



Department
for Business
Innovation & Skills

Better
Regulation
Delivery Office

Government Response

**Extending and Simplifying
Primary Authority:
Keeping the UK Competitive**

March 2016

Executive summary

1. Primary Authority allows businesses to access consistent, tailored, assured advice they can rely on and provides regulators with flexible and responsive ways of working. This gives businesses greater confidence to invest and grow and increases regulator efficiency. Primary Authority makes it easier to comply with regulation and run a business in the UK. Operational since 2009, the scheme is very successful and, as at 04 March 2016 over 9000 businesses had entered partnerships with 169 different local authorities.
2. Having reviewed the operation of the scheme through 2014-15 with many of those involved, improvements were identified that would make it work more effectively, delivering greater benefits to regulators and businesses. Our proposals for the extension and simplification of the scheme were considered at meetings with a range of stakeholders during summer 2015.
3. Our proposals were also presented in a discussion document, Extending and Simplifying Primary Authority: Keeping the UK Competitive, published in September 2015. The discussion document sought to raise awareness of the proposed changes and to invite comments and evidence on how the proposed changes would impact on businesses and regulators. 35 responses to the discussion document were received from local authorities, individual businesses, business representative groups, and a small number of other interested parties.
4. The responses received were broadly positive, particularly in respect of changes that will widen access to the scheme and simplify co-ordinated partnerships. Views were more mixed in respect of proposals to formally recognise the role of regulators other than local authorities within Primary Authority.
5. We are grateful to all those who gave their views both in meetings and by responding to the discussion document, and welcome their input into shaping the future of the scheme. This document provides a summary of the responses received and identifies individual concerns raised. In preparing this response, the Government has reflected on any concerns or issues articulated.
6. The Government wants to ensure that as many businesses as possible can access the benefits of Primary Authority as simply as possible and it is our view that the proposed changes to Primary Authority that we have brought forward in the Enterprise Bill¹ will improve access to the scheme, particularly for smaller businesses.
7. The Government intends to bring forward further changes, for example in secondary legislation and through the revision of its statutory guidance on the scheme. The Better Regulation Delivery Office will work closely with stakeholders in relation to these changes. Our intention is that revised statutory guidance will be published to coincide with the commencement of the changes proposed in the Enterprise Bill, and that this guidance will be developed with stakeholders in order to ensure that it meets their needs.
8. The proposed changes will increase the demands on the Primary Authority Register that supports delivery of the scheme and we are proposing significant enhancements to the Register, to ensure that it better serves the needs of users.

¹ The draft Enterprise Bill was published on 17 September 2015, see: <http://services.parliament.uk/bills/2015-16/enterprise.html>

Contents

Executive summary	2
Contents	3
1 Introduction	5
2. Simplification of Primary Authority	7
Simplifying entry.....	7
Consultation responses.....	7
Government response.....	8
Simplifying co-ordinated partnerships.....	10
Consultation responses.....	11
Government response.....	13
3 Extension of Primary Authority	15
Additional areas of legislation.....	15
Consultation responses.....	15
Government response.....	15
‘Supporting Regulators’.....	15
Consultation responses.....	16
Government response.....	18
‘Complementary Regulators’	19
Consultation responses.....	19
Government response.....	20
‘Qualifying Regulators’	20
Consultation responses.....	21
Government response.....	21
Mutual recognition of Primary Authority Advice	22
Consultation responses.....	22
Government response.....	23
4. Streamlining administrative processes	25
Defining ‘enforcement action’	25
Consultation responses.....	25
Government response.....	26

Notification of proposed enforcement action	26
Consultation responses.....	27
Government response.....	27
Time limits relating to notification of proposed enforcement action.....	28
Consultation responses.....	28
Government response.....	29
Guidance on cost recovery.....	29
Consultation responses.....	29
Government response.....	30
Simplifying ‘primary authority categories’	30
Consultation responses.....	30
Government response.....	31
Inspection plans	31
Consultation responses.....	32
Government response.....	33
5. Next steps	35
Annex A – Respondents	36
Business representative organisations or trade associations	36
Businesses	36
Local government	37
National regulators	38
Others	38

1 Introduction

- 1.1 The benefits of Primary Authority have been amply demonstrated over the past six years, with a growing number of local authorities and businesses recognising the opportunity that the scheme provides for a more mature relationship between regulators and those they regulate.
- 1.2 In 2014-15, we spent six months reviewing the implementation of the scheme to identify whether improvements were needed. The review involved extensive engagement with a wide range of stakeholders, including surveys of businesses and local authority officers². This review, taken alongside experience gained through the operation of the scheme from 2009 to 2015, informed the development of a package of proposed measures to develop the scheme. Specific findings included:
- Participation in Primary Authority is associated with a range of benefits for business, and these vary in nature for businesses of different sizes and types.
 - The anticipated benefits of changes to Primary Authority in 2013³, which enabled businesses that share an approach to regulatory compliance - such as members of a trade association or businesses within a company group - to enter Primary Authority co-ordinated partnerships, are not yet fully realised. Only a small proportion of the UK's 5 million small businesses⁴ are currently in a primary authority partnership.
 - There would potentially be benefits to extending Primary Authority to a number of areas of legislation that are not currently in scope of the scheme, and to including the entirety of certain enactments in Schedule 3 of the Regulatory Enforcement and Sanctions Act 2008 ('the RES Act') that are currently only partially included.
 - Businesses that are regulated by both local authorities and national bodies would welcome a clearer role for national regulators in the scheme, and would similarly welcome recognition of the role and advice of a primary authority by other agencies that enforce the same legislation as local authorities.
 - The divergence of regulatory regimes across the UK presents challenges for businesses and for Primary Authority.
 - Certain processes of Primary Authority are creating administrative burdens on businesses and local authorities that could be further reduced.
- 1.3 During summer 2015, the Government invited a wide range of local authorities, national regulators, primary authority businesses, and co-ordinators and other business representatives to participate in a series of meetings with the Better Regulation Delivery Office⁵ (BRDO) in Birmingham, Cardiff and London, to discuss the proposed changes (referred to in this document as 'the summer events'). 132 accepted the invitation and some arranged separate conversations with BRDO.

² The review findings and associated research will be published in due course.

³ Enterprise and Regulatory Reform Act 2013

⁴ Figures from <http://researchbriefings.files.parliament.uk/documents/SN06152/SN06152.pdf>

⁵ BRDO administers Primary Authority on behalf of the Secretary of State.

- 1.4 The discussion document 'Extending and Simplifying Primary Authority: Keeping the UK Competitive' was published on 17 September 2015 and built on feedback received during the summer events. Responses to the discussion document were requested by 22 October 2015. This deadline was subsequently extended as responses continued to be received. All responses received up to the beginning of December 2015 are reflected in this response.
- 1.5 The discussion document sought views on proposals to extend and simplify Primary Authority, and how these could operate in practice. Responses highlighted a number of key issues which are addressed in this response.
- 1.6 35 responses to the discussion document were received. A list of the organisations that contributed a written response to the discussion document, participated in individual discussions with BRDO, and / or participated in the summer events is available at Annex A.
- 1.7 The following chapters provide a summary and analysis of written responses to the individual proposals in the discussion document and the Government's response to them. They include some commentary on the feedback that was received through individual discussions with BRDO and the summer events.

2. Simplification of Primary Authority

Simplifying entry

Extend access to Primary Authority to any business that wishes to form a partnership, enabling more small businesses to benefit

2.1 The Government is committed to simplifying entry to Primary Authority, for small businesses in particular. The discussion document set out a proposal to remove the requirement that a business must be carrying out a regulated activity and must carry out that activity in more than one local authority area, or share an approach to compliance with a business in another area, in order to join Primary Authority.

Consultation responses

2.2 Discussions at the summer events focussed heavily on the proposal to amend the eligibility criteria for Primary Authority, with the views expressed being broadly positive. Respondents to the discussion document were, similarly, broadly in favour of the proposal. Businesses, business representative groups and current primary authorities were particularly welcoming of the proposal, with several citing the importance of good quality advice to pre-start-up businesses and small single site businesses looking to grow. One franchisor welcomed growth for the scheme, viewing it as a good thing for all participants as it would lead to increased understanding of Primary Authority and confidence in businesses that are participating.

- *Moves to open up Primary Authority advice to firms in the pre-start-up phase are welcome. We anticipate that widespread use of Primary Authority by start-ups would be an efficient way to ensure that firms get into the habit of regulatory compliance, reducing the need for enforcement from regulators later in a firm's life-cycle, and more importantly would provide the certainty and stability that small businesses crave, allowing them to focus on growth rather than administration. (Institute of Directors)*
- *I think this would be beneficial, starting up with [business] we did a lot of work prior to officially signing up as PA as there was only 1 premises open at that time but that was when they needed the advice to help set up stores and documentation. (Newcastle City Council)*

2.3 Some local authorities viewed the changes as providing an opportunity to strengthen the ability of local authorities to provide business advice, with a few noting that local authority business advice services have in some cases been reduced to signposting businesses to other sources of advice. Others noted that they already provide a similar 'chargeable advice' service to business, albeit without the statutory basis of Primary Authority and the assurance that accompanies this.

2.4 Some respondents, notably current providers of Primary Authority, anticipated challenges for local authorities in meeting an increased business demand for partnerships and mention was made of the need to review their cost recovery for primary authority services to ensure that the actual costs of providing the service are fully recovered.

