 107A and 198A)

Road Traffic Offenders Act 1988⁽⁴⁶⁾ (section 4)

Offshore Safety Act 1992⁽⁴⁷⁾ (sections 1 and 2)

Timeshare Act 1992⁽⁴⁸⁾ (section 10 and Schedule 2)

Trade Marks Act 1994⁽⁴⁹⁾ (section 93)

Olympic Symbol etc (Protection) Act 1995⁽⁵⁰⁾

⁽³⁹⁾ 1968 c.67
⁽⁴⁰⁾ 1971 c.30
⁽⁴¹⁾ 1972 c.66.
⁽⁴²⁾ 1974 c.39.
⁽⁴³⁾ 1974 c.37.
⁽⁴⁴⁾ 1984 c.39.
⁽⁴⁵⁾ 1988 c.48.
⁽⁴⁶⁾ 1988 c.53.
⁽⁴⁷⁾ 1992 c.15.
⁽⁴⁸⁾ 1992 c.35.
⁽⁴⁹⁾ 1994 c.26.
⁽⁵⁰⁾ 1995 c.32.

Any enforcement functions under or by virtue of the following enactments, or enactments made under them, where the exercise of those functions relates to the protection of consumers;-

- Explosives Act 1875⁽⁵¹⁾ (sections 31, 32 and 40)
- Cancer Act 1939⁽⁵²⁾, section 4
- Trade Descriptions Act 1968⁽⁵³⁾, section 12
- Development of Tourism Act 1969⁽⁵⁴⁾
- Supply of Goods (Implied Terms) Act 1973⁽⁵⁵⁾
- Fair Trading Act 1973⁽⁵⁶⁾
- Hallmarking Act 1973⁽⁵⁷⁾
- Prices Act 1974⁽⁵⁸⁾
- Unfair Contract Terms Act 1977⁽⁵⁹⁾
- Sale of Goods Act 1979⁽⁶⁰⁾
- Consumer Protection Act 1987⁽⁶¹⁾
- Property Misdescriptions Act 1991⁽⁶²⁾
- Enterprise Act 2002⁽⁶³⁾, Part 8
- Fireworks Act 2003⁽⁶⁴⁾ (section 12)
- Energy Act 1976⁽⁶⁵⁾
- Weights and Measures etc Act 1976⁽⁶⁶⁾
- Public Passenger Vehicles Act 1981⁽⁶⁷⁾
- Supply of Goods and Services Act 1982⁽⁶⁸⁾

- Crystal Glass (Descriptions) Regulations 1973⁽⁶⁹⁾
- Aerosol Dispensers (EEC Requirements) Regulations 1977⁽⁷⁰⁾
- [Alcohol Tables Regulations 1979⁽⁷¹⁾]

(51) 1875 c.17
 (52) 1939 c.13.
 (53) 1968 c.29.
 (54) 1969 c.51.
 (55) 1973 c.13.
 (56) 1973 c.41.
 (57) 1973 c.43.
 (58) 1974 c.24.
 (59) 1977 c.50.
 (60) 1979 c.54.
 (61) 1987 c.43.
 (62) 1991 c.29.
 (63) 2002 c.17.
 (64) 2003 c.22.
 (65) 1976 c.76.
 (66) 1976 c.77.
 (67) 1981 c.14.
 (68) 1982 c.29.
 (69) S.I. 1972/1952
 (70) S.I. 1977/1140
 (71) S.I. 1979/132

Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 ⁽⁷²⁾
 Package Travel, Package Holidays and Package Tours Regulations 1992 ⁽⁷³⁾
 Medicines (Advertising) Regulations 1994 ⁽⁷⁴⁾
 Footwear (Indication of Composition) Labelling Regulations 1995 ⁽⁷⁵⁾
 Toys (Safety) Regulations 1995 ⁽⁷⁶⁾
 Unfair Terms in Consumer Contracts Regulations 1999 ⁽⁷⁷⁾
 Consumer Protection (Distance Selling) Regulations 2000 ⁽⁷⁸⁾
 Medical Devices Regulations 2002 ⁽⁷⁹⁾
 Sale and Supply of Goods to Consumers Regulations 2002 ⁽⁸⁰⁾
 Controls on Certain Azo Dyes and “Blue Colourant” Regulations 2003 ⁽⁸¹⁾
 Creosote (Prohibition on Use and Marketing) (No 2) Regulations 2003 ⁽⁸²⁾
 Biofuel (Labelling) Regulations 2004 ⁽⁸³⁾
 General Product Safety Regulations 2005 ⁽⁸⁴⁾
 Electromagnetic Compatibility Regulations 2006 ⁽⁸⁵⁾
 Consumer Protection and Unfair Trading Regulations 2008⁽⁸⁶⁾
 Cosmetic Products (Safety) Regulations 2008 ⁽⁸⁷⁾
 Textile Products (Determination of Composition) Regulations 2008 ⁽⁸⁸⁾

Any enactment to which section 4(3) of the Act applies with respect to a matter specified in paragraph (d) of that subsection

The granting of licences or permits and any related enforcement functions undertaken by a local authority under the following enactments:

Cinemas Act 1985⁽⁸⁹⁾ (sections 1 to 3A and 5 to 16)
 Road Traffic Act 1988⁽⁹⁰⁾ (the whole Act except sections 39 to 40 and 157 to 159)
 Gambling Act 2005⁽⁹¹⁾

⁽⁷²⁾	S.I. 1987/2117
⁽⁷³⁾	S.I. 1992/3288
⁽⁷⁴⁾	S.I. 1994/1932
⁽⁷⁵⁾	S.I. 1995/2489
⁽⁷⁶⁾	S.I. 1995/204
⁽⁷⁷⁾	S.I. 1999/2083
⁽⁷⁸⁾	S.I. 2000/2334
⁽⁷⁹⁾	S.I. 2002/618
⁽⁸⁰⁾	S.I. 2002/3045
⁽⁸¹⁾	S.I. 2003/3310
⁽⁸²⁾	S.I. 2003/1511
⁽⁸³⁾	S.I. 2004/3349
⁽⁸⁴⁾	S.I. 2005/1803
⁽⁸⁵⁾	S.I. 2006/3418
⁽⁸⁶⁾	S.I. 2008/1277
⁽⁸⁷⁾	S.I. 2008/1284
⁽⁸⁸⁾	S.I. 2008/15
⁽⁸⁹⁾	1985 c.13.
⁽⁹⁰⁾	1988 c.52.
⁽⁹¹⁾	2005 c.19.

Any function under the following enactments which relates to product safety, compliance with standards or weights and measures:-

- Weights and Measures Act 1985⁽⁹²⁾
- Calibration of Tanks and Vessels (EEC Requirements) Regulations 1975 ⁽⁹³⁾
- Measuring Container Bottles (EEC Requirements) Regulations 1977 ⁽⁹⁴⁾
- Alcoholometers and Alcohol Hydrometers (EEC Requirements) Regulations 1977 ⁽⁹⁵⁾
- Taximeters (EEC Requirements) Regulations 1979 ⁽⁹⁶⁾
- Measuring Instruments (EEC Requirements) Regulations 1988 ⁽⁹⁷⁾
- Measuring Instruments (EEC Requirements) (Gas Volume Meters) Regulations 1988 ⁽⁹⁸⁾
- Units of Measurement Regulations 1995 ⁽⁹⁹⁾
- Non-automatic Weighing Instruments Regulations 2000 ⁽¹⁰⁰⁾
- Weights and Measures (Packaged Goods) Regulations 2006 ⁽¹⁰¹⁾
- Measuring Instruments (Automatic Discontinuous Totalisers) Regulations 2006 ⁽¹⁰²⁾
- Measuring Instruments (Automatic Rail-weighbridges) Regulations 2006 ⁽¹⁰³⁾
- Measuring Instruments (Automatic catchweighers) Regulations 2006 ⁽¹⁰⁴⁾
- Measuring Instruments (Automatic Gravimetric Filling Instruments) Regulations 2006 ⁽¹⁰⁵⁾
- Measuring Instruments (Beltweighers) Regulations 2006 ⁽¹⁰⁶⁾
- Measuring Instruments (Capacity Serving Measures) Regulations 2006 ⁽¹⁰⁷⁾
- Measuring Instruments (Liquid Fuel and Lubricants) Regulations 2006 ⁽¹⁰⁸⁾
- Measuring Instruments (Material Measures of Length) Regulations 2006 ⁽¹⁰⁹⁾
- Measuring Instruments (Cold-water Meters) Regulations 2006 ⁽¹¹⁰⁾
- Measuring Instruments (Liquid Fuel Delivered from Road Tankers) Regulations 2006 ⁽¹¹¹⁾

