

FOOD (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Food (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the **Explanatory Notes** and **Policy Memorandum** for the Bill.

OUTLINE OF BILL PROVISIONS

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

BACKGROUND

3. The purpose of the Food (Scotland) Bill is to improve and protect public health and other interests of consumers in respect of food. The Bill establishes Food Standards Scotland (FSS) to carry out functions in relation to food safety and standards. It includes provisions to enable FSS to work with and on behalf of the public to provide clear and accessible evidence-based advice and guidance.

4. The Scottish Government has an overarching ambition to help people in Scotland live longer, healthier lives. The Scottish Ministers are committed to improving public health and have taken decisive action to tackle smoking and reduce alcohol consumption. Ensuring people are eating safe, healthy food and improving diet offers similar potential to improve public health.

OUTLINE OF BILL PROVISIONS

5. The Bill is structured in the following parts:

- **Part 1** establishes Food Standards Scotland as a body corporate and sets out its core objectives to improve and protect public health, and other interests of consumers, in Scotland in respect of food. Part 1 also sets out key aspects of the relationship between the Scottish Ministers and Food Standards Scotland. The Scottish Ministers may request

advice and assistance from Food Standards Scotland in relation to particular matters and may give Food Standards Scotland directions in certain circumstances.

- **Part 2** introduces specific provisions in relation to food law. These include provision for a food hygiene information scheme, an offence of failing to report suspicion of food not being compliant with food information law and powers for authorised officers to detain, seize and remove food and for a Sheriff to determine the treatment of such food.
- **Part 3** provides for administrative sanctions for non-compliance with food safety and standards law. These sanctions will be compliance notices and fixed penalties.
- **Part 4** sets out interpretation provisions for the Bill.
- **Part 5** sets out general provisions on coming into force and modification of enactments.

APPROACH TO USE OF DELEGATED POWERS

6. The Scottish Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make proper use of valuable Parliamentary time; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

DELEGATED POWERS

7. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

PART 2 - FOOD AND FEEDING STUFFS

Section 32 – Food Information

8. Section 32 sets out four food information provisions to be inserted as sections 15A to 15D of the Food Safety Act 1990 (“the 1990 Act”). The new provisions cover: the meaning of “food information”; contravention of food information law; duty to report non-compliance with food information law; and power to obtain information. These introduce powers for authorised officers of food authorities to detain, seize and remove food which contravenes food information law and places a requirement on food business operators to report suspected non-compliance with food information law. For the purposes of defining the meaning of “food information law”

this section includes within the 1990 Act a provision to specify by regulations any enactment relating to food information. The provision is as follows.

To specify any enactment relating to food information as “food information law”.

Power conferred on The Scottish Ministers
Power exercisable by Regulations made by statutory instrument
Procedure Negative procedure of the Scottish Parliament

Reason for taking the power The regulation of food is substantially harmonised at EU level. At present the EU regularly makes new laws on food. EU food law is given effect to in Scotland by regulations made by the Scottish Ministers within devolved competence. It is likely that EU legislation on food information will be revised or added to in future. It is therefore likely that there will be new domestic regulations needed in future to give effect to developments in EU legislation on food information e.g. new labelling requirements for importing and exporting certain foods.

This power enables flexibility to respond to developments in EU law which are given effect to by changes made in domestic law; provisions of new domestic regulations which give effect to EU law in relation to food information can be included within the meaning of “food information law”. It also leaves open the possibility of including any enactments related to food information which are purely domestic in nature.

Furthermore, the power allows for public consultation and advice from Food Standards Scotland before deciding which provisions in domestic law related to food information ought to be the subject of the new enforcement powers for food information in the Bill. Going forward the power allows for these provisions to be varied to take account of the experience gained from using the new powers; in this respect any change to the meaning of “food information law” continues to require a public consultation and regard to be had to any relevant advice from Food Standards Scotland (who, as part of its functions, is required to monitor enforcement action).

Choice of procedure Negative procedure.

This power concerns a procedural matter, essentially giving administrative flexibility for, and future proofing of, a definition. The scope of the definition of “food information law” is narrow: it is limited to “enactments” within the meaning of schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 which must relate to “food information” within the meaning of Regulation (EU) No. 1169/2011. The power is being inserted into the Food Safety Act 1990. Negative procedure aligns the handling of this provision with the existing powers to make subordinate legislation on food in that Act (section 48(3)).

Further, under the 1990 Act the Scottish Ministers will be required to have regard to relevant advice given by Food Standards Scotland and must consult publicly before making any new regulations (section 48(4) to (5)).

For these reasons negative procedure is considered appropriate in making proper use of Parliamentary time and scrutiny. It strikes a balance between the importance of making the appropriate provisions of food information law subject to the new enforcement measures against the need for flexibility in the meaning of food information law, in the context of the limitation on which pieces of legislation can be specified as food information law (i.e. enactments which relate to food information), the fact that food regulations are almost exclusively made by way of the negative procedure and the safeguards in the 1990 Act which require public consultation and regard to be had to advice from Food Standards Scotland before regulations can be made.