2.5

A small number of respondents to the discussion document expressed concerns about the implications of the proposal for local authorities acting in the 'enforcing authority' role, suggesting that the burden on them of identifying which businesses are in Primary Authority would be increased with a greater number of partnerships, as would the time taken to review any information provided about businesses in partnerships, and to report back to primary authorities.

- 2.6 Business respondents in particular identified a need to improve awareness and understanding of Primary Authority amongst enforcing authorities, citing failures to check whether a business has a partnership. It was suggested that training would be needed in order to address this issue. Similarly, mention was made of the importance of raising awareness amongst small and medium sized enterprises and pre-start-ups if they are to know about the scheme and be able to access it.
- 2.7 Specific concerns were raised by a small number of respondents in relation to the proposed extension of Primary Authority to businesses regulated by a single local authority ('singly regulated businesses'), particularly in respect of the following: potential conflict of interest unless there is a clear separation of the 'advice role' and the 'enforcement role' so that the business is not paying for enforcement; whether businesses might seek to partner with '*weak local authorities in order to evade compliance*'; and, potential challenge from consultants in relation to unfair competition.
- 2.8 There was recognition from a number of respondents that businesses are not always able to access the advice that they need from their own local council.
- '*...business should be able to access good regulatory support. If this is not available from their Local Authority (perhaps due to capacity or particular skills gaps) then a business should be able to source the support they need from another Local Authority/Regulator.*' (Derby City Council)
- 2.9 However, there was a view amongst some respondents that the default approach should be that a business partners with its own local council, which '*is likely to be best placed to advise it*' and a number of safeguards were suggested by respondents in respect of the nomination of a primary authority for a singly regulated business that chose to partner with a local authority other than its own local council. The main suggestions were that there should be consultation with the business' own local council prior to nomination of another local authority as its primary authority and that the prospective primary authority should be required to provide standard information about the scheme to the business, including highlighting their right to 'shop around' for a primary authority.

Government response

- 2.10 Entrepreneurs and pre-start-up businesses often have a high demand for timely, accurate and clear regulatory advice, wanting to 'get it right first time'. Similarly, businesses that are moving into a new sector or tackling new challenges will often want clear regulatory advice to support them through these periods of change or expansion. The Enterprise Bill⁶ proposes replacement of the current definition of a 'regulated person' for the purposes of Primary Authority⁷, as this requires the business to already be regulated in respect of the area in which it wants advice before a primary authority can be nominated.

⁶ <http://services.parliament.uk/bills/2015-16/enterprise.html>

⁷ Section 22, Regulatory Enforcement and Sanctions Act 2008

- 2.11 The proposed change will open up access to the scheme to persons who are not yet trading and to businesses that are not yet regulated in respect of a particular function, for example where a growing business is taking on health and safety responsibilities for employees for the first time. The Government is clear that amending the eligibility criteria in the manner proposed will improve the availability of robust, expert advice for these businesses, boosting their confidence and improving the effectiveness of regulators, whose effort at these stages in the business lifecycle can have a greater impact by establishing good, sustainable compliance practices.
- 2.12 A primary authority has the power to charge fees so as to recover the costs⁸ it has reasonably incurred in relation to its partnership with a business, but is not entitled to profit from those fees. This provision allows local authorities to provide services to business that they might not otherwise be able to resource.
- 2.13 We recognise that the proper functioning of Primary Authority relies on local authority officers having a good understanding of the scheme and we will continue to provide materials and training for local authorities, explaining Primary Authority to them. These materials and training will be updated in a timely fashion to reflect the changes to the scheme.
- 2.14 At the same time, local authorities have a responsibility to ensure that they, and their staff, are meeting their statutory obligations in respect of businesses that are participating in Primary Authority. As at March 2016, over 9000 businesses were in partnerships, with the overwhelming majority of these being small businesses. The proposed changes to the scheme will mean significant increases in these numbers and this will effect a fundamental change in the way that frontline officers need to think about Primary Authority.
- 2.15 The question of whether or not a business is receiving Primary Authority Advice will need to be in the mind of every frontline officer who interacts with businesses, whether through inspections, the provision of advice and support, or in the course of an investigation. This forms part of a broader question that frontline officers should already be asking themselves, and the business they are interacting with, as to whether the business is receiving reliable regulatory advice that will allow it to maintain ongoing compliance. Where the business *is* receiving good advice on compliance this should make the officer's task easier. Conversely, where the business is not receiving the support that it needs to deliver and maintain compliance, it is sensible for the officer to consider how he or she might help the business to access such support, whether through a direct primary authority partnership or through signposting to other potential sources of reliable guidance and advice, such as a relevant trade association.
- 2.16 The proposed change will open up access to the scheme to businesses that are currently singly regulated. This change recognises that the value to businesses of participating in Primary Authority is not limited to providing consistency across local authority boundaries but that there is a benefit to businesses of all sizes in being able to form a relationship of trust with regulators, within which they can receive tailored advice that gives them confidence in their regulatory compliance.

⁸ See 4.25 – 4.32 in relation to guidance to local authorities on cost recovery.

- 2.17 Experience to date in the scheme indicates that businesses and co-ordinators that look for a local authority to partner with other than the local authority in whose area they are based will often be looking for particular expertise and robust challenge that will give them confidence. Businesses may also make this choice in order to create a clear separation between the enforcement role and the primary authority role. There are safeguards in place to ensure that partnerships act in accordance with the expectations placed on them by Primary Authority, and the Secretary of State has the power to revoke partnerships where a local authority is no longer considered suitable to fulfil the role of primary authority for a business.
- 2.18 For most businesses that are regulated by a single local authority, our expectation is that this local authority is likely to be their partner of choice. However, the Government is clear that a business may have good reason to look elsewhere, for example, where it wishes to access particular regulatory expertise or where its own local authority is unable or unwilling to meet its needs. Our view is that it is reasonable for a business to be able to make this choice within the transparency provided by Primary Authority.
- 2.19 We recognise that, in order to make appropriate choices, businesses will need to have access to clear and straightforward information about Primary Authority and we will continue to expect local authorities to provide such information to businesses that they propose to partner with. Similarly, in order to understand whether it should enter into a partnership with a business and, once in a partnership, how it should work with that business, a local authority needs to be well-informed as to the compliance issues faced by the business. We will continue to expect primary authorities to gather relevant data and intelligence to inform their decisions.

Simplifying co-ordinated partnerships

Simplify co-ordinated partnerships to make it as easy as possible for businesses to register partnerships through trade associations, franchisors and company groups

- 2.20 The current two-stage application process for co-ordinated partnerships has, since these partnerships were introduced in 2013, proved to be burdensome, time-consuming and resource-intensive. Whilst a growing number of primary authorities and trade associations are working together to develop robust guidance for businesses in a wide range of sectors, there is evidence that the application process can deter small businesses from joining Primary Authority, and they do not therefore enjoy the full benefits of this valuable partnership work. Nevertheless, over 7700 businesses have already entered co-ordinated partnerships, demonstrating the appetite for a new relationship with local regulators.
- 2.21 The discussion document set out a proposal to simplify arrangements for co-ordinated partnerships, enabling a franchisor or trade association to enter and maintain a partnership with a primary authority which would allow them to disseminate assured advice to their group of businesses, without requiring each business to submit an individual application and form a partnership.

Consultation responses

2.22 Discussions at the summer events revealed good support for the proposed changes to co-ordinated partnerships, with particular enthusiasm being expressed by businesses and local authorities that currently have co-ordinated partnerships. Respondents to the discussion document were also broadly supportive of the proposals. Business groups and franchisors in particular welcomed the proposed changes, both as a means of reducing administrative burdens on themselves and on trade association members and franchisees that choose to participate in Primary Authority, and as a way of bringing more of these businesses into the scheme.

- *...we have not been able to extend the benefits of Primary Authority to the totality of our independent membership because the current process has proved overly bureaucratic. The majority of our independent members are small, one shop businesses. In common with single operators across other industries, anything to reduce the administration and bureaucracy which may prevent them from benefitting from schemes such as this, or importantly requiring them to take time away from their business, is to be welcomed... (Association of British Bookmakers)*
- *We fully support the proposal to simplify nomination of co-ordinated partnerships. Our business has some 160 franchisees operating some 860 restaurants. There would be a very large amount of communication and administration involved to get all of those franchisees signed up to the current system. Also there are ongoing changes with new franchisees, some franchisees leaving the system, and changing restaurant ownership between the company and franchisees. (McDonald's Restaurants)*
- *Ease of roll out to trade association members is an essential improvement. The current method acts as a regulatory burden which needs to be removed. Such changes would be welcomed by our coordinated partners and especially beneficial to large associations... (Buckinghamshire and Surrey Trading Standards Service)*
- *We would support the simplification of the nomination process for individual members of a co-ordinated partnership. It is clear that the current application process is cumbersome and places undesirable barriers to entry for small business. We would observe that there is a need to accurately identify which business are part of the partnership and this could be achieved simply by the co-ordinator undertaking to maintain an accurate list of members who are part of the partnership. (Derby City Council)*

2.23 One franchisor expressed concerns as to the potential administrative challenges for a co-ordinator, particularly in responding quickly to requests for information, and a trade association that currently co-ordinates partnerships for some of its members queried what the transition arrangements would be for such partnerships. Another trade association, whilst welcoming the proposal, noted that some of its members would still want '*evidence of membership to show to their customers*'.