Any enactment to which section 4(3) of the Act applies with respect to a matter specified in paragraph (d) of that subsection.

⁽⁹²⁾ 1985 c.72.
⁽⁹³⁾ S.I. 1975/2125
⁽⁹⁴⁾ S.I. 1977/932
⁽⁹⁵⁾ S.I. 1977/1753
⁽⁹⁶⁾ S.I. 1977/1379
⁽⁹⁷⁾ S.I. 1988/186
⁽⁹⁸⁾ S.I. 1988/296
⁽⁹⁹⁾ S.I. 1988/1804
⁽¹⁰⁰⁾ S.I. 2000/3236
⁽¹⁰¹⁾ S.I. 2006/ 659
⁽¹⁰²⁾ S.I. 2006/1255
⁽¹⁰³⁾ S.I. 2006/1256
⁽¹⁰⁴⁾ S.I. 2006/1257
⁽¹⁰⁵⁾ S.I. 2006/1258
⁽¹⁰⁶⁾ S.I. 2006/1259
⁽¹⁰⁷⁾ S.I. 2006/1264
⁽¹⁰⁸⁾ S.I. 2006/1266
⁽¹⁰⁹⁾ S.I. 2006/ 1267
⁽¹¹⁰⁾ S.I. 2006/1268
⁽¹¹¹⁾ S.I. 2006/1269

Any function under the following enactments which relates to the regulation of business associations

Companies Act 1985⁽¹¹²⁾, Part XI
Business Names Act 1985⁽¹¹³⁾

Any function under section 18 and Schedule 2 of the Energy Act 1976 (114) which relates to price indications

Any function under the Disability Discrimination Act 1995(115) which does not relate to the encouragement of and observance of equal opportunities requirements

In respect of Northern Ireland

Hallmarking Act 1973⁽¹¹⁶⁾
Consumer Protection Act 1987⁽¹¹⁷⁾
Noise Act 1996⁽¹¹⁸⁾
Food Standards Act 1999⁽¹¹⁹⁾
Tobacco Advertising and Promotion Act 2002⁽¹²⁰⁾
London Olympic and Paralympic Games Act 2006⁽¹²¹⁾, except sections 5, 7(2), 7(4), 10 to 18, and 34 to 36
Violent Crime Reduction Act 2006⁽¹²²⁾

[Any enactment to which section 4(3) of the Act applies with respect to a matter specified in paragraph (d) of that subsection.]

⁽¹¹²⁾ 1985 c.6.
⁽¹¹³⁾ 1985 c.7.
⁽¹¹⁴⁾ 1976 c.76
⁽¹¹⁵⁾ 1995 c.50.
⁽¹¹⁶⁾ 1973 c.43.
⁽¹¹⁷⁾ 1987 c.43.
⁽¹¹⁸⁾ 1996 c.37.
⁽¹¹⁹⁾ 1999 c.28.
⁽¹²⁰⁾ 2002 c.36.
⁽¹²¹⁾ 2006 c.12.
⁽¹²²⁾ 2006 c.38.