Section 33 - Food Hygiene Information Scheme

9. Section 33 of the Bill amends section 16 of, and Schedule 1 to, the Food Safety Act 1990 (“the 1990 Act”) to include an enabling provision to create a mandatory food hygiene information scheme in Scotland. At present a voluntary food hygiene information scheme is in place across nearly all local authorities in Scotland with an estimated 28,000 participating food businesses. The scheme was developed by the Food Standards Agency in Scotland, consumer organisations, industry and local authorities in response to consumer concern about the lack of information publically available on compliance with food hygiene requirements.

10. A mandatory scheme will serve to improve and maintain the observance of hygienic conditions and practices by food businesses that sell or supply food to consumers. This will be achieved by providing public information on compliance with hygienic conditions and practices so that consumers can make informed choices about where they shop for and eat food. It will create an incentive for food businesses to meet the highest standards of hygienic practices on the basis that consumers will be inclined to eat and shop in those premises compared to premises which, whilst safe, require improvement.

11. Section 33(1) inserts a specific power to create the scheme into section 16(1) (food safety and consumer protection) of the 1990 Act. Section 16 is the main regulation making power in food law. Schedule 1 to the 1990 Act refers to particular matters which regulations made under section 16(1) may make provision on; that Schedule is amended by section 33(2) to refer to matters which the new power inserted into section 16(1) may in particular make provision on by regulations, such as the way in which a food hygiene information scheme is enforced and provision for a review or appeal system for ratings. The provision is as follows.

To make provision for a food hygiene information scheme

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument

Procedure

Negative procedure of the Scottish Parliament

Reason for taking the power

Consultation responses on this proposal suggested that more detail on how the mandatory scheme would work would be helpful. Taking time to consider how new schemes in Northern Ireland and Wales impact on food businesses and food hygiene practices before deciding on the detail in Scotland seems sensible. So, the detail of the scheme should be developed further in light of experience elsewhere and then consulted on before regulations are prepared. This gives stakeholders another opportunity to comment on more detailed proposals, and for detailed impact assessments to be made.

New section 16(1)(da) in the 1990 Act ensures that the Scottish Ministers have the power to create a food hygiene information scheme. Arguably section 16(1)(d) could be used to create a scheme but the general width of that power may give rise to some doubt. In any event, it is arguable that existing powers in section 16(1) are limited to regulating the activities of food businesses in terms of the enforcement measures already laid out in the 1990 Act (e.g. making offences, allowing improvement notices to be issued and creating a licensing or registration scheme); a question therefore arises whether food authorities can be required by regulations made under section 16(1) to enforce regulations other than in a way which is presently conceived of under the 1990 Act. A food hygiene information scheme requires new kinds of enforcement activity (in the context of food law) such as issuing ratings and carrying out re-inspections in accordance with the requirements of a process to review a rating. The amendments made to Schedule 1 ensure that provision can be made for a food hygiene information scheme which places requirements on food authorities to determine ratings in accordance with specified criteria, give reasons for the rating, issue certificates showing the rating, publicise ratings and to partake in a review and appeal process. The amendments made to Schedule 1 ensure that provision can be made about the review and appeal of ratings generally e.g. provision could be made allowing an appeal to the sheriff. The amendments also ensure that transitional provision can be made allowing ratings under the existing voluntary scheme to satisfy an obligation to have and display a rating under the new scheme, at least for an initial period of time.

Choice of procedure

Negative procedure.

Improving hygienic conditions and practices is not a controversial aim; the response to the consultation demonstrated broad support for the measure. The aim of the scheme is to allow the public to make a choice based on this rating. Any disadvantage to food businesses (who do not have high food hygiene standards) are in the interests of promoting public health.

There is already a voluntary food hygiene inspection regime in place, and most local authorities (the “food authorities” under the 1990 Act) operate this scheme. A mandatory scheme is not expected to have a significant impact on local authorities.

The power is being inserted into the Food Safety Act 1990. Negative procedure aligns the handling of this power with the existing powers to make subordinate legislation under the 1990 Act (section 48(3)). This requires the Scottish Ministers to have regard to relevant advice given by Food Standards Scotland and consult publicly before making new regulations. This gives food businesses and other stakeholders the opportunity to contribute to forming the detail of the scheme.

For these reasons negative procedure is considered appropriate in making proper use of Parliamentary time and scrutiny. It strikes a balance between allowing the detail of a mandatory food hygiene rating scheme to be scrutinised and the fact that the aim of the measure is not controversial, such a scheme albeit mandatory will not be novel, the fact that food regulations are almost exclusively made by way of the negative procedure and that the safeguards in the 1990 Act which require public consultation and regard to be had to advice from Food Standards Scotland will apply before regulations can be made.

Section 34 – Regulation of animal feeding stuffs

12. Section 34(1) introduces an enabling power giving the Scottish Ministers authority to make provisions by order for the regulation of animal feeding stuffs and connected purposes by applying (with or without modifications), or making provision equivalent to, provisions of the 1990 Act (see section 34(2)). The order can also modify any enactment (section 34(3)). Before an order can be made there must be a consultation and regard must be had to any relevant advice from Food Standards Scotland (section 34(4) and (5)). The provision is as follows.