2.24 A small number of local authority respondents raised specific concerns which related to other parties' future understanding of the scheme. One local authority noted that removing the requirement for individual businesses to complete an application might result in businesses having less understanding of Primary Authority, and of the assured nature of Primary Authority Advice. Another local authority anticipated an increase in the level of enquiries and referrals from enforcing authorities who do not currently understand how co-ordinated partnerships work.

2.25

Concerns were raised by a number of respondents as to the implications for enforcing authorities, who will find it harder to establish whether or not a business is in a co-ordinated partnership. Mention was made by one respondent of current difficulties experienced in using the Primary Authority Register to identify businesses in partnerships and this respondent anticipated that a growth in the number of businesses in Primary Authority would mean that officers spent more time checking the Register prior to 'routine visits', which was seen as potentially 'frustrating/demoralising' for officers.

- 2.26 In response to a specific question on the discussion document as to whether there should be suitability requirements for co-ordinators, three quarters of those who responded felt that there should be suitability requirements. Suggestions included requiring that the co-ordinator should be knowledgeable about the group of businesses; should have an interest in the regulatory areas; should be able to form a strong relationship with the primary authority; should have sufficient capacity to hold business data; should be able to communicate with the group of businesses and to disseminate advice; and, should be able to monitor the businesses in the group. There was also a suggestion that co-ordinators should receive training prior to nomination in order to ensure that they are able to fulfil their role.
- *BRDO must ensure there is a robust examination of who can run a co-ordinated primary authority partnership. (Association of Convenience Stores)*
- 2.27 Most respondents mentioning specific organisations with regards to the co-ordinator role did so in relation to trade associations. However, one respondent to the discussion document suggested that there would be benefits to Local Enterprise Partnerships taking on a co-ordinator role, and the same point was raised during the summer events. One respondent suggested that smaller trade associations or those with very diverse membership would be unsuited to the co-ordinator role.
- 2.28 In response to a specific question on the discussion document with regard to the visibility of advice issued by a primary authority via a co-ordinator, there was a broad consensus that this advice should be visible and easily accessible for enforcing authorities via the Primary Authority Register. However, one trade association noted that it should be sufficient for the participation of the business in the scheme to be clearly visible. Some respondents noted the importance of advice being available to all parties at the same time, and being kept up-to-date.
- 2.29 One respondent noted that advice issued via a co-ordinator is likely to be generic and therefore not commercially sensitive, although this view of advice issued via co-ordinated partnerships as generic, which was implicit in many responses, was challenged by one respondent who suggested that the move away from a 'shared approach to compliance' should allow for consideration of how bespoke advice might be provided within the framework of a co-ordinated partnership, citing the example of where a group of businesses '*may achieve compliance in slightly different ways, so "one size fits all" advice issued by the regulator may not be fit for purpose, and need slight tweaking to suit the participants of the coordinated partnership*'.
- 2.30 A number of respondents linked the question of visibility of advice to the wider question of how enforcing authorities will be able to identify which businesses are participating in Primary Authority. Some respondents identified the importance of businesses drawing an enforcing officer's attention to their participation in Primary Authority at an early stage in any interaction, such as an inspection.
- 2.31

A number of respondents answered a specific question on the discussion document concerning the use of inspection plans in relation to co-ordinated partnerships. One business that currently co-ordinates partnerships for its franchisees expressed the view that an inspection plan could work well for franchised operations, where franchisor and franchisees are all operating in the same way. However, this business and a small number of local authorities expressed concerns as to how an inspection plan might work where the co-ordinator is a trade association.

Government response

- 2.32 The Government is committed to placing trade associations and franchisors at the heart of delivering the assurance that Primary Authority Advice provides to the businesses that they support, building on their relationships with these businesses, and their knowledge and understanding of the regulatory issues that they face. Trade associations and franchisors, acting in the co-ordinator role, will be able to develop and maintain strong relationships with primary authorities, making it quicker and easier for their businesses to access assured advice.
- 2.33 The Enterprise Bill proposes the replacement of the current provisions which allow for the nomination of a primary authority for individual businesses that '*share an approach to compliance*', with a new provision which allows for nomination of a primary authority for a 'regulated group', where that regulated group has a 'co-ordinator'. Whilst the nomination will be in respect of the 'regulated group', in practice this means that the partnership recognised will be between the primary authority and the co-ordinator. Individual businesses in the group will no longer apply for co-ordinated partnerships but will have an automatic entitlement, dependent on their relationship with the co-ordinator, to receive and rely on Primary Authority Advice that is issued by the primary authority and provided to them by the co-ordinator.
- 2.34 The Enterprise Bill proposes responsibilities for co-ordinators that will allow for effective operation of the scheme in respect of regulated groups. Trade associations, franchisors and others will need to meet minimum criteria in order to properly deliver the functions of the proposed co-ordinator role. Criteria will include their ability to maintain up-to-date membership lists and to communicate with the businesses in their group. The Secretary of State will have regard to these criteria, which will be set out in statutory guidance on the scheme, in considering applications for nomination of a co-ordinator and of a co-ordinated partnership, and in the event that the operation of a partnership is under review. Prospective co-ordinators will also need to agree robust working arrangements with a primary authority, for example through a Memorandum of Understanding. Our intention is that revised statutory guidance on Primary Authority will make clear the responsibilities of co-ordinators and materials will be developed to support them in their role.
- 2.35 Trade associations, franchisors and small businesses have made it clear that robust, assured regulatory advice has a value for businesses but that access to this advice needs to be as simple as possible if the benefits are to be maximised. The changes will deliver the desired simplification of access and, in doing so, will have an impact on the transparency that has been a key requirement of the scheme to date. A co-ordinator will be required to maintain accurate details of who is entitled to rely on any assured advice issued by its primary authority, and to respond in a timely manner to requests from enforcing authorities for a copy of their 'membership list'.

- 2.36 The Primary Authority Register will continue to provide a comprehensive database of all nominated partnerships, both direct partnerships between a primary authority and a single business and co-ordinated partnerships between a primary authority and the co-ordinator of a regulated group. It will be preferable for a co-ordinator's membership list to be available to enforcing authorities via the Primary Authority Register but this will not be a requirement of the scheme.
- 2.37 The Enterprise Bill proposes a duty on enforcing authorities to notify proposed enforcement action to the primary authority for a regulated group where it is aware that the business is a member of that regulated group. Enforcing authorities will know that a business is a member of a regulated group through publication of the co-ordinator's membership list via the Primary Authority Register or through communication with the business⁹. Businesses that are members of a regulated group, receiving Primary Authority Advice via a co-ordinator, will be encouraged to signal their membership of the regulated group to an enforcing authority that they interact with at the earliest opportunity, and co-ordinators and primary authorities working together in co-ordinated partnerships will be expected to consider how they can best support their businesses to do this. These expectations will be set out in statutory guidance on the scheme.
- 2.38 It has also become apparent that businesses that have a direct partnership with a primary authority may sometimes wish to rely on advice or guidance that they receive from their trade association or franchisor. The proposed changes will allow for a business that is in a direct partnership to nevertheless benefit from relevant Primary Authority Advice received via a co-ordinator where this is on a topic that their direct primary authority has not advised on.
- 2.39 The Government is clear that regulators are best able to use their resources to good effect where their actions and decisions are well-informed. For this reason, time spent understanding whether a business is receiving regulatory advice, whether from a primary authority, a national regulator or another source, and, if so, whether it is following this advice, will always be of value in helping an officer to determine how to deal with the business, and how to respond proportionately to any non-compliance. Businesses will be encouraged to signal their reliance on Primary Authority Advice received via a co-ordinated partnership to enforcing authorities at the earliest opportunity. Primary authorities will be required to share the Primary Authority Advice that they provide to co-ordinators with enforcing authorities by publishing it in the secure area of the Primary Authority Register, and co-ordinators and primary authorities will be expected to consider how they can best maximise the visibility of Primary Authority Advice. These expectations will be set out in statutory guidance on the scheme.
- 2.40 The Enterprise Bill proposes that inspection plans will continue to be available to co-ordinated partnerships and introduces provisions to ensure that there will be transparency as to the businesses that are covered by an inspection plan. The criteria for inspection plans for co-ordinated partnerships which are currently included in the Primary Authority Statutory Guidance will be updated to ensure that these criteria are rigorous and fit for purpose, addressing in particular the need for enforcing authorities to be able to identify which businesses are covered by the inspection plan.

⁹ See 4.10 – 4.18 in relation to provisions that may apply where the enforcing authority does not make a notification of proposed enforcement action.

3 Extension of Primary Authority

Additional areas of legislation

Extending Primary Authority to additional areas of legislation

- 3.1 Since Primary Authority was established in 2009, it has been extended a number of times to meet the needs of business and regulators. In April 2013, it was extended to fire safety regulation, underage sales of alcohol, the use of sunbeds by minors and carrier bag charging in Wales. The discussion document invited views on whether Primary Authority should be extended to further areas of legislation that are currently not part of the scheme.

Consultation responses

- 3.2 Discussions at the summer events identified good support for the extension of Primary Authority to further areas of legislation. Suggested areas for consideration included age restrictions in relation to knife sales and licensing conditions in relation to the sale of alcohol.
- 3.3 A number of businesses responding to the discussion document also identified areas that might be considered for inclusion in Primary Authority. Their suggestions related primarily to the licensing role of local authorities, particularly in relation to alcohol. One business explained the challenges that it experiences in complying with conditions that have broadly the same aim but are worded disparately. For example, retail premises operated by the business across England are subject to conditions set by a number of Licensing Authorities that include thirteen conditions that have the same objective but are worded differently, requiring the business to comply in different ways.