ANNEX D - DRAFT PRIMARY AUTHORITY SCHEME (DEFINITION OF ENFORCEMENT ACTION) ORDER 2009

D R A F T S T A T U T O R Y I N S T R U M E N T S

2009 No.

REGULATORY REFORM

Primary Authority Scheme (Definition of Enforcement Action) Order 2009

<i>Made</i> - - - - -	<i>000</i>
<i>Laid before Parliament</i>	<i>12th March 2009</i>
<i>Coming into force</i> - - -	<i>6th April 2009</i>

The Secretary of State, in exercise of the powers conferred by sections 28(6) and 29(1) of the Regulatory Enforcement and Sanctions Act 2008⁽¹²³⁾, and with the consent of the Welsh Ministers makes the following Order:

Citation, Commencement and interpretation

1.—(1) This Order shall be known as the Primary Authority Scheme (Definition of Enforcement Action) Order 2009 and shall come into force on 6th April 2009.

(2) In this Order “the Act” means the Regulatory Enforcement and Sanctions Act 2008.

Enforcement action

2.—(1) Subject to paragraph (2), the following action is to be regarded as enforcement action for the purposes of Part 2 of the Act:

- (a) the giving of any communication in writing which indicates that the actions referred to in (b) to (h) below will be taken within a period of time specified in the communication, or at the end of a period of time specified in the communication unless the regulated person acts (or omits to act) in the manner specified in the communication;
- (b) the service of a stop notice within the meaning of section 46(2) of the Act;
- (c) the service of a notice (a “prohibition notice”) under the following enactments:-
 - (i) section 22 of the Health and Safety at Work etc Act 1974⁽¹²⁴⁾
 - (ii) section 10 of the Safety of Sports Grounds Act 1975⁽¹²⁵⁾
 - (iii) Regulation 15(4) of the Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2002⁽¹²⁶⁾

⁽¹²³⁾ 2008 c.13.

⁽¹²⁴⁾ 1974 c.37.

⁽¹²⁵⁾ 1975 c.52.

⁽¹²⁶⁾ S.I. 2002/528; regulation 15 was inserted by paragraph 5(1) of the Schedule to S.I. 2008/91.

- (iv) Regulation 24(3) of the Fluorinated Greenhouse Gases Regulations 2008⁽¹²⁷⁾;
 - (d) the service of a notice (an “abatement notice”) under section 80 of the Environmental Protection Act 1990⁽¹²⁸⁾;
 - (e) the service of a notice (an “emergency prohibition notice”) under the following enactments:-
 - (i) section 12(1) of the Food Safety Act 1990⁽¹²⁹⁾
 - (ii) Regulation 22 of the Feed (Hygiene and Enforcement) (England) Regulations 2005⁽¹³⁰⁾
 - (iii) Regulation 22 of the Feed (Hygiene and Enforcement) (Wales) Regulations 2005⁽¹³¹⁾
 - (iv) Regulation 8 of the Food Hygiene (England) Regulations 2006⁽¹³²⁾
 - (v) Regulation 8 of the Food Hygiene (Wales) Regulations 2006⁽¹³³⁾;
 - (f) the imposition of an improvement notice under the following enactments:-
 - (i) section 10 of the Animal Welfare Act 2006⁽¹³⁴⁾
 - (ii) section 10 of the Food Safety Act 1990⁽¹³⁵⁾
 - (iii) section 21 of the Health and Safety at Work etc Act 1974⁽¹³⁶⁾
 - (iv) Regulation 6 of the Food Hygiene (England) Regulations 2006⁽¹³⁷⁾
 - (v) Regulation 6 of the Food Hygiene (Wales) Regulations 2006⁽¹³⁸⁾
 - (vi) Regulation 17 of the Feed (Hygiene and Enforcement) (England) Regulations 2005⁽¹³⁹⁾
 - (vii) Regulation 17 of the Feed (Hygiene and Enforcement) (Wales) Regulations 2005⁽¹⁴⁰⁾;
 - (g) the reference of any matter to a prosecuting authority other than a local authority, with a view to the prosecuting authority considering the commencement of proceedings in relation to the matter;
 - (h) the commencement of proceedings in a court of law or tribunal created under an enactment;
 - (i) the imposition of any sanction in respect of any act or omission.
- (2) The following action is not to be regarded as enforcement action for the purposes of Part 2 of the Act:-
- (a) action referred to in section 28(5) of the Act not specified in paragraph (1);
 - (b) action taken by an enforcing authority pursuant to or in connection with the exercise of functions under-
 - (i) the Regulatory Reform (Fire Safety) Order 2005⁽¹⁴¹⁾,
 - (ii) the Licensing Act 2003⁽¹⁴²⁾, or
 - (iii) the Gambling Act 2005⁽¹⁴³⁾.