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Affirmative procedure of the Scottish Parliament

<i>Reason for taking the power</i>	The Bill repeals section 30 of the Food Standards Act 1999 together with the other provisions of that Act which are being repealed in order to remove from it matters which fall within the legislative competence of the Scottish Parliament. Section 34 of the Bill is largely a restatement of the Scottish Ministers’ powers under section 30.
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Most legislation on animal feeding stuffs is made by regulations made by the Scottish Ministers in order to give effect to EU law within devolved competence and the powers relied on to do this are contained in section 2(2) of the European Communities Act 1972. Some

secondary legislation related to animal feeding stuffs in limited respects is made within devolved competence under powers contained in the Agriculture Act 1970. The power under section 30 of the 1999 Act, and now contained in section 34 of the Bill, is a fall back power in the event that it is necessary or desirable to regulate the safety of animal feeding stuffs where there is no European vires to do so and the powers under the 1970 Act are insufficient.

Choice of procedure Affirmative procedure.

Although the exercise of this power is limited to making provision akin to the 1990 Act it does enable the modification of primary legislation and therefore, for this reason, it is considered that the affirmative procedure is appropriate.

PART 3 – ADMINISTRATIVE SANCTIONS

Section 35 - Fixed Penalty Notices

13. Section 35 introduces an enabling power giving the Scottish Ministers the power by regulations to make existing offences in food law subject to administrative sanctions in the form of a fixed penalty notice. Authorised officers of enforcement authorities will be able to use such notices as an alternative to making a report to the Procurator Fiscal. The Scottish Ministers will have discretion (see the meaning of “relevant offence” in section 51) to determine which existing offences in food law should be made subject to a fixed penalty notice and in what circumstances. Section 50 allows the Lord Advocate to issue guidance to enforcement authorities on the exercise of their functions in this regard.

14. The Scottish Ministers will be able to determine the basis upon which an authorised officer will be entitled to assert that an offence has been committed and therefore issue a fixed penalty notice. Different standards of proof may be required in respect of the range of offences. A higher standard may be necessary in the case of more serious offences which would entail more serious sanctions.

15. The Scottish Ministers will also be able to introduce detail for issuing of fixed penalty notices and their content. The provisions under section 35 are as follows.

To make provision to specify the sum of money to be paid under a fixed penalty notice (section 35(2)).

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative procedure of the Scottish Parliament

<i>Reason for taking the power</i>	Consultation responses were largely in favour of the introduction of fixed penalty notices as a means to provide authorised officers with an alternative sanction to seeking prosecution. The amount of the sum of money comprising the penalty needs to be flexible to allow for changes
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from time to time e.g. brought about by guidance issued by the Lord Advocate on appropriate fine levels. It would be too restrictive to set out the sum of money for fixed penalty notices in the Bill as it is highly likely that the amount set will need to be varied in future in accordance with living costs. Additionally, different levels will need to be set depending on the seriousness of the offence (or the seriousness of a particular act or omission giving rise to an offence) and this level of detail is better suited to secondary legislation.

Choice of procedure Negative procedure.

This power does not introduce a new offence. The Bill provides for the basis of the fixed penalty notice scheme as an alternative to seeking prosecution. The power to make regulations provides for some of the operational details and builds in flexibility for future changes. Fixed penalty notices are now a common enforcement measure used by public authorities for a wide range of offences, and this provision is a reasonable requirement. Furthermore, the Scottish Ministers must consult widely and seek advice from FSS before making regulations.

Section 35(5) limits the exercise of this power so that the Scottish Ministers cannot specify a sum exceeding level 4 on the standard scale. Level 4 is deemed to be suitable for offences which are not minor but nonetheless not serious enough to warrant level 5 on the standard scale. Subject to consultation and advice from Food Standards Scotland it is intended that minor offences will attract a sum below level 4; but setting the limit at level 4 allows flexibility for this to be increased in future.

Setting a limit on the face of the Bill balances the need for flexibility with ensuring the appropriate level of scrutiny by Parliament and use of Parliamentary time which is considered to merit the negative procedure, in the context that this power does not introduce any new offences, fixed penalty notices are not novel and the safeguards in the 1990 Act which require public consultation and regard to be had to advice from Food Standards Scotland will apply before regulations can be made.

For these reasons, it seems reasonable for this provision to be bound by the negative procedure.

To make provision to specify the standard to which an authorised officer must be satisfied before issuing a fixed penalty notice (section 35(4))

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative procedure of the Scottish Parliament

<i>Reason for taking the power</i>	Different standards may be set for different offences which are to be specified for the purposes of issuing a fixed penalty notice (including
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offences which are yet to be created and which may be specified in years to come). A specified standard could, for example, be reasonable belief, on the balance of probabilities or beyond reasonable doubt. This power allows for the appropriate standard to be selected for each specific existing offence by allowing the matter to be consulted on in detail before regulations are made. But this also allows flexibility going forward as the use of fixed penalties is informed by practice, which might mean changing the standard for some offences; in this regard FSS has powers which enable it to observe, and monitor the performance of, enforcement action.