Government response

- 3.4 Government will continue to work with all relevant stakeholders and monitor the evidence base for extending Primary Authority to further areas of regulation. For example, the Psychoactive Substances Act 2016 includes provisions to include this new legislation covering the supply of psychoactive substances (or legal highs) within Primary Authority. BRDO will work with all Government departments to ensure that Primary Authority is a factor in considering effective implementation and enforcement of regulatory policy.

‘Supporting Regulators’

Enabling national regulators to be formally recognised as playing a role to support primary authorities in the development of Primary Authority Advice, guidance and inspection plans

- 3.5 For many businesses that are regulated by local authorities, this is in relation to areas of regulation where a national regulator plays a significant role. This may be because the national regulator shares an enforcement role with local authorities, because it guides local authorities in their delivery of local regulation, or both. The national regulator will often have expertise and a view of the 'big picture' that can be a valuable resource for local regulators. The discussion document invited views on the proposal that a new power should be created to enable the Secretary of State to specify that certain national regulators should be able to play a formally recognised role in individual partnerships, supporting the primary authority to develop Primary Authority Advice and inspection plans.

Consultation responses

- 3.6 Discussions at the summer events focussed heavily on the possibility of creating a more formal role for specified national regulators within Primary Authority, with positive views being expressed about the value of national regulator input into Primary Authority Advice. Respondents to the discussion document were similarly broadly supportive of the proposal that specified national regulators should be able to play a clearer, statutory role in primary authority partnerships, alongside a local authority, should they choose to do so, with a number of respondents seeing clear benefits in terms of pooling knowledge and understanding and delivering greater consistency for businesses that are dual regulated. One primary authority noted that some businesses had decided not to enter partnerships because the perceived value of Primary Authority Advice was reduced if a national regulator was able to disregard it.
- *I can only see it as a good thing to drive better consistency in enforcement, particularly when operating a large number of sites across the country. (KFC UKI)*
 - *Some of our businesses are regulated by both local and national regulators and it seems strange to the business that the national regulator does not have to have regard for PA. (Salford City Council)*
- 3.7 One business that had experienced differing opinions about the same activity from different regional offices of a national regulator, and disagreement with its Primary Authority Advice, identified that there would be benefits in terms of delivering consistency both between local authorities and the national regulator and also across the national regulator's offices. A trade association specifically welcomed the proposal that national regulators should be required to act consistently with advice that they had supported a primary authority to develop.
- 3.8 In response to a specific question on the discussion document as to which regulatory bodies should be specified as 'supporting regulators' in Primary Authority, respondents suggested a wide range of bodies, including national regulators, Government departments such as the Department for Health and the Department for Environment, Food and Rural Affairs, professional bodies such as the Law Society and the Chartered Institute of Building, and non-statutory bodies such as the Advertising Standards Authority (which applies codes written by the Committees of Advertising Practice).
- 3.9

Of the national regulators suggested, the most commonly suggested by both local authorities and businesses were the Food Standards Agency, the Health and Safety Executive and the Financial Conduct Authority, with a smaller number suggesting the Gambling Commission. Local authority respondents also suggested the Civil Aviation Authority, the Charity Commission, the Competition and Markets Authority, the Environment Agency and the Scottish Environment Protection Agency, the Medicines and Healthcare Products Regulatory Agency, the National Measurement and Regulation Office and utilities regulators. Business respondents also mentioned bodies such as Scottish Licensing Boards, the Rural Payments Agency (through its Horticultural Marketing Inspectorate), and Camelot. In the summer events, mention was also made of Cadw¹⁰.

- 3.10 Some local authority respondents made reference to the role that a national regulator might potentially play in the event of a reference to determination under Primary Authority in their regulatory area. This was perceived by some as a potential limitation on the extent to which a national regulator such as the Food Standards Agency or Health and Safety Executive might feel able to get involved in developing advice. One primary authority stated that they had already experienced reluctance on the part of a national regulator asked to comment on draft Primary Authority Advice, on the basis that this might compromise their role in the determination process. It was suggested that clarity would be needed as to the respective roles of local authorities and national regulators.
- 3.11 A small number of respondents expressed concerns that involving a national regulator in the development of Primary Authority Advice would lead to delays, suggesting that partnerships would need to put clear timescales in place. However, one trade association was of the view that tripartite working between a co-ordinator, its primary authority and a national regulator would *'provide a quicker process'* and would lead to more useful and practical guidance for the sector as it would draw on the local authority's greater experience of business issues at the ground level, and the national regulator's industry level view.
- 3.12 A concern was expressed by business respondents as to whether the proposed cost recovery provisions for supporting regulators might result in a business having to *'pay for two lots of advice'*, and one business stressed that the charging process should be *'transparent and clear'*. There was a further concern as to whether a business that is regulated by both local authorities and a national regulator would have to approach both for advice.
- 3.13 In response to a specific question on the discussion document with regard to what might happen if a partnership requests involvement of the national regulator but the national regulator declines, respondents expressed very mixed views. These ranged from a view that the request should always be accepted by a specified national regulator, with a referral mechanism for any refusal, to the view that forcing a national regulator to provide support would not be conducive to a good quality of service. There was a view from trade associations that the involvement of national regulators in co-ordinated partnerships would deliver greater impact as the national regulator's contribution would be beneficial across a sector.

¹⁰ The Welsh Government's historic environment service.

Government response

- 3.14 The Government is clear that the support that national regulators have sometimes already provided, where individual primary authorities have requested assistance, is of value to business and to local authorities, providing them with expertise and access to wider evidence. It can also provide value for the national regulators involved, in delivering their strategic priorities, particularly where their input and support have the potential to guide a whole sector. However, this support has to date been limited, both in terms of the proportion of primary authorities seeking assistance from relevant national regulators, and in terms of national regulators feeling able to provide this assistance. Early discussions with a range of national regulators have indicated that in general they would welcome the opportunity to play an enhanced role in supporting Primary Authority and, in doing so, supporting the delivery of their own priorities and objectives.
- 3.15 The Enterprise Bill proposes a new power to enable the Secretary of State to specify, in regulations, regulatory bodies ('supporting regulators') that would be able to play a statutory role in Primary Authority, supporting the development of Primary Authority Advice or an inspection plan in conjunction with a primary authority. The creation of this statutory role is accompanied, in the Enterprise Bill, by a provision that will allow a supporting regulator to recover the costs of its contribution from a business or co-ordinator, where they have given prior agreement to the supporting regulator's involvement. The supporting regulator would also, having been involved in the development of advice or an inspection plan, be required to act consistently with it.
- 3.16 A regulatory body could be specified as a supporting regulator only where it exercises a regulatory function that is either a function in scope of Primary Authority, or is relevant to such a function, for example, where a national regulator oversees the regulatory functions of local authorities but does not deliver those same functions itself. We are considering whether national regulators such as the Health and Safety Executive, the Food Standards Agency and the Gambling Commission might be specified. Our intention is that the proposed use of the power would first be subject to consultation.
- 3.17 Supporting regulators and their officers will need to have easy access to the register of partnerships that is maintained by BRDO, on behalf of the Secretary of State, and to further information such as contact details for primary authorities. Proposed enhancements to the Primary Authority Register will take account of these needs and BRDO will provide support to any regulatory body that is specified as a supporting regulator.
- 3.18 The RES Act makes provision for a referral to the Secretary of State for determination in the event that proposed enforcement action is notified and the enforcing authority, primary authority and business are subsequently unable to reach agreement as to whether the proposed action would be inconsistent with Primary Authority Advice that is both correct and properly given. In the event of a referral to determination¹¹, BRDO, acting on behalf of the Secretary of State, will consult with any relevant national regulator where it is of the view that the national regulator may be able to assist it in assessing whether Primary Authority Advice is correct and properly given and, in

¹¹ Since the introduction of Primary Authority in 2009, relatively few situations have arisen in which local authorities have disagreed about Primary Authority Advice that has been provided to a business. In such cases, informal discussions have usually lead to mutually agreed advice moving forward and, as at March 2015, just one referral to determination had been made. BRDO publishes the outcome of any referral made under the statutory determination process on the public pages of the Primary Authority Register (see the 'Role of BRDO' page).

particular, whether the primary authority has taken proper account, in producing its advice, of any guidance published by the national regulator. It is our view that conflicts of interest are unlikely to arise and that there are significant benefits to be realised through a national regulator supporting a primary authority to ensure, at the outset, that its advice is consistent with the national regulator's guidance and reflects the best expertise available at the time. This should provide greater certainty and reduce the likelihood of advice being subsequently challenged through the determination process.

- 3.19 Our intention is that revised statutory guidance on Primary Authority will include guidance to supporting regulators on their role. This guidance will address matters such as agreements between supporting regulators and any partnership that they support as to how they will work together and how cost recovery will be operated. The revised statutory guidance will also provide guidance to primary authorities that choose to invite a supporting regulator to support one or more of their partnerships.
- 3.20 The Enterprise Bill envisages that, once a regulatory body has been specified as a 'supporting regulator' it may choose whether or not to provide support to, or within, an individual partnership. We anticipate that supporting regulators would wish to allocate the resources that are available to them in line with their priority outcomes, and with a view to delivering the greatest impact through the support that they provide.