⁽¹²⁷⁾ S.I. 2008/41.
⁽¹²⁸⁾ 1990 c.43.
⁽¹²⁹⁾ 1990 c.16.
⁽¹³⁰⁾ S.I. 2005/3280.
⁽¹³¹⁾ S.I. 2005/3368.
⁽¹³²⁾ S.I. 2006/14.
⁽¹³³⁾ S.I. 2006/31.
⁽¹³⁴⁾ 2006 c.45.
⁽¹³⁵⁾ 1990 c.16.
⁽¹³⁶⁾ 1974 c.37.
⁽¹³⁷⁾ SI 2006/14.
⁽¹³⁸⁾ S.I. 2006/31.
⁽¹³⁹⁾ S.I. 2005/3280.
⁽¹⁴⁰⁾ S.I. 2005/3368.
⁽¹⁴¹⁾ S.I.2005/1541.
⁽¹⁴²⁾ 2003 c.17.
⁽¹⁴³⁾ 2005 c.19.

Enforcement Actions: Exclusions

3. — Sections 28(1) to (4) of the Act shall not apply in the following circumstances:

- (a) where the enforcement action is required urgently, or in the opinion of the enforcing authority or an authorised officer of the enforcing authority is required urgently, to avoid a significant risk of serious harm to human health or the environment (including the health of animals or plants) or the financial interests of consumers;
- (b) the service of a notice referred to in Article 2(1)(e) above;
- (c) where the application of section 28(1) to (4) of the Act would be wholly disproportionate, or in the opinion of the enforcing authority or an authorised officer of the enforcing authority would be wholly disproportionate;
- (d) where the enforcement action is required urgently, or in the opinion of the enforcing authority or an authorised officer of the enforcing authority is required urgently, to protect the public from minor harm;
- (e) where the enforcement action relates to an application to the court under Part 8 of the Enterprise Act 2002⁽¹⁴⁴⁾;
- (f) where the enforcement action relates to the acceptance of an enforcement undertaking under section 50 of the Act, or an undertaking under section 219 of the Enterprise Act 2002.

Signatory text

Address
12th March 2009

Name
Parliamentary Under Secretary of State
Department

⁽¹⁴⁴⁾ 2002 c.40.

EXPLANATORY NOTE

(This note is not part of the Order)

Part 2 of the Regulatory and Enforcement Sanctions Act 2008 establishes a scheme for coordination of regulatory enforcement against a person (a “regulated person”) where that person carries on an activity in the area of two or more local authorities and each of those authorities has the same relevant function in relation to that activity. Under the scheme one authority can be appointed as “the primary authority” in relation to the regulated person. In such cases, the taking of enforcement action against the regulated person by any other local authority (an “enforcing authority”) has to be notified to the primary authority, who may direct the enforcing authority not to take the action.