Choice of procedure Negative procedure.

This power does not introduce a new offence. The Bill provides for the basis of the fixed penalty notice scheme as an alternative to seeking prosecution. This power to make regulations provides for some of the operational details and builds in flexibility for future changes. Furthermore, the Scottish Ministers must consult widely and seek advice from FSS before making regulations. Fixed penalty notices are now a common enforcement measure used by public authorities for a wide range of offences, and as this provision is a reasonable procedural element, the negative procedure is suitable.

Section 36 - Content and form of fixed penalty notice

16. Section 36(1) sets out the information which must be included in a fixed penalty notice, which is to include the period of time within which a fixed penalty notice must be paid. Section 36(2) provides for the Scottish Ministers specifying in regulations the period of time within which a fixed penalty notice must be paid beginning on the date of issue. Section 36(3) provides that the Scottish Ministers may make regulations which make further provision about the form and content of information to be contained in fixed penalty notices, including any additional information which is to be included in the notice. The powers found in section 36 are as follows.

To make provision specifying the period of time within which payment of a fixed penalty notice is to be made (section 36(2)).

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative procedure of the Scottish Parliament

<i>Reason for taking the power</i>	Setting a period of time is a technical detail best implemented by regulation as it gives flexibility to vary the period of time to make payment in the future. Also, this provision can be considered in further detail once the power below regarding the content and form of fixed penalty notices has been exercised. Furthermore, the Scottish Ministers must consult widely and seek advice from FSS before making regulations.
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Choice of procedure Negative procedure.

This power does not introduce a new offence. The Bill provides for the basis of the fixed penalty notice scheme as an alternative to seeking prosecution. This is a minor provision and given that there needs to be consultation as referred to above, it is appropriate for it to be implemented by the negative procedure.

To make provision about the form and content of fixed penalty notices (section 36(3)).

Power conferred on The Scottish Ministers
Power exercisable by Regulations made by statutory instrument
Procedure Negative procedure of the Scottish Parliament

Reason for taking the power This is a procedural and technical provision which will allow for the content and form of a compliance notice to be updated as and when required to take into account administrative changes. It would also give flexibility to make such minor changes without the need to amend primary legislation.

Choice of procedure Negative procedure.

This power does not introduce a new offence. The Bill provides for the basis of the fixed penalty notice scheme as an alternative to seeking prosecution. This power to make regulations provides for some of the operational details and builds in flexibility for future changes. This is a reasonable provision for a fixed penalty sanction: it does not raise any contentious issues and as such it is appropriate to have by negative procedure. Again, like all the regulation-making powers in Part 3, the Scottish Ministers have to first consult widely and have regard to advice from FSS.

Section 41 – Compliance Notices

17. Section 41 gives the Scottish Ministers the power to make existing offences in food law subject to administrative sanctions in the form of a compliance notice. Authorised officers of enforcement authorities will be able to use such notices as an alternative to fixed penalty notices or making a report to the Procurator Fiscal. Offences for which a compliance notice would be considered appropriate are likely to be minor in nature, and therefore not merit more punitive sanctions. The Scottish Ministers will have discretion to determine which offences (see the meaning of “relevant offence” in section 51) in food law should be made subject to a compliance notice and in what circumstances. Section 50 allows the Lord Advocate to issue guidance to enforcement authorities on the exercise of their functions in this regard.

18. The power will enable the Scottish Ministers to determine the basis upon which an authorised officer will be entitled to assert that an offence has been committed and therefore

issue a compliance notice. Different standards may be required in respect of the range of offences.

19. The power also enables the Scottish Ministers to introduce detail for issuing of compliance notices and their content.

To make provision to specify the standard to which an authorised officer must be satisfied before issuing a compliance notice (section 41(3)).

<i>Power conferred on</i>	Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative procedure of the Scottish Parliament

<i>Reason for taking the power</i>	It would be inappropriate to set out a standard on the face of the Bill to which an authorised officer needs to be satisfied before issuing a compliance notice because this will vary for the different offences. Furthermore, the Scottish Ministers must consult widely and seek advice from the FSS before making regulations under this section.
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<i>Choice of procedure</i>	Negative procedure.
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This authority does not introduce a new offence. The Bill provides for the basis of the compliance notice scheme as an alternative to fixed penalty or seeking prosecution. This delegated authority merely provides for some of the operational details and builds in flexibility for future changes, and therefore the negative procedure is suitable.

Section 42 – Content and form of compliance notice

20. Section 42(1) sets out the information which must be included in a compliance notice, which is to include the period of time within which steps are required to be taken. Section 42(3) provides for an enabling power by which the Scottish Ministers must specify in regulations the minimum period of time which may be specified in a compliance notice as the time within which steps must be taken. Section 42(4) provides that the Scottish Ministers may make regulations which make further provision about the form and content of information to be contained in compliance notices, including any additional information which is to be included in the notice. These provisions are accounted for here.

To make provision specifying a minimum period of time within which a compliance notice may be complied with (section 42(3)).