'Complementary Regulators'

Specify regulators other than local authorities who could be required to act consistently with Primary Authority Advice

- 3.21 Businesses that are regulated by both local authorities and other local or national bodies in relation to the same or similar legislation can face potential duplication and inconsistency of advice. Primary Authority provides a mechanism to offer co-ordinated and consistent advice to a business and provides assurance in respect of this advice in relation to other local authorities. However, no assurance is provided where a business experiences an inconsistent approach by a regulator other than a local authority, as that regulator is acting outside of Primary Authority. The discussion document invited views on the proposal that a new power should be created to enable the Secretary of State to specify certain regulators who would be required to act consistently with Primary Authority Advice.

Consultation responses

- 3.22 Those respondents to the discussion document who expressed views on this proposal were all supportive of the proposed mechanism, with several giving examples of where they had experienced inconsistent approaches. A number of suggestions were made as to regulatory bodies that should be required to act consistently with Primary Authority Advice, all of which had already been mentioned in relation to the proposal that specified regulators should have a formal role in supporting primary authorities.
- *I think that if a company has received assured advice and are acting in accordance with the advice they have received then this should protect them from any other enforcement agency.... (Ableworld)*

- 3.23 One respondent raised concerns as to how such regulators would be able to identify partnerships, and Primary Authority Advice, expressing the view that '*the Primary Authority Register is not going to be able to do what is required.*'

Government response

- 3.24 The Enterprise Bill proposes a new power to enable the Secretary of State to specify, in regulations, regulatory bodies ('complementary regulators') that would be required to act consistently with Primary Authority Advice in exercising designated functions in relation to a business that has received the Primary Authority Advice, whether through a direct partnership or from its co-ordinator, where it is a member of a regulated group. Similarly, a complementary regulator would be required to act consistently with an inspection plan made by a primary authority.
- 3.25 A regulatory body could be specified as a complementary regulator only where it exercises a function which is the same as or equivalent to a relevant function which is in scope of Primary Authority. The Government continues to gather information in relation to regulators, other than local authorities, that interact with businesses in relation to regulatory functions that are within scope of Primary Authority and intends to consult further before specifying particular regulatory bodies as complementary regulators.
- 3.26 Our intention is that revised statutory guidance on Primary Authority will include guidance to complementary regulators on their responsibilities.
- 3.27 Complementary regulators and their officers will need to have easy access to the register of partnerships that is maintained by BRDO, and to further information such as contact details for primary authorities, and published inspection plans. Proposed enhancements to the Primary Authority Register will take account of these needs and BRDO will provide support to any regulatory body that is specified as a complementary regulator.

'Qualifying Regulators'

Specify regulators other than local authorities who can become primary authorities

- 3.28 The discussion document invited views on the proposal that a new power should be created to enable the Secretary of State to specify certain regulators other than local authorities who would be recognised in the same way as local authorities, in that they could be a primary authority. Such regulators would, where they were not designated as the primary authority for a business, be subject to the same requirements under the scheme as any local authority ie. they would be 'enforcing authorities' for the purposes of Primary Authority. The discussion document explained that this new power was needed to reflect the current and possible future changes in local government and ensure that future bodies that are not a 'local authority' as defined in the RES Act, but which carry out functions of a local authority, can be specified in secondary legislation and would then be eligible to act as primary authorities. The discussion document also proposed that this power might be used in respect of Licensing Boards in Scotland, which are not recognised by the RES Act as local authorities.

Consultation responses

- 3.29 The views of those responding on this issue were mixed, with no consensus as to whether the proposed power would be useful and how it should be used.
- 3.30 Stakeholders in Scotland noted that the proposed use of such a power to allow Scottish Licensing Boards to act as primary authorities in relation to gambling age restrictions, as suggested in the discussion document, is not appropriate as these Boards have no enforcement role.
- 3.31 One business respondent suggested that it would be beneficial for the Health and Safety Executive (HSE) to be able to act as a primary authority as the business had experienced inconsistency from different HSE officers. The respondent also reported an occasion on which Primary Authority Advice that it had received in relation to health and safety risk assessment was disregarded by the HSE.
- 3.32 Some local authorities were concerned that national regulators should not be able to act as primary authorities, citing a number of concerns. One respondent noted that a national regulator may take a narrower view than a local authority, giving the example of food labelling or menu descriptions, where the expertise of the Food Standards Agency would relate only to food legislation whereas a local authority could also address related fair trading and metrology issues.

Government response

- 3.33 The Cities and Local Government Devolution Act 2016 proposes significant changes to the local government landscape, with powers being devolved from the centre to newly created combined authorities. Should these, or other future changes involve the devolution of regulatory powers to new bodies, that might not fall within the definition of a 'local authority' in the RES Act, but which might carry out regulatory functions of a local authority, it would be desirable for these new bodies to be able to take on the responsibilities of a local authority within Primary Authority.
- 3.34 The Enterprise Bill proposes a new power to enable the Secretary of State to specify, in regulations, regulatory bodies ('qualifying regulators') that would be treated within Primary Authority in the same way as local authorities. They would be able to be nominated as a primary authority and would be required to meet the obligations that the scheme places on enforcing authorities. Our intention is that revised statutory guidance on Primary Authority will include guidance to regulatory bodies other than local authorities that are specified as qualifying regulators.
- 3.35 A regulatory body could be specified as a qualifying regulator only in relation to a regulatory function that it exercises which is a relevant function of local authorities for the purposes of Primary Authority, or which, for the purposes of that regulator, is equivalent to such a function. The Government is clear that there is currently no intention to use this new power to specify any existing national regulator as a 'qualifying regulator'.
- 3.36 The Government is no longer considering how this power might be used in respect of Licensing Boards in Scotland.

Mutual recognition of Primary Authority Advice

Reduce the detrimental impact of divergent regulatory regimes on business by enabling mutual recognition of Primary Authority Advice

- 3.37 Devolution enables tailored responses to local conditions, but it can create different regulatory regimes, which can have a cost for businesses operating across the UK, as they have to comply with divergent legislation for devolved areas of law. The application of Primary Authority in Scotland and Northern Ireland differs to that in England and Wales and this means that the scheme may not currently deliver all that it could in terms of supporting businesses to manage divergent legislation, particularly where the business wants to apply a single standard or procedure across the UK.
- 3.38 In Scotland, Primary Authority applies to regulatory functions that apply across Great Britain (“reserved matters”)¹², such as Health and Safety and Fair Trading. It is operating well in these reserved areas, covering over 2,600 premises in Scotland, with some local authorities in Scotland acting as primary authority for businesses trading across the UK. The Scottish Government consulted in 2015 on the development of a Scottish Primary Authority scheme¹³ that would apply to devolved matters.
- 3.39 In relation to Wales, Primary Authority applies to the same regulatory functions as in England, even though some of those functions are devolved to Wales. The scheme is operating well in Wales, with an increasing number of local authorities in Wales establishing primary authority partnerships¹⁴. One local authority has developed a close working relationship with a local authority in England that allows them to work together to address business needs for advice in relation to devolved areas such as the display of tobacco products.
- 3.40 The discussion document sought views on proposals to formalise principles that would further encourage the effective operation of Primary Authority across the UK.

Consultation responses

- 3.41 Discussions at the summer events revealed that businesses and primary authorities were very supportive of any steps that could be taken to ensure that Primary Authority Advice issued in one nation is not undermined in another. Those attending the event in Cardiff were particularly supportive, noting that much legislation is effectively the same in England and Wales, and that concerns should only arise where legislation is substantially different. Respondents to the discussion document were broadly in agreement that businesses that operate across UK boundaries would benefit from greater consistency.

¹² The details of the scope of Primary Authority in relation to Scotland and Northern Ireland are set out in the Co-ordination of Regulatory Enforcement (Regulatory Functions in Scotland and Northern Ireland) Order 2009, see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421844/list-of-pa-categories.pdf

¹³ The Regulatory Reform (Scotland) Act 2014 includes provisions for Primary Authority partnerships for devolved matters in Scotland <http://www.gov.scot/Publications/2015/04/1951>

¹⁴ As at December 2015, six of the twenty two local authorities in Wales are primary authorities.

- *It would be helpful for both regulators and multi-site businesses that assured advice issued by any UK PA could be relied upon throughout the UK (West Yorkshire Trading Standards)*
- *Most businesses we are in PA partnerships with trade either online or across the UK so this proposal is welcomed. (Northamptonshire County Council)*

- 3.42 However, representatives of local authorities and local authority officers in Scotland were not supportive of the proposal. It was suggested that there is no evidence that enforcers are not working well together across the UK or, in relation to reserved matters, that there *'is any divergence of opinion or advice across regulators in devolved nations'*. It was also noted that *'While good communication should be encouraged across the devolved nations where matters are devolved businesses will need to have multiple primary authority partnerships to ensure the legal competence of any assured advice and that it is appropriate.'*
- 3.43 Some business respondents confirmed that costs are attributable to operating across national boundaries and one business, which operates over 2000 retail premises in England and Wales, and 400 in Scotland, noted that these costs can result from the fact that wherever possible, the business attempts to design a single approach that will deliver compliance with differing regulatory requirements in England, Scotland and Wales, and this will often involve doing more than the law requires in one or two nations.
- 3.44 One business, which operates over 1200 restaurants across the UK, expressed the view that it would *'simplify matters very significantly, and reduce costs for business and workload for authorities'* if a mechanism such as a Memorandum of Understanding could allow for a business to have a single primary authority covering the same function in all four nations, and another business noted that it would be *'very reluctant to have separate PA relationships in devolved administrations'* as this would involve a danger of the same work being carried out two or three times. A third business commented that there was potential for greater collaboration and consistency in particular in relation to devolved areas where the regulations derive from the same European Regulations.
- 3.45 One local authority respondent raised concerns about the capacity of local authority officers in one nation to keep up-to-date with devolved legislation in the other nations, quoting the example of regulations relating to charging for carrier bags, which differ in each nation.
- 3.46 A business representative respondent expressed the view that compatible advice across the UK is essential and went on to suggest that businesses would prefer that Primary Authority Advice should be compatible and accepted across Europe.