This Order specifies action which is and is not to be regarded as enforcement action for this purpose. It also prescribes circumstances in which the enforcing authority does not have to notify the primary authority before it takes enforcement action, and cannot be directed not to take that action. In such cases the authority will have to notify the primary authority of the enforcement action as soon as it reasonably can.

ANNEX E – DRAFT PRIMARY AUTHORITY (PROCEDURE FOR REFERENCES TO LBRO) ORDER 2009

STATUTORY INSTRUMENTS

2009 No. 0000

REGULATORY REFORM

The Primary Authority Scheme (Procedure for References to LBRO) Order 2009

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	6th April 2009

The Secretary of State, in exercise of the powers conferred by paragraph 6(1) of Schedule 4 to the Regulatory Enforcement and Sanctions Act 2008⁽¹⁴⁵⁾, makes the following Order:

Citation, commencement and interpretation

4.—(1) This Order may be cited as the Primary Authority Scheme (Procedure for References to LBRO) Order 2009.

(2) This Order will come into force on 6th April 2009.

(3) In this Order—

“the Act” means the Regulatory Enforcement and Sanctions Act 2008;

“reference” means reference of a proposed enforcement action to LBRO under Schedule 4 to the Act;

“working day” means a day other than—

(a) a Saturday or Sunday,

(b) Christmas Day or Good Friday, or

(c) a day which is a bank holiday under the Banking and Financial Dealings Act 1971⁽¹⁴⁶⁾ in the part of the United Kingdom where the primary authority is or (if different) the part of the United Kingdom where the enforcing authority is.

Address for LBRO

5.—(1) Applications or other communications to LBRO must be made in writing to the following electronic address: [www.\[\]](http://www.lbpro.gov.uk), or such other address (whether electronic or otherwise) as may from time to time be published from time to time by LBRO on its website.

(2) Any other documents may be sent to LBRO at that address.

⁽¹⁴⁵⁾ 2008 c.13.
⁽¹⁴⁶⁾ 1971 c.80.

(3) The location of the LBRO website is [] or such other location as may be published from time to time by LBRO in such manner as LBRO consider appropriate.

Information to be included with an application to LBRO

6.—(1) All applications to LBRO must contain the following information—

- (a) the applicant's name and business address;
- (b) the name and business address of the primary authority;
- (c) full details of the proposed enforcement action.

(2) [An application may be made by—

- (a) where the enforcing authority is the applicant, the person or persons responsible for enforcement in the enforcing authority;
- (b) where the regulated person is the applicant, by the person or persons within the regulated person responsible for the operation of the relevant primary authority agreement with the business;
- (c) where the primary authority is the applicant, by the person or persons responsible for the operation of the relevant primary authority agreement within the primary authority.]

(3) In addition, in each case, the following information must also be provided—

- (a) where the enforcing authority is the applicant—
 - (i) a copy of the notice regarding the proposed enforcement action (including, where appropriate, the reasons for taking that enforcement action);
 - (ii) a statement as to why the enforcing authority considers that the enforcement action is consistent with relevant advice given by the primary authority;
- (b) where the regulated person is the applicant—
 - (i) a copy of the relevant advice received from the primary authority;
 - (ii) any written notification of the proposed enforcement action received from the enforcing authority;
 - (iii) a statement of why the regulated person believes that the proposed enforcement action is inconsistent with the advice from the primary authority;
- (c) where the primary authority is the applicant—
 - (i) a copy of the advice it has given on the relevant matter;
 - (ii) evidence to show that there are special reasons which prevent it from making a decision on the proposed enforcement action;
 - (iii) evidence that the proposed enforcement action is inconsistent with the advice.

Procedure for gaining consent to a reference

7. The enforcing authority must apply for consent to a reference as soon as reasonably practicable, [and in any event not later than [10] working days] after receipt of the notification that the Primary Authority has directed that the enforcement action should not proceed.