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative procedure of the Scottish Parliament

<i>Reason for taking the power</i>	It is not known yet which offences in food legislation will be made relevant offences and it may be that different minimum periods of time for compliance may be suitable for different relevant offences. Setting a minimum period of time is a requirement that would be best
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implemented by regulations because it will allow flexibility to vary the length of time depending on the nature of the offence. It will also allow for a minimum period of time to be set for any new offences, without the need to amend primary legislation.

Choice of procedure

Negative procedure.

A minimum period of time to comply with a notice must be specified by the Scottish Ministers in regulations. It is a standard provision of a compliance scheme as it guarantees the recipient of a notice a minimum period of time within which to comply and thereby acts as a control on the powers of authorised officers to determine the period for compliance when issuing a notice. There is such a provision in section 10(1)(d) of the Food Safety Act 1990 in relation to improvement notices which requires compliance with particular food regulations within such a period – not being less than 14 days - as an authorised officer may specify. For the purposes of the Bill a range of offences in food legislation could be specified as relevant offences and it may be that a period less than, or more than, 14 days may be an appropriate minimum period depending on the nature of the offence.

However, despite the need for flexibility, it may be that most relevant offences will attract the same minimum period of time for compliance. It is not anticipated that the exercise of this power will result in complicated provision being made. It should be a relatively straightforward matter. Essentially, this is a narrow power which is limited to specifying a minimum period (or periods) of time in relation to requiring compliance with food legislation. This is legislation which largely, if not exclusively, will apply to food businesses. Food businesses should already be complying with food legislation. It is not expected to be controversial. Specifying the minimum period (or periods) will be informed by practice through consultation with food businesses and enforcement authorities. Indeed, before regulations can be made the Scottish Ministers must run a consultation and have regard to advice from Food Standards Scotland.

For these reasons negative procedure is considered appropriate in making proper use of Parliamentary time and scrutiny.

To make further provision about the form and content of compliance notices (section 42(4)).

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative procedure of the Scottish Parliament

Reason for taking the power

Section 42(1) provides for the information that must be included in a compliance notice; the information required by that section is

fundamental to the operation of the compliance notice scheme and the obligation to provide it in a notice cannot be varied by regulations. This power supplements that requirement by allowing the Scottish Ministers to make provision by regulations about the detail of the information required by section 42(1) and the form it is to take in the notice. It also allows for additional, nonessential, information to be required in notices.

The exercise of this power is administrative in nature. It will be used to take care of the detail in a notice and ensure that notices are issued in a clear and consistent form across Scotland. It may be desirable to change the form and detail of the information provided in a notice from time to time, as practice develops. It seems appropriate to have the flexibility to do this by regulations.

Choice of procedure Negative procedure.

This authority does not introduce a new offence. The Bill provides for the basis of the compliance notice scheme as an alternative to fixed penalty notices or seeking prosecution. This delegated authority merely provides for some of the operational details and builds in flexibility for future changes. This is a reasonable provision for compliance notice schemes and does not raise any contentious issues; as such it is appropriate to have by negative procedure. Again, like all the regulation-making powers in Part 3, the Scottish Ministers have to consult widely and have regard to advice from FSS.

Sections 48 – Power to make supplementary etc. provision

21. Section 48(1) gives the Scottish Ministers a general power to make by regulations, supplementary, incidental or consequential provisions in relation to administrative sanctions in the form of a fixed penalty notice or compliance notice, and in relation to the execution by authorised officers of their functions in that regard. Section 48(2) sets out what, in particular, provision made under section 48(1) can include.

22. Section 48(2)(a) refers to the power to introduce provisions for facilitating, prohibiting or restricting the imposition of fixed penalty notices or compliance notices in cases where another sanction has been issued in respect of a relevant offence arising out of the same act or omission. Likewise regulations may facilitate, prohibit or restrict the imposition of other sanctions where a fixed penalty notice or compliance notice has been issued in respect of a relevant offence arising out of the same act or omission. Section 51 contains the meaning of “relevant offence”.

23. Section 48(2)(b) refers to the power to make regulations providing for early payment discounts with regard to fixed penalty notices.

24. Section 48(2)(c) refers to the power to make regulations to apply with modifications, or make equivalent provision to, the following sections of the 1990 Act:

- a. section 20 (offences due to fault of another person),
- b. section 21 (defence of due diligence),
- c. section 30(8) (documentary evidence in proceedings for offences),
- d. section 32 (powers of entry),
- e. section 33 (obstruction etc. of officers),
- f. section 34 (time limit for prosecutions),
- g. section 36 (offences by bodies corporate),
- h. section 36A (offences by partnerships),
- i. section 40 (power to issue codes of practice),
- j. section 45 (regulations as to charges),
- k. section 49(3) to (5) (authentication of documents),
- l. section 50 (service of documents).

25. Sections 48(3) allows for regulations under section 48(2)(a) to make modifications to sections 37 and 44 on the effect of fixed penalty notices and compliance notices on criminal proceedings.

26. Section 48(4) expands on the meaning of “another sanction” and section 48(5) allows the Scottish Ministers to modify subsection (4).