Government response

- 3.47 We are working closely with officials to formalise the relationship between the Devolved Administration (Das) – the Scottish Government, Welsh Government and Northern Ireland Executive and BRDO¹⁵ through concordat(s). These will be developed and implemented at a suitable time after the 2016 elections in Northern Ireland, Scotland and Wales.

¹⁵ Acting on behalf of the Secretary of State.

- 3.48 The concordat(s) will outline the principles underpinning the way partners will work together effectively on cross-border priorities, both where policies and working practices are aligned, and where there are differences due to policy or political decisions.
- 3.49 The concordat(s) will consider the issue of 'mutual recognition' and how this might serve to ensure continuity of effective working practices across geographical borders whilst recognising differences in legal powers and duties. This would be of particular relevance to smooth operation of Primary Authority, and to business growth.
- 3.50 In particular, the concordats will look at how to support and foster the confidence of businesses working across borders – by providing tools to enable businesses to be certain of what they are required to do in order to comply with the legislative requirements of the nation they are operating in.

4. Streamlining administrative processes

Defining 'enforcement action'

Simplifying the secondary legislation that defines what constitutes an 'enforcement action' for Primary Authority

- 4.1 Where a business has a primary authority, any local authority that wishes to take enforcement action (the enforcing authority) against that business must first notify the primary authority about the action it proposes to take. This requirement of the scheme provides the assurance that is a key benefit of Primary Authority Advice, as the notification to the primary authority allows it consider whether the proposed action is consistent with advice that it has given to the business. The primary authority is entitled, where it identifies inconsistency with its Primary Authority Advice, to direct the enforcing authority not to take the proposed action¹⁶.
- 4.2 The discussion document invited views on a proposal to simplify the definition of 'enforcement action'¹⁷, with one possibility being the creation of a generic definition of a 'notice', to replace the current list of named notices under specific regulations. The current list presents a challenge as it requires updating every time a new notice or Order is brought into legislation and this creates a time lag between new legislative requirements and them being included within Primary Authority. The list can also cause confusion for local authorities and businesses, leading to uncertainty as to whether an enforcement action is included or not.

Consultation responses

- 4.3 There was a widespread view, amongst those that responded on this question, that clarity and certainty are of key importance, in order to reduce the potential for 'legal quibbling'. One local authority was supportive of a wide generic definition in the secondary legislation, and suggested that examples to support interpretation of the definition might be provided in statutory guidance on the scheme.
- 4.4 However, a number of respondents noted that the current definitions are adequate and one local authority expressed concerns that any widening of the definition of enforcement action might mean an increase in notifications in respect of its primary authority businesses. Whilst this would be beneficial in terms of improving its knowledge of the business and its ability to influence enforcing authorities' actions, the current requirement for a primary authority to respond within 5 working days would have an implication for resources.

4.5

¹⁶ The requirement to notify proposed enforcement action is waived in certain circumstances such as where the enforcement action must be taken urgently. In those circumstances, the enforcing authority must notify the primary authority that it has taken the enforcement action after that action has been taken.

¹⁷ As currently set out in the Co-ordination of Regulatory Enforcement (Enforcement Action) Order 2009, which has been amended in 2013 and twice in 2014.

In response to a specific question on the discussion document as to which particular actions should be excluded from the definition of 'enforcement actions', mention was made of a number of actions that are not caught by the current definition, including: complaints, samples taken, investigative activities, and letters that merely point out contraventions or provide advice. One respondent qualified the mention of letters by suggesting that '*anything from an explicit warning letter upwards*' should probably be classed as enforcement action.

- 4.6 In response to a specific question on the discussion document as to which actions defined as 'enforcement actions' should be exempted from the requirement to pre-notify the primary authority, but should instead be notified retrospectively, mention was made of the current provisions for exempting urgent action '*for example where there is immediate risk to health and/or safety*'. One other suggestion was that routine inspections, or visits in relation to minor complaints should not require pre-notification but that visits relating to major complaints '*should be pre-notified because of the consequences, but for information purposes only*'.

Government response

- 4.7 The Government is in agreement with respondents that clarity and certainty are important for the definition of enforcement action. We do not propose a significant widening of the definition of enforcement action and do not anticipate including actions, such as samples taken, investigative activities, and advisory letters that are not currently defined as enforcement action within the scheme. However, we propose to consider further the possibility of replacing the current list of named notices under specific regulations with a generic definition of a statutory 'notice', which would not require updating every time a new notice or Order is brought into legislation.
- 4.8 Clarity and certainty are of equal importance in relation to whether enforcement action must be notified to the primary authority before it is taken or whether it may be notified retrospectively. We do not propose any significant change to the current requirements in this respect.

Notification of proposed enforcement action

Removing barriers to business assurance where enforcing authorities fail to notify the primary authority of intended enforcement action

- 4.9 If an enforcing authority fails to notify the primary authority that it intends to take enforcement action against a business with a primary authority partnership, the legislation that establishes Primary Authority does not currently provide for the business or its primary authority to challenge the enforcing authority's action through the scheme. Instead, the only action available is to seek a judicial review of the actions of the enforcing authority. This situation arises rarely but it undermines the effectiveness of the scheme and is detrimental to business confidence in Primary Authority.
- 4.10 The discussion document sought views on proposals to provide primary authorities with a power to direct against proposed enforcement action, where primary authority has been made aware of proposed action, despite a failure on the part of the enforcing authority to make the required notification.

Consultation responses

- 4.11 Of the respondents to the discussion document that expressed a view on this issue all but one indicated agreement that a primary authority should be able to direct against an enforcement action that had not been notified by the enforcing authority. One business in particular expressed strong support for the proposal, reporting that it has experienced two instances of enforcing authorities failing to comply with the notification requirement before serving notices on the business, and noting that it is not acceptable that businesses should face consequences if they fail to comply with legal requirements but local authorities face no consequences if they do not take any notice of the requirements of Primary Authority.
- 4.12 Some respondents currently providing Primary Authority, whilst being supportive of the proposal in principle, expressed concern as to how it might work in practice. Concerns centred on whether it would act as a disincentive for enforcing authorities to properly make notifications of proposed enforcement action; the mechanics of entering the proposed action on the Primary Authority Register; and the challenge for a primary authority that might receive a 'notification' from a business of proposed enforcement action, but without sufficient information to be able to properly review it against Primary Authority Advice because the enforcing authority had not yet provided such information to the business.
- 4.13 Representatives of local authority officers in Scotland were not supportive of the proposal, suggesting that there is little or no evidence that it is needed, and that it would not be appropriate in Scotland, where it is the Crown that acts as prosecutor.
- 4.14 The majority of those responding felt that the timescale proposed in the discussion document, which would allow a business 5 working days from receiving notification of proposed enforcement action to raise this with its primary authority, were fair and proportionate, although one local authority respondent expressed concerns about whether 5 working days would be adequate for large, complex businesses and how there could be certainty about the exact time that the business received notification from an enforcing authority, in the absence of any prescribed format for this notification.
- 4.15 One local authority respondent raised the separate issue of the timescale currently allowed for businesses to consider proposed enforcement action that their primary authority has not directed against, suggesting that this should be reduced from 10 working days to 5 days. Another local authority respondent suggested that the timescale currently allowed for primary authorities to review proposed enforcement action should be increased from 5 to 10 working days.

Government response

- 4.16 Instances of local authorities failing to notify a primary authority of proposed enforcement action that they are required to notify are not common. However, the impact of such failures, whatever their causes, is significant, not only for the business and primary authority concerned but also for the scheme as a whole. The Government is clear that providing an opportunity for a business to notify its primary authority, where it becomes aware of proposed enforcement action that has not been correctly notified will deliver benefits for individual businesses that may find themselves in this situation. It will also strengthen confidence in Primary Authority and provide additional motivation for local authorities to follow the rules.

- 4.17 The Enterprise Bill proposes a time-limited opportunity of 5 working days for a business to signal to its primary authority that it has received notification of proposed enforcement action that the local authority has not properly notified to the primary authority. In relation to a business that is a member of a regulated group, relying on Primary Authority Advice received via its co-ordinator, the Bill proposes that the co-ordinator may also notify the proposed enforcement action to the primary authority. Where it receives such a notification, from a business or its co-ordinator, the primary authority would be under a duty to suspend the proposed action for a period of 5 working days while it reviews the enforcement action and determines whether it would be inconsistent with any advice that it has given the business. Our intention is that revised statutory guidance on Primary Authority will include guidance on the operation of this provision.

Time limits relating to notification of proposed enforcement action

Removing unnecessary time limits relating to the notification of enforcing action

- 4.18 The legislation that establishes Primary Authority does not currently provide for proposed enforcement action that has been correctly notified to the primary authority to move ahead until at least 15 working days have elapsed, even where enforcing authority, the primary authority and the business are all in agreement that the action is not inconsistent with any Primary Authority Advice given.
- 4.19 The discussion document set out a proposal to amend current provisions to allow an enforcing authority to move ahead as soon as the primary authority has made a decision not to direct against proposed enforcement action and informs the enforcing authority of the decision. Similarly, the current provisions would be amended to allow an enforcing authority that has gone on to inform the business of its proposed enforcement action to proceed as soon as the business informs the authority that it will not refer the matter to the Secretary of State.