8. The regulated person must apply for consent to a reference as soon as reasonably practicable, [and in any event not later than 10 working days] after receipt of a notice under section 28(3) of the Act informing the regulated person of the enforcement action proposed to be taken.

9. The primary authority must apply for consent to a reference as soon as reasonably practicable, [and in any event not later than 10 working days] after receipt of the notification that the enforcing authority proposes to take enforcement action in relation to a regulated person for which it is the primary authority.

10.—(1) LBRO must give notice of the application to the primary authority or regulated person as appropriate on receipt of an application for consent.

(2) On receipt of the notice of the application, the other parties may submit, in writing, any representations which they wish to make to LBRO in relation to the matter.

(3) Submissions may be submitted electronically and must be made within 7 working days of receipt of the notice of the application.

(4) Submissions from a person must include the information set out for that person in article 3(3).

(5) Where LBRO requests further information from the parties, the parties must submit that information within 7 calendar days.

(6) LBRO may share information it receives with the other parties. In particular, LBRO may share the primary authority's advice directly with the enforcing authority if the enforcing authority has not seen the advice.

(7) LBRO may share information received with a regulator to which section 12 of the Act applies, where the regulator's views are sought or required in relation to a reference.

(8) [LBRO may call for evidence to be given orally (in person or by electronic means).]

11.—(1) LBRO must decide whether to consent to the reference as soon as reasonably practicable after receiving the application.

(2) LBRO may decline to consent to a reference if—

(a) the parties have not provided all the relevant information with an application; or

(b) LBRO considers that it does not have access to, and will not have access to within a reasonable period of time, relevant information from the national regulators

it considers it needs to make a decision.

(3) LBRO must, by the fastest means possible, inform the parties of its decision.

(4) If LBRO withholds consent to the reference, then it must specify in the decision notice the reasons for that decision.

Withdrawal of application for consent

12. A party may, at any time, in writing, withdraw its application for consent by giving notice [in writing] to LBRO.

Reference to LBRO for determination

13. Where LBRO makes a request for further information during the determination period, the parties must respond within 5 working days.

14. LBRO may request that evidence be given orally during the determination period, whether in person or by electronic means.

15. [LBRO may request that the parties attend a hearing of the matter.]

[Draft decision notice]

16.—(1) LBRO may, during period referred to in paragraph 6(1) of schedule 4 to the Act, issue a draft of its proposed decision under paragraph 1(4), 2(2), or 3(2) of Schedule 4 to the Act and invite the parties to comment on it.

(2) Where LBRO has issued a draft decision notice for comment, the parties [shall respond within 2 working days].

Charging the regulated person

17. If LBRO propose to charge the regulated person any costs it incurs in considering the regulated person's reference, it must

(a) notify the regulated person of their intention to do so when giving consent to the reference; and

(b) provide an estimate of the reasonable costs to the regulated person before LBRO takes the decision on whether to consent to the reference.

LBRO decisions

18. As soon as possible after taking a decision under paragraph 1(4), 2(2), or 3(2) of Schedule 4 to the Act LBRO, must communicate its decision to the parties.

19. LBRO must provide to the parties, a full statement of reasons as soon as possible after the decision has been made and in any event within 28 days of the decision being made.

Date

Name
Parliamentary Under Secretary of State,
Department for Business, Enterprise and Regulatory Reform

EXPLANATORY NOTE

(This note is not part of the Order)

Part 2 of the Regulatory and Enforcement Sanctions Act 2008 establishes a scheme for coordination of regulatory enforcement against a person (a “regulated person”) where that person carries on an activity in the area of two or more local authorities and each of those authorities has the same relevant function in relation to that activity. Under the scheme one authority can be appointed as “the primary authority” in relation to the regulated person. In such cases, the taking of enforcement action against the regulated person by any other local authority (an “enforcing authority”) has to be notified to the primary authority, who may direct the enforcing authority not to take the action.