To make supplementary, incidental or consequential provision as considered appropriate in connection with fixed penalty notices and compliance notices and provision on the carrying out of functions under Part 3 of the Act by enforcement authorities and authorised officers (section 48(1)).

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative procedure of the Scottish Parliament

<i>Reason for taking the power</i>	This power enables technical provision to be made supplemental, incidental or consequential to provision in the Bill on administrative sanctions and on the functions of enforcement authorities in relation to administrative sanctions, in order to enable the administrative sanctions scheme to function in practice as desired and to allow for a degree of future-proofing. It would not be possible to foresee every eventuality that would require a change or addition in relation to compliance and fixed penalty notices.
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Sections 59 (subordinate legislation) and 60(a) (ancillary provision) also include powers to make supplementary, incidental or consequential provision.

Section 59 attaches to powers the Scottish Ministers already have to make orders or regulations under the Bill; whereas section 48 is a free-standing power.

Section 60(a) is a free-standing power commonly found in one form or another in many pieces of primary legislation: it is a general power to make ancillary provision by order. However, section 48 is a specific regulation making power (which allows it to be easily combined with other regulation making powers in Part 3 of the Bill) to make supplemental etc. provision in connection with administrative sanctions and the functions of enforcement authorities and authorised officers in that regard. It has been made clear in section 48(2) that this specific power includes the power to make provision about some particular matters; without section 48(2) it is possible that there could have been some debate about the extent of the power in section 48(1) to make provision on these particular matters. In that respect section 48 may go further than the broadly expressed powers in section 60(a). Essentially, section 48 makes clear that the Scottish Ministers can make the provision needed to allow an administrative sanctions scheme to function properly and it seems beneficial for the reader to place a specific power such as this within the Part of the Bill to which it relates.

Choice of procedure Negative procedure.

The fundamental mechanics of how administrative sanctions are to work are set out in the Bill; that includes, for example, defining what a fixed penalty notice is, who can issue a notice, what it means to pay a fixed penalty, what the basic restrictions are on issuing a notice and the effect of a notice being withdrawn. This power enables further provision to be made in order to ensure that what is set out in the Bill can be properly given effect to in practice. It also specifically allows regulations to make provision about how enforcement authorities are to carry out their functions in relation to the administrative sanctions scheme: again, this is to ensure that what is in the Bill can be given effect to in practice. Therefore the exercise of this power is constrained by what is in the Bill since the power can only be used to make supplemental, incidental or consequential provision and provision about how enforcement authorities are to carry out their functions in Part 3 of the Bill.

Although this may be a power which is wider than section 60 (mentioned above) it is intended to be exercised for a similar purpose. It is essentially concerned with the detail needed to give effect to provisions in the Bill – in this case, specifically the implementation of the administrative sanctions scheme. Section 60 is a power commonly

found in primary legislation and in the usual way it is subject to negative procedure (unless it is used to amend primary legislation).

In addition, before making any regulation under this section, the Scottish Ministers must consult widely and take advice from FSS.

For these reasons it is considered appropriate to follow negative procedure

To make particular provision under section 48(1) to facilitate, prohibit or restrict: (1) the issuing of a fixed penalty notice or compliance notice in respect of a relevant offence arising out of an act or omission in cases where another sanction has been issued or imposed in respect of the same act or omission; or (2) issuing or imposing of another sanction in respect of an act or omission in cases where a fixed penalty notice or compliance notice has been issued in respect of a relevant offence arising out of the same act or omission (section 48(2)(a)).

<i>Power conferred on</i>	Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative procedure of the Scottish Parliament

<i>Reason for taking the power</i>	The very detailed nature of regulating the circumstances in which a fixed penalty notice, a compliance notice and other sanctions in food law (e.g. an improvement notice under section 10 of the 1990 Act) could relate to one another and how that relationship should work is best left to be made in regulations after consultation and with regard to advice from Food Standards Scotland. It may be, for example, that a prohibition on issuing a compliance notice in respect of an act or omission giving rise to a relevant offence is not appropriate where that act or omission is the subject of an improvement notice.
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The list of other sanctions is contained in section 48(4) and after consultation this may be expanded further; it may also be varied in future depending on any new sanctions which might be introduced into food law e.g. contained in regulations which apply with modifications provisions of the 1990 Act. That means there is a need for flexibility to take account of views on how administrative sanctions should relate to one another and to other sanctions in food law, and going forward to take account of developments in the law and lessons learned once the administrative sanctions scheme has been commenced.

<i>Choice of procedure</i>	Negative procedure.
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This strikes a balance between the importance of ensuring that provision needed to allow the administrative sanctions scheme to function properly is scrutinised and the fact that this provision will comprise highly technical detail made only after public consultation and with regard to advice from Food Standards Scotland as required by section

49 (regulations).

Furthermore, it will likely be considered appropriate to make provision under this power where that provision is not otherwise covered by guidance (which must be complied with) issued by the Lord Advocate to enforcement authorities on the exercise by them, and their authorised officers, of functions in relation to administrative sanctions under section 50 (Lord Advocate's guidance); it is also possible, should section 40 of the 1990 Act be applied (under section 48(2)(c)) that a recommended code of practice issued to enforcement authorities by the Scottish Ministers may make provision on aspects of the relationship between sanctions and how authorised officers should exercise their functions in respect of administrative sanctions and other sanctions. Given the scope for dealing with these matters in guidance and/or a recommended code of practice it is anticipated that the use of this power will be limited.