Consultation responses

- 4.20 There was limited discussion on this proposed technical amendment in the summer events, with general support for the proposal being expressed. Those responding to the discussion document in relation to this proposal were broadly positive, agreeing that the proposed change would provide greater flexibility and that any action that needs to be taken should be taken as soon as possible. There was agreement on the latter point from both local authorities and businesses, with one respondent pointing out that it *'is frustrating for businesses who want to comply but have had a local failure and notices must be reported to suppliers and can have a significant impact on future contracts when the matter can be resolved in a very short space of time'*.
- 4.21 One local authority respondent suggested that the 10 working day limit should be retained for businesses *'to avoid any surprises at a later date'*.
- 4.22 One local authority respondent advocated removing both time limits as they were seen as delaying the work of a local authority.

Government response

- 4.23 Primary Authority aims to provide opportunity for reflection on advice that a primary authority has provided, in order to determine whether enforcement action that is proposed against a business relying on that advice should proceed. It is not in the interests of businesses, primary authorities or enforcing authorities for enforcement action to be unnecessarily delayed where there is no relevant advice in place, or where the primary authority's advice was not being followed by the business.
- 4.24 The Enterprise Bill proposes that a primary authority or business in receipt of a notification of proposed enforcement action from a local authority may make a written notification to the local authority which will have the effect of releasing it from the obligation to wait the prescribed number of working days before proceeding with its proposed action.

Guidance on cost recovery

Clarify which guidance local authorities should use in their cost recovery policies

- 4.25 Primary authorities have the ability to charge for the service they provide¹⁸ and current statutory guidance on the scheme refers to HMT's 'Managing Public Money'¹⁹ as the guidance that primary authorities should use when cost recovering for Primary Authority. However, our research indicates that local authorities find the Managing Public Money guidance too generic. There is also evidence that some primary authorities have not felt able to accurately recover the costs for the services that they provide in full.
- 4.26 The Department for Communities and Local Government (DCLG) indicates that the most often used guidance is the Service Reporting Code of Practice, owned by the Chartered Institute of Finance and Accountancy (CIPFA)²⁰ and the discussion document set out a proposal to amend the Primary Authority Statutory Guidance to refer to this Code of Practice, in place of Managing Public Money, and provide additional guidance on cost recovery.

Consultation responses

- 4.27 Discussions at the summer events revealed good support for improved cost recovery guidance. Those responding to the discussion document in respect of this issue were all supportive of the proposal to amend the guidance to local authorities in respect of cost recovery for primary authority services.

¹⁸ Section 31 of the RES Act 2008 'The primary authority may charge the regulated person such fees as it considers to represent the costs reasonably incurred by it in the exercise of its functions under this Part in relation to the regulated person'. Section 33(3) requires a local authority to have regard to any guidance given to it.

¹⁹ The guidance on cost recovery available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212123/Managing_Public_Money_AA_v2_-_chapters_annex_web.pdf

²⁰ The guidance applies to all local authority services throughout the United Kingdom from 1 April 2016 for the preparation of 2016/17 Budgets, Performance Indicators and Statements of Accounts. Available from <http://www.cipfastats.net/sercop/>

- 4.28 Of local authority respondents currently providing primary authority services, half agreed that they would like additional support to assist them with cost recovery policies, although concerns were raised as to whether referring to CIPFA's Service Reporting Code of Practice would cause difficulties as it is not publicly available. Examples of further guidance or clarification that were specifically mentioned related to charging VAT and partnership activities which might not be covered by cost recovery provisions. It was suggested that any guidance should not be too prescriptive as local authorities would want to retain the flexibility to negotiate bespoke packages with individual businesses.
- 4.29 One local authority respondent that is currently developing its primary authority offer suggested that it would be beneficial to share more case studies and approaches used by different local authorities.
- 4.30 The Local Government Association (LGA) proposed that councils and businesses should '*have greater flexibility to negotiate an agreed fee to be charged for primary authority services, rather than linking charges exclusively to costs*'.

Government response

- 4.31 Primary Authority has evolved, over the six years since it was introduced, against a backdrop of significant change in the financial circumstances of local authorities. Cost recovery for primary authority services allows some local authorities to continue to provide support to business that they would not otherwise be able to provide on an ongoing basis. It is important to these local authorities, and to the businesses that they are in partnership with, that the rules around what costs can be recovered are clear and relevant.
- 4.32 BRDO proposes to work with Primary Authority stakeholders, the LGA, DCLG, and CIPFA to develop guidance that will provide the clarity needed. Once this guidance has been developed, it will be referenced in a revised version of the Primary Authority Statutory Guidance that local authorities are required to have regard to.

Simplifying 'primary authority categories'

Simplify the regulatory categories in respect of which a business can have a partnership

- 4.33 The number of Primary Authority categories has grown over the life of the scheme and an increase in devolution means that the current structure is no longer fit for purpose. It is not always clear to those entering a partnership which category they should form a partnership under. We propose to reduce the number of categories from 22.

Consultation responses

- 4.34 Of those who responded to the discussion document in respect of this issue, the majority were supportive of the proposal to simplify primary authority categories, reducing them in number. Those respondents that were not supportive expressed concerns about any crossover between county and district council functions in a reduced number of categories.

- 4.35 One local authority respondent and a business representative group both highlighted the potential benefits to partnerships of broadening categories to cover all regulatory functions of a particular regulatory service. For example, nomination for a 'Trading Standards' category would allow a partnership to make its own decisions as to which trading standards functions should be covered and would reduce the need for subsequent applications for new categories.

Government response

- 4.36 The Government is committed to rationalising and reducing the number of Primary Authority categories to provide for a simpler system that better reflects the move towards increased devolution. For the system to operate smoothly, it will also need to continue to recognise the distinction between county and district council functions.
- 4.37 The intention is to reduce the number of Primary Authority categories from the current 22. The proposed new categories will reflect the distinct reserved or devolved functions, and whether the functions are exercised at county or district council level. So to take trading standards as an example, eight of the current Primary Authority categories comprise legislation that is enforced at county council level by trading standards services. Within the proposed new system, legislation that relates to reserved functions, i.e. most or all of that which sits within the current Fair Trading, Metrology and Product Safety categories, would be combined into a new category – Trading Standards Reserved – that would be within scope of Primary Authority for England, Wales, Scotland and (with regard to Product Safety legislation) Northern Ireland. Legislation that relates to devolved functions, i.e. most or all of that which sits within the current Age Restricted Products, Agriculture, Animal Health and Welfare, Food Standards and Road Traffic categories, would be combined into a new 'Trading Standards Devolved' category.
- 4.38 For the proposed new categories that will comprise devolved functions, the intention is to create sub-categories that will allow for nomination of a separate local authority in each nation as the primary authority in relation to their nation's devolved legislation in that category.

Inspection plans

Make inspection plans more effective

- 4.39 Inspection plans are documents that are used to assist and guide local authorities in planning and conducting their inspection activities. Many plans include a request that enforcing authorities provide feedback on what they have found (and in some cases provide a format for them to do this). Inspection plans are developed by primary authorities and must, before publication, receive consent from the Secretary of State. BRDO, acting on behalf of the Secretary of State, reviews all proposed inspection plans prior to consent and consults with any relevant national regulator.

- 4.40 The Enterprise and Regulatory Reform Act 2013 made it a legal requirement for local authorities to act in accordance with inspection plans. However, concerns have been expressed by some businesses and primary authorities that the requirements of inspection plans are not always being followed, both in relation to how the inspections are conducted and in provision of feedback to the primary authority, thereby limiting their benefits. There is evidence that some primary authorities and their partner businesses have decided not to develop inspection plans because of this.
- 4.41 The discussion document sought views on why enforcing authorities might not always fulfil their statutory duty to act in accordance with inspection plans, and what might be done to address any issues identified. The discussion document also set out a proposal to widen the scope of inspection plans, which are currently restricted by the Primary Authority Statutory Guidance to 'proactive' interventions, so that they would also be able to guide reactive interventions, such as an inspection carried out following a complaint about a business.

Consultation responses

- 4.42 There was broad consensus amongst those who responded to the discussion document in respect of this issue, both local authorities and businesses. Their view was that those officers who do not follow an inspection plan will usually lack awareness of the plan, understanding of how inspection plans are meant to work, or, more generally, understanding of the Primary Authority scheme. In relation to the first point, a number of suggestions were made as to why an officer might lack awareness of a particular inspection plan, with the most common being that officers simply do not check the Primary Authority Register before inspecting, to establish whether a business has a primary authority and, if so, whether there is an inspection plan in place. One primary authority officer noted that contacting enforcing authorities that have failed to provide inspection feedback to the primary authority will often result in the required feedback then being provided. The written responses to the discussion document did not include specific mention of the scope of inspection plans and whether this is sufficiently clear.
- 4.43 In relation to measures that might be put in place to improve compliance with inspection plan requirements, a number of respondents suggested that there could be more promotion of new, revised and existing inspection plans, and more training provision, particularly in relation to use of the Primary Authority Register and use of inspection plans, with an emphasis on the benefits of inspection plans for all parties. Four respondents commented on the lack of a meaningful sanction for failing to follow an inspection plan and one respondent specifically suggested a sanction should be available, noting that this should be for repeat offenders as an advisory email was felt to be appropriate in the first instance.
- 4.44 A number of respondents commented that inspection plans can be difficult to use, even where this has not been the intention of the primary authority, and that they need to be simpler. One respondent suggested that all inspection plans should be shorter and more user friendly. It was also suggested that improvements to the Primary Authority Register could be needed to make inspection plans easier to find, access and download and that further technological improvements should be considered. For example, one respondent noted that better updating of local authority back office systems would be helpful and another suggested that a smartphone app might allow officers to more easily check whether an inspection plan is in place at a specific location.