This Order makes provision for the procedure that governs the reference of matters for determination by the LBRO.

LIST OF ORGANISATIONS TO BE CONSULTED

Amicus
Association of Convenience Stores
Audit Commission
Audit Scotland
British Cement Association
British Chambers of Commerce (BCC)
British Hospitality Association
British Retail Consortium
Camelot
Cattles plc.
Central England Trading Standards Authorities (CEntSA)
Charity Commission
Chartered Institute of Environmental Health
Chemical Industries Association
Chief Fire Officers Association
Citizens Advice Bureau
Commission for Equality and Human Rights
Companies House
Competition Commission
Confederation of British Industry (CBI)
Consumer Council for Water
Convention of Scottish Local Authorities
Co-Op Group
Directors of Public Protection, Wales
East of England Trading Standards
Engineering Employers Federation (EEF)
Environment Agency
Environment and Heritage Service
Environmental Industries Commission (EIC)
Environmental Services Agency
Federation of Small Businesses
Financial Reporting Council
Financial Services Authority
(All) Fire and Rescue Authorities in the United Kingdom
Food and Drinks Federation
Food Standards Agency
Foodaware
Forum of Private Business
Health and Safety Executive (HSE)
Improvement and Development Agency (IDeA)
Improvement Service, Scotland
Institute of Directors (IoD)
Intellectual Property Office
Justices' Clerks' Society
LACORS
Law Society
(All) Local Authorities in the United Kingdom

LIST OF ORGANISATIONS TO BE CONSULTED (CONT.)

Local Government Association
Local Government Employers
London Hazards Centre
National Audit Office
National Consumer Council
National Weights and Measures Laboratory
North East Trading Standards Association
Northern Ireland Audit Office
Northern Ireland Local Government Association
Northern Ireland Trading Standards Service
Office for National Statistics
Office of Fair Trading (OFT)
Office of the Scottish Charity Regulator (OSCR)
Pennon Group Plc.
PricewaterhouseCoopers
Professional Contractors Group
Royal Environmental Health
Scottish Environment Protection Agency (SEPA)
Scottish Trades Union Congress (STUC)
Security Industry Authority
Small Business Council
Small Business Service
Society of Chief Officers of Environmental Health, Scotland
Society of Chief Trading Officers (SCOTSO)
SOLACE
South West England Coordination of Trading Standards (SWERCOTS)
South West Regulatory Forum
The Scottish Executive
The Society of Chief Officers of Trading Standards in Scotland (SCOTSS)
Trades Union Congress (TUC)
Trading Standards East Midlands
Trading Standards in Scotland (SCOTSS)
Trading Standards Institute
Trading Standards North West
Trading Standards South East
United Kingdom Environmental Law Association (UKELA)
Wales Audit Office
Welsh Local Government Association
Yorkshire and The Humber Regional Trading Standards Group

ABOUT THIS CONSULTATION

This consultation document and consultation process have been planned to adhere to the Code of Practice on Consultation and is in line with the six consultation criteria, which are:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

The complete code is available on the Better Regulation Executive's web site, address <http://www.berr.gov.uk/bre/consultation%20guidance/page44420.html>.

Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

The Department for Business, Enterprise and Regulatory Reform will process your personal data in accordance with DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Individual responses will not be acknowledged unless specifically requested.

Your opinions are valuable to us. Thank you for taking the time to read this document and respond.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Vanessa Singhateh,
BERR Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Vanessa on 020 7215 2293
or e-mail to: Vanessa.singhateh@berr.gsi.gov.uk

Better Regulation Executive
Department for Business, Enterprise and Regulatory Reform
3rd Floor
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 0397

Email: primary.authorities@berr.gsi.gov.uk
Website: <http://www.berr.gov.uk/bre/inspection-enforcement/implementing-principles/sanctions-bills/page44047.html>

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