For these reasons negative procedure is considered appropriate in making proper use of Parliamentary time and scrutiny.

To make particular provision under section 48(1) for early payment discounts in relation to fixed penalty notices (section 48(2)(b)).

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative procedure of the Scottish Parliament
<i>Reason for taking the power</i>	This power allows for detailed provision to be made which is best left to regulations (if it is to be made) after consultation and with regard to advice from Food Standards Scotland. That consultation and advice from Food Standards Scotland will help determine whether provision for early payment discounts is appropriate and if it is appropriate then how that ought to work e.g. what the reduced sum of money is to be for early payment, to which relevant offences it should relate and the time period in which early payment should be permissible (different periods of time and different discounts may be applied for different relevant offences). The power also enables, going forward, any provision on early discount payments to be varied to take account of how it is working in practice.
<i>Choice of procedure</i>	Negative procedure. Provision for early payment discounts is largely technical and is, of course, confined to matters concerning a reduction in the sum payable under a fixed penalty notice. It essentially comprises providing for a reduced sum of money which is to be accepted as payment for discharging liability, the relevant offences to which it should relate and the period of time which early payment is permissible before the sum

specified under section 35(2) becomes the amount payable.

It is also not a controversial measure: it does not create any additional burdens as it in fact provides for the reduction of the sum of money payable under a fixed penalty notice.

For these reasons negative procedure is considered appropriate in making proper use of Parliamentary time and scrutiny.

To make particular provision under section 48(1) to apply with modifications or make provision equivalent to certain provisions of the Food Safety Act 1990 (section 48(2)(c)).

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative Procedure of the Scottish Parliament

<i>Reason for taking the power</i>	The provisions of the 1990 Act referred to in section 48(2)(c) are relevant to administrative sanctions and it may be desirable to apply them with modifications or make equivalent provision using secondary legislation for the purposes of Part 3 of the Bill. This gives flexibility to apply some or all of the respective sections of the 1990 Act and permits this to be varied in future, without resorting to primary legislation.
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<i>Choice of procedure</i>	Negative procedure.
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These provisions of the 1990 Act apply to many regulations in food law made subject to negative procedure. They are often expressly applied to regulations (e.g. regulation 5 of S.S.I. 2009/435) or they apply to regulations by virtue of regulations being made under sections 16 or 17 of the 1990 Act (e.g. section 50 applies to any document which is required or authorised “under this Act” which includes documents provided for in regulations made under section 16 or 17). They are standard procedural and administrative provisions found throughout food law.

Furthermore, as with the other regulation-making powers in Part 3, the Scottish Ministers have to first consult widely and have regard to advice from FSS before making regulations.

Therefore the negative procedure is considered appropriate.

To make particular provision for the modification of sections 37 and 44 (section 48(3)).

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative procedure of the Scottish Parliament

Reason for taking the power This provision specifically allows for regulations made under section 48 (2)(a) above, to modify sections 37 and 44 which relate to the effect of a fixed penalty notice and compliance notice on criminal proceedings. This gives flexibility if any changes to those sections are required in certain circumstances where those sections would otherwise prohibit or restrict the issuing of administrative sanctions.

Choice of procedure Negative procedure.

This power is limited to making modifications in relation to the effect of administrative sanctions on criminal proceedings so as to facilitate, prohibit or restrict the issuing of administrative sanctions (including as between fixed penalty notices and compliance notices) with other sanctions (“another sanction” is defined in section 48(4)). Should this power be used it would be for limited and highly technical reasons in order to streamline the relationship between such sanctions.

Any regulations will need to be consulted upon and advice from FSS taken into account before being made.

Negative procedure is therefore considered appropriate.

To make particular provision to modify section 48(4) (section 48(5)).

Power conferred on The Scottish Ministers
Power exercisable by Regulations made by statutory instrument
Procedure Negative procedure of the Scottish Parliament

Reason for taking the power This section provides for the meaning of “another sanction” and as new sanctions could be created, it is sensible to allow provision for the list of sanctions to be amended to take account of developments in the law and lessons learned once the administrative sanctions scheme has been commenced.

Choice of procedure Negative procedure.

The Scottish Ministers have to consult widely and have regard to advice from FSS. This strikes a balance between the importance of ensuring that provision needed to allow the administrative sanctions scheme to function properly is scrutinised and the fact that this provision will comprise detail made only after public consultation and with regard to advice from Food Standards Scotland as required by section 49 (regulations).

Section 51 – Interpretation of Part 3

27. Section 51 sets out the definitions of key terms in Part 3 of the Bill. In particular, there is one definition which provides for a delegated power. It allows the Scottish Ministers to specify

which offences under food legislation are to be “relevant offences” for the purposes of the administrative sanctions scheme set out in Part 3 of the Bill. Section 56 defines “food legislation”.