- 4.45 A couple of respondents noted that the process for getting consent to an inspection plan needs to be quicker, with one noting in particular that quicker processes are needed for national regulators commenting on inspection plans.

Government response

- 4.46 As at December 2015, the number of inspection plans remains relatively small²¹, compared to the number of businesses that are participating in Primary Authority. This is unsurprising – primary authorities are developing inspection plans where there is real evidence of a need to influence the way that a business, or a group of businesses, is experiencing inspections and other interventions. As inspection numbers decline in some regulatory areas, the rationale for inspection plans has been reduced. However, in areas where businesses continue to experience inspections, such as in relation to food hygiene²², or other interventions, inspection plans are more likely to be appropriate. These inspection plans range from purely informative plans that aim to help inspecting officers by explaining the business and its approach, to plans that aim to focus effort where it is most needed and to reduce duplication.
- 4.47 Whilst the number of inspection plans in place is small, they cover over 2000 businesses, ranging from large multi-site high street retailers, pubs, cinemas, restaurants and holiday parks to single site pet shops and mobile burger vans. The large number of businesses reflects the fact that primary authorities working with co-ordinated partnerships are increasingly seeing inspection plans as a valuable tool²³. The number of premises covered by an inspection plan is estimated to be around 19,000 across the UK, extending to every local authority area.
- 4.48 The Government is clear that evidence-based inspection plans that draw on the primary authority's knowledge and understanding of the business, and its approach to managing compliance, can deliver greater certainty for businesses and are of great value to local authority regulators. They can help frontline officers to understand the business and to focus their inspection efforts to better effect. At the same time, they can inform a better national picture of the business' activities and the effectiveness of its regulatory controls. However, in order for these benefits to be realised, local authorities must ensure that they, and their staff, are meeting their statutory obligations in respect of inspection plans.
- 4.49 We will continue to provide materials and training for local authorities, explaining Primary Authority and in particular inspection plans to them. We will also encourage primary authorities, co-ordinators and businesses that are covered by an inspection plan to continue to play a part in raising awareness and understanding of inspection plans and will explore what can be done in terms of making it easier for frontline officers to find and understand inspection plans.

²¹ As at December 2015, 26 inspection plans were in place.

²² As at December 2015, 11 of the 26 inspection plans in effect covered the Food Safety & Hygiene category. Other categories covered in inspection plans included Age Restricted Products, Health Safety & Welfare, Food Standards, Age Restricted Services, Product Safety, Explosives Licensing, Fire Safety, Agriculture and Animal Establishments.

²³ The first inspection plans in relation to businesses in co-ordinated partnerships came into effect in 2015 and cover members of the Nationwide Caterers Association and the Ornamental Aquatic Trade Association.

- 4.50 At the same time, we will identify what further measures are required in order to improve the use of inspection plans and to ensure that local authorities meet their statutory obligations in this respect, providing businesses and their primary authorities with reassurance that the benefits of investment made in inspection plans will be fully realised. We will also explore whether the scope and limitations of inspection plans, as currently defined in the Primary Authority Statutory Guidance, remain appropriate.
- 4.51 It is important that the process by which inspection plans are considered and consented to prior to publication on the Primary Authority Register is robust. This provides reassurance for all those with an interest in the scheme that primary authorities are guiding the activities of enforcing authorities in an appropriate manner. However, BRDO acknowledges that primary authorities and businesses can experience frustration where an inspection plan that they have developed does not receive consent as soon as they would have expected. BRDO commits to ensuring that it provides greater transparency around the inspection plan process and the timescales that can be expected. BRDO will continue to work with national regulators to encourage their timely and appropriate involvement in the process.

5. Next steps

- 5.1 The Government would like to thank all the organisations and individuals who have offered their views and advice.
- 5.2 The Government has brought forward many changes to Primary Authority proposed in the discussion document in the Enterprise Bill²⁴, notably those relating to simplifying entry to the scheme; simplifying co-ordinated partnerships; providing powers for the Secretary of State to specify 'supporting regulators', 'complementary regulators' and 'qualifying regulators'; and allowing a business to refer proposed enforcement action to its primary authority where the enforcing authority has failed to make the required notification. Taken together, these measures will transform the scheme, widening its impact and delivering benefits for a greater number of businesses.
- 5.3 The Government intends to bring forward further changes in secondary legislation, through its statutory guidance and through revision of the List of Primary Authority Categories. BRDO will work closely with stakeholders in relation to these changes, including in revising statutory guidance on the scheme. Our intention is that revised statutory guidance will be published to coincide with the commencement of the changes proposed in the Enterprise Bill and any other changes, and that this guidance, which is currently addressed to local authorities, will be extended to provide guidance to co-ordinators, supporting regulators and complementary regulators.
- 5.4 We are proposing significant enhancements to the Primary Authority Register that supports delivery of the scheme, to ensure that it better serves the needs of existing users and that, once the changes to the scheme take effect, it will properly serve the needs of new users such as supporting regulators and complementary regulators.
- 5.5 The views of the organisations and individuals that have engaged with BRDO and have responded to the discussion document have been invaluable in shaping the development of the scheme and will continue to inform ongoing development work.

²⁴ The draft Enterprise Bill was published on 17 September 2015, see: <http://services.parliament.uk/bills/2015-16/enterprise.html>

Annex A – Respondents

The following organisations contributed a written response to the discussion document, participated in one to one discussions with BRDO, and/ or participated in the summer events:

Business representative organisations or trade associations

Association of British Bookmakers
Association of Convenience Stores
Association of Licensed Multiple Retailers
British Association of Removers
British Association of Shooting and Conservation
British Beer & Pub Association
British Chambers of Commerce
British Independent Retailers Association
British Frozen Foods Federation
British Hospitality Association
British Parking Association
British Retail Consortium
British Sandwich Association
British Soft Drinks Association
British Toy & Hobby Association
Confederation of British Industry
Construction Products Association
EEF, The Manufacturers' Association
Food and Drink Federation
Food Storage & Distribution Federation
Federation of Small Businesses
Glass & Glazing Federation
Health Food Manufacturers' Association
Institute of Directors
Lighting Industry Association
National Casino Industry Forum
National Federation of Property Professionals
National Federation of Retail Newsagents
National Pawnbrokers Association
The Nationwide Caterers Association
National Federation of Meat & Food Traders
NSF International
Ornamental Aquatic Trade Association Ltd
Proprietary Association of Great Britain
Provision Trade Federation
Trade Association Forum
Wine and Spirits Trade Association

Businesses

Ableworld
Asda
B&Q
Boots
Checkmate
Home Retail Group

KFC UK
Ladbrokes
McDonalds Restaurants
Sainsburys
Subway
Tesco
The Co-operative Group
Waitrose

Local government

Aylesbury Vale District Council
Birmingham City Council
Bridgend County Borough Council
Buckinghamshire and Surrey Trading Standards
Caerphilly Borough Council
Cannock Chase Council
Central Bedfordshire Council
Cheshire West and Cheshire Council
City of London Corporation
Convention of Scottish Local Authorities
Cornwall Council
Derby City Council
Derbyshire Fire and Rescue Service
Devon and Somerset Trading Standards
East Staffordshire Borough Council
Halton Borough Council
Hampshire County Council
Hampshire Fire and Rescue Service
Hertfordshire County Council
Horsham District Council
Huntingdonshire District Council
Kent County Council
Kent Fire and Rescue Service
Lancaster City Council
Local Government Association
London Borough of Barnet
London Borough of Bexley
London Borough of Crawley
London Borough of Harrow
London Borough of Islington
London Borough of Newham
Mid and West Wales Fire and Rescue Service
Milton Keynes Borough Council
Monmouthshire CC
Neath Port Talbot County Borough Council
Newcastle City Council
Newport City Council
North Yorkshire County Council
Northamptonshire County Council
Nottinghamshire County Council
Oxfordshire County Council
Pembrokeshire County Council
Powys County Council
Reading Borough Council

Rhondda Cynon Taf County Borough Council
Rother and Wealden District Council
Rugby Borough Council
Salford City Council
Shropshire Council
Slough Borough Council
Solihull Metropolitan Borough Council
South Northamptonshire Council and Cherwell District Council
Staffordshire County Council
Torfaen County Borough Council
Tyne and Wear Fire Service
Vale of Glamorgan Council
Wakefield Metropolitan District Council
Walsall Metropolitan Borough Council
Warwickshire County Council
West Yorkshire Fire and Rescue Service
West Yorkshire Trading Standards
Westminster City Council

National regulators

Environment Agency
Food Standards Agency
Gambling Commission
Health and Safety Executive
National Measurement and Regulation Office

Others

Ashfords
Chartered Institute Of Environment Health
Chartered Trading Standards Institute
Chief Fire Officers Association
Food Solutions
Institute of Food Science & Technology
Institute of Licensing
Lawmark
Leatherhead
PGD Consumer Affairs Consultancy Ltd
Society of Chief Officers of Trading Standards in Scotland
Trading Standards Wales
Welsh Government
Whitehouse Consultancy

Three anonymous written responses were also received.

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