To specify which offences in food legislation are “relevant offences” in Part 3 of the Bill

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Negative Procedure of the Scottish Parliament

Reason for taking the power Flexibility is needed so that relevant offences can be specified after consultation and can be varied in future to take account of practice, and to include new offences created in food legislation in future. If desirable this power can also be exercised in combination with powers in section 59 so that different administrative sanctions (i.e. fixed penalty notices or compliance notices) can be applied to different relevant offences.

Choice of procedure Negative procedure.

Only an offence in food legislation can be made a relevant offence. The exercise of this power is therefore limited; the power cannot be used to specify an offence which is not found in food legislation nor can it be used to create a new offence.

Exercising this power (to specify relevant offences) does not allow enforcement authorities to issue administrative sanctions for relevant offences unrestricted. An authorised officer must be satisfied to the specified standard that the person has committed the relevant offence and the Lord Advocate may issue guidance (under section 50) to enforcement authorities on the exercise of their functions which must be complied with e.g. guidance may cover the circumstances in which an administrative sanction should be issued and the circumstances where the matter should instead be reported to the fiscal.

For these reasons, and considering the requirement to consult and to have regard to advice from FSS before making any regulations (under section 49), negative procedure is considered appropriate in making proper use of Parliamentary time and scrutiny.

PART 4: INTERPRETATION

Section 52(1) (meanings of “food” and “animal feeding stuffs”)

<i>Power conferred on</i>	The Scottish Ministers
<i>Power exercisable by</i>	Regulations made by statutory instrument
<i>Procedure</i>	Affirmative procedure of the Scottish Parliament

Reason for taking the power The Bill does not contain definitions of food or animal feeding stuffs and therefore where these terms appear in the Bill they must be given their ordinary meanings having regard to the context and where appropriate section 101 of the Scotland Act 1998 (interpretation of Acts of the Scottish Parliament etc.). This power is intended to be temporary pending highly technical adjustments which are being sought to the legislative competence of the Scottish Parliament. The adjustments require an order under section 30 of the Scotland Act 1998. Should that order be obtained before stage 3 the intention of the Scottish Government is to bring forward amendments to section 52 to insert definitions of these terms. If, however, a section 30 order is not obtained (or not obtained in time) then this power allows for the meaning of these terms to be varied within legislative competence as it currently stands. The power offers flexibility by enabling articles or substances to be included in or excluded from the ordinary meanings of these terms should that prove to be desirable.

Choice of procedure Affirmative procedure.

The meanings of food and animal feeding stuffs are central to the Bill yet any adjustment made to those meanings by this power is likely to be highly technical in nature and unlikely to have a wide impact. However, section 52(2) enables an order made under section 52(1) to modify the Bill. For that reason it seems appropriate that this power is subject to affirmative procedure.

Section 57 (in relation to the definition of “premises”)

Power conferred on The Scottish Ministers
Power exercisable by Regulations made by statutory instrument
Procedure Negative procedure of the Scottish Parliament

Reason for taking the power This provision is akin to the definition of “premises” contained in section 1(3) of the Food Safety Act 1990 including the order making power contained within it. The definition of premises in the 1990 Act includes any ship or aircraft of a description specified by order. The definition of premises in the Bill includes any aircraft or ship, boat or other water-going vessel, other than one of a description specified by order. The power in the Bill enables regulations to exclude certain ships and aircraft etc from being included in the definition of premises and thereby removes them from being subject to the provisions of the Bill e.g. it may be undesirable for Food Standards Scotland to carry out observations on board certain types of ship visiting Scotland from other states. The classifications and categories of ships and aircraft etc may require to be updated from time to time and it therefore seems appropriate to make this provision by order, in keeping with the

approach taken by the 1990 Act.

Choice of procedure Negative procedure.

In keeping with the 1990 Act, the negative procedure is considered to be appropriate. This is a very narrow order making power: it is limited to describing certain aircraft, ships, boats or other water-going vessels which are to be excluded from the meaning of “premises” for the purposes of the Bill. Before making any such order consultation is required and regard to be had to any relevant advice from FSS.

PART 5: FINAL PROVISIONS

Section 60 (ancillary provision)

Power conferred on The Scottish Ministers
Power exercisable by Order made by statutory instrument
Procedure Negative procedure of the Scottish Parliament

Reason for taking the power This is a standard provision to make ancillary provisions as appropriate to give effect to any provisions in the Bill.

Choice of procedure Negative procedure.

This is a common and an un-contentious provision and negative procedure is considered appropriate in making proper use of Parliamentary time and scrutiny.

Section 62 (commencement)

Power conferred on The Scottish Ministers
Power exercisable by Order made by statutory instrument
Procedure None

Reason for taking the power Part 5 of the Bill (except section 58) comes into force the day after Royal Assent while the rest of the Bill will come into force on such a day as the Scottish Ministers appoint by order.

Choice of procedure No procedure is standard practice for commencement orders.

This document relates to the Food (Scotland) Bill (SP Bill 48) as introduced in the Scottish Parliament on 13 March 2014

FOOD (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM