EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (INFORMATION-SHARING) (NHS PAYMENTS AND REMISSION OF CHARGES ETC) (ENGLAND) REGULATIONS 2015

2015 No. 124

AND

THE DELEGATION OF ADDITIONAL FUNCTIONS TO THE NHS BUSINESS SERVICES AUTHORITY (AWDURDOD GWASANETHAU BUSNES Y GIG) (REGULATIONS 2015

2015 No. 127

1. This Explanatory Memorandum has been prepared jointly by the Department for Work and Pensions and the Department of Health, and is laid before Parliament by Command of Her Majesty.

This Memorandum contains information for the Joint Committee on Statutory Instruments (JCSI).

2. Purpose of the Instruments

2.1. The Social Security (Information-sharing) (NHS Payments and Remission of Charges etc.) (England) Regulations 2015, (the "Information-sharing Regulations"), allow the Secretary of State for Work and Pensions to supply information to a prescribed list of "qualifying persons" within the health sector. The qualifying persons are then entitled to hold and use the information for prescribed purposes, which, in this context, relate to a patient's eligibility for an exemption or partial exemption from a requirement to pay for certain healthcare services, to their entitlement to receive a voucher to cover the cost of all or part of a relevant healthcare service, to receive a remission from certain charges, or to the refunding of travel expenses under the Healthcare Travel Costs Scheme, by virtue of either being in receipt of qualifying social security benefits, or by being a member of the family of the benefit recipient.

2.2. The Delegation of Additional Functions to the NHS Business Services Authority (Awdurdod Gwasanethau Busnes Y GIG) Regulations 2015, (the "Delegation of Additional Functions Regulations"), provide directions from the Secretary of State for Health which require the NHS Business Services Authority to exercise specified functions of the NHS Commissioning Board ("NHS England"). The functions specified are those exercised by NHS England as a prescribed "qualifying person" within the meaning of the Information-sharing Regulations, as well as to NHS England's functions relating to the recovery of certain unpaid prescription charges where an exemption claim has been claimed but not substantiated.

2.3. Given the strong level of inter-dependence between these two sets of Regulations, the Department for Work and Pensions and the Department of Health have presented a joint Explanatory Memorandum.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. Yes. In the Information-sharing Regulations, the Secretary of State for Work and Pensions and the Secretary of State for Health are distinguished, at all places, by the titles of their Departments in order to provide clarity for the reader, notwithstanding that they are exercising functions not vested in them individually but which may be exercised by any one of Her Majesty's principal Secretaries of State.

4. Legislative Context

4.1. Section 131 of the Welfare Reform Act 2012 establishes a framework for the sharing of data relating to relevant social security benefits by the Secretary of State for Work and Pensions. That framework allows the Secretary of State for Work and Pensions to share data with prescribed "qualifying persons" for specified purposes relating to welfare services. Both the "qualifying persons" and the purposes for the information-sharing need to be specified in subordinate legislation, and the Information-sharing Regulations achieve this purpose.

4.2. By section 1(4) of the National Health Service Act 2006, services provided as part of the National Health Service in England must be provided free of charge, except in so far as the making or recovery of charges is permitted by or under legislation. Regulations allow charges to be levied on some patients, most notably NHS prescription charges and charges for dental services, but the same Regulations also provide for exemptions from those charges. Those exemptions fall into three broad categories: exemptions based upon the age of the patient; exemptions based upon the health of the patient (for example, for sufferers from diabetes), and exemptions based upon the economic circumstances of the patient. In relation to the last of these three categories, one of the deciding factors in determining whether or not a patient is entitled to the remission of charges is if they – or potentially a family member – are in receipt of relevant social security benefits. Receiving those benefits may also be the gateway to receiving other benefits that would not generally be provided as part of the NHS, such as reimbursement of travel expenses and free eye tests.

4.3. Relatively low volume data matching checks are already in place, post-dispensing, to test a person's entitlement to a free prescription or to free dental treatment on the basis of being in receipt of a qualifying benefit. Up until now, common law powers have been sufficient to support these checks. However, the two Departments have concluded that specific data sharing legislation is now appropriate in the context of the Department of Health's proposed programme of increasing both the scope and volume of eligibility checks. The Departments believe there is a public expectation that such data will be shared to ensure that the right people can access the right services on the right basis at the right time.

5. Territorial Extent and Application

5.1. These two instruments apply to England.

6. European Convention on Human Rights

6.1. As both these instruments are subject to the negative resolution procedure, and do not amend primary legislation, no statement is required.

7. Policy background

7.1. The Department for Work and Pensions and the Department of Health have identified a need for improved data sharing arrangements from two perspectives:

a) To enable the more efficient validation of a person's eligibility to receive an exemption from a requirement to pay for healthcare services, where that person is entitled to a qualifying social security benefit or is a member of the family of a person entitled to a qualifying social security benefit;

b) To allow the Department of Health to significantly extend and increase the volume and scope of the eligibility checks it undertakes in respect of prescriptions and other health care services in order to detect, pursue and ultimately prevent financial loss to the NHS through fraud.

7.2. In practice, post dispensing checks to determine eligibility for an exemption from NHS charges, or the requirement to pay for relevant health care services, are already carried out by the NHS Business Services Authority (NHS BSA) acting on behalf of both the Secretary of State for Health and NHS England. However, as part of the Department of Health's counter fraud strategy for the NHS, the number of eligibility checks based upon entitlement to relevant social security benefits will expand significantly. The arrangements by which NHS BSA carry out this work have been reviewed, and the need for two changes identified: first, to formalise the delegation of relevant functions of the Secretary of State and NHS England in relation to the Information-sharing Regulations; and second, to put into Regulations the requirement that NHS BSA performs relevant NHS England functions in relation to the recovery of prescription charges levied by NHS chemists and GP practices. The Secretary of State for Health has powers to direct a Special Health Authority, such as NHS BSA, to perform either his own functions or the functions of another body that relate to the NHS, but where he directs them to perform the functions of another body, the directions have to be in Regulations.

7.3. As indicated above, a number of health care services attract the payment of a charge, except where exemptions apply, and some services may allow the reimbursement of monies spent by patients. These include NHS prescriptions, NHS dental charges, the provision of ophthalmic goods and services and eye tests, wigs and fabric supports, and the refunding of travel expenses under the Healthcare Travel Costs Scheme for the cost of attending hospital or other NHS premises for NHS-funded treatment. People who are in receipt of qualifying social security benefits may be entitled to an exemption from payment of such charges or to the reimbursement of expenditure incurred by them.

7.4. The two Departments recognise that it is not always easy for people to understand the extent of their entitlement to an exemption from a requirement to pay for relevant healthcare services. The way that social security benefits are delivered means that customers may not always have clear documentary evidence of their entitlement. It is also accepted by the two Departments that a significant proportion of fraudulent

activity is committed by people who claim to be in receipt of a qualifying social security benefit and therefore claim to be entitled to a remission from all or part of a charge for goods and services. Consequently, a key principle underlying these regulations is the need to provide a means of improving a person's awareness of their entitlement (or otherwise) to an exemption from paying a charge for relevant health care services or to reimbursement for monies spent, and to improve overall access to services. Introducing a robust way of testing entitlement will identify those who may be entitled to help because of a different qualification and provide support to claim their exemption correctly, but also to identify instances of fraud and thereby reduce the level of financial loss to the NHS. The two Departments have also concluded that a robust legal framework will better support future technological developments to enable these improved tests of entitlement. For example, the Department of Health is actively considering options for a new electronic system that will undertake real time point-of-dispensing eligibility checks to immediately establish a customer's entitlement (or otherwise) to an exemption from charges.

7.5. As part of its counter-fraud strategy for the NHS, the Department of Health has asked the NHS BSA to significantly increase the volume and scope of the checks carried out post-dispensing to determine eligibility (or otherwise) to an exemption from a charge made for a prescription, or for the provision of dental treatment. Initially, this work will rely on benefits data already held by NHS BSA (i.e. relating to medical and maternity exemptions, the NHS low income scheme, prescription pre-payment certificates and tax credits). However, during 2015-16, the scope of this checking will be increased to cover a much wider range of qualifying social security benefits, and it is this step-change in scope and volume that requires a much greater level of information sharing between the two Departments, and between the Department for Work and Pensions and NHS BSA on behalf of the Department of Health and of NHS England, than is currently the case. It is expected that the level of post-dispensing checks will approach 100% by the end of 2016, although this type of checking would be largely superseded by the proposed electronic system that will allow real-time point-of-dispensing eligibility checks.

7.6. The two Departments have agreed that the most appropriate solution is to introduce regulations under the data sharing powers of the Welfare Reform Act 2012 on the grounds that there is:

a) A public good in providing greater clarity to low income and vulnerable customers to help them establish eligibility or otherwise to receive the benefits and healthcare services they are entitled to; and
b) A wider public good in preventing, detecting and investigating fraudulently obtained benefits, thereby reducing the level of financial loss to the NHS.

7.7. Data will be shared in a very limited and carefully prescribed way. When checking prescriptions, the NHS BSA will supply a limited series of data to the Department for Work and Pensions which will cover the patient's name, address, date of birth and, where appropriate, the National Insurance Number. The Department for Work and Pensions (DWP) will then match this information against their various benefits systems to establish eligibility. There are four possible outcomes: (1) the patient is in receipt of a qualifying benefit, and is therefore eligible for a free prescription; (2) the patient is not in receipt of a qualifying benefit (and is not eligible); (3) there is no

match for the individual against the DWP database; and (4) the customer is deceased.

7.8. It is important to note that none of the "qualifying persons" named in the regulations will have direct access to DWP benefit records. The principle of proportionality will apply, in that the "qualifying persons" will supply just enough data for DWP to match against their records, and DWP will provide just enough information in return to demonstrate the customer's eligibility status according to one of the four outcomes. There will be no wholesale transfer of benefits data. Equally importantly, neither the Secretary of State for Work and Pensions nor his officials will have access to patient records held by pharmacists or other "qualifying persons". At no time will any medical records or other health or care related information be shared or made available for enquiry.

7.9. DWP will require governance at each change in the provision of data for these purposes as the Department of Health rolls out its new strategy. This governance will test the impact of the data sharing exercises and any data matching that takes place, as well as the security and proportionality of the information being exchanged against the purpose. DWP will require a new (or revised) Privacy Impact Assessment (PIA) at each change in order to provide assurance to both Departments, its ministers and the public that its data exchange is still meeting the requirements of the Data Protection Act 1998 whilst ensuring that the benefits and outcomes for its patients and customers are maintained. The PIAs will be independently rated within DWP and will be available for publication.

7.10. Regulation 9 of the Information-sharing Regulations provides a reciprocal power which allows "qualifying persons" to share information with the Department for Work and Pensions in the very limited circumstances described above – i.e. for eligibility matching purposes.

7.11. The Delegation of Additional Functions Regulations are required as a consequence of the Information-sharing Regulations in that they direct the NHS BSA to exercise the relevant functions of the NHS Commissioning Board (NHS England) by virtue of the latter being prescribed as a "qualifying person" within the meaning of the Information-sharing Regulations. NHS England has powers to make arrangements with the NHS BSA under section 13Z of the National Health Service Act 2006 such that the NHS BSA is permitted to carry out the functions of NHS England. However, in the context of the increased scope and volume of these eligibility checks, it is considered more appropriate that the obligation on the NHS BSA to perform these functions should be set out in legislation by means of these Regulations. Similarly, if NHS BSA is to carry out NHS England's recovery functions relating to prescription charges that have not been recovered by NHS chemists and NHS doctors in general practice, it is considered appropriate, in the light of increased counter fraud activity expected as part of the new counter fraud strategy, that this duty should now be set out in legislation.

8. Consultation outcome

8.1. The Information-sharing Regulations are enabling in nature, and place on a statutory footing the sharing of information in limited circumstances between the Secretary of State for Work and Pensions and a tightly prescribed group of "qualifying persons".

The principal "qualifying persons" are the Secretary of State for Health, the NHS Commissioning Board (NHS England) and the NHS Business Services Authority. The Regulations also place on a statutory footing the sharing of information by "qualifying persons" with the Secretary of State for Work and Pensions for the purposes set out in the Information-sharing Regulations, the immediate implications of which will be as part of the next phase of the Department of Health's counter-fraud strategy.

8.2. With the agreement of the Department for Work and Pensions, the Department of Health has undertaken limited formal consultation with the three principal "qualifying persons" in respect of both sets of Regulations. The consultation period ran for two weeks, ending on the 12 December 2014. This period was selected to reflect the fact that the three principals have been fully engaged in scoping the requirement of these regulations and the underlying policy. The formal response from each of the principal "qualifying persons" was positive, with no objections raised to the regulations.

8.3. The Department of Health has notified the three main contracting groups representing dispensers, namely the Pharmaceutical Services Negotiating Committee, the General Practitioners Committee (for the British Medical Association) and representatives of appliance contractors, as well as the Dispensing Doctors Association, about the Department's developing strategy in respect of counter-fraud activity and, in particular, about the proposed direction of travel in relation to post and point-of-dispensing eligibility checks. The Department will, of course, fully engage with these groups as the finer details of this policy are developed.

9. Guidance

9.1. The Department of Health will continue to work with representatives of the dispensing contractors to ensure that dispensers' responsibilities with regard to seeking evidence of a customer's eligibility for an exemption to paying a charge for relevant healthcare services are properly understood and can be explained to members of the public. As part of the programme of work on post dispensing checks undertaken by the NHS BSA, up to date information detailing the exemption rules and requirements has been circulated to pharmacies and General Practitioners' surgeries. As the NHS BSA's work progresses, further consideration is being given to how this information can best be made available to dispensers and members of the public.

10. Impact

10.1. Having had due regard to the relevant duties of both the Secretary of State for Work and Pensions and the Secretary of State for Health, we have not identified any substantial impact on either business or civil society as a result of the changes introduced by these regulations, either jointly or severally, on those duties. Both departments keep these matters under regular review, as set out in paragraph 12 below, and will revisit the assumptions made if evidence from those reviews suggests that a change may be required.

10.2. The departments believe that there are no immediate implications for small businesses, particular service providers or the wider public and, as such, have determined that neither a full Impact Assessment nor a full public consultation would

be required in relation to either set of Regulations.

10.3. As these Regulations do not create a new offence, amend an existing offence, repeal and re-enact an existing offence or create an enabling power in primary legislation to provide for the creation or extension of criminal offences in secondary legislation, and the Department for Work and Pensions has notified the Ministry of Justice of the extension of the criminal power, in accordance with the Ministry of Justice's own guidelines, a Justice Impact Assessment is not required.

11. Regulating small business

11.1. There are no immediate implications for small businesses as a result of the coming into force of these Regulations. They will, however, enable arrangements to be made between businesses which can make and recover charges from patients in relation to the supply of NHS medicines, foods and appliances on prescription, the provision of dental treatment, or the supply of glasses, contact lenses, sight tests and optical appliances (i.e. as "qualifying persons" under the Information-sharing Regulations) and the Department for Work and Pensions, in order to check a person's eligibility for NHS Low Income Scheme benefits, including remission of a charge that would otherwise be payable. It is anticipated that any such arrangements would be a matter between the businesses concerned and the relevant NHS commissioners who are arranging for the supply of the products or services in question. Consequently, any impact on businesses will be dealt with as part of the relevant contract and/or contractual framework negotiations.

12. Monitoring and review

12.1. The two departments have agreed that whenever there is a step change in terms of the volume or scope of data to be shared between them, they will work together to prepare and submit a Privacy Impact Assessment. The first such assessment will be conducted in the first quarter of 2015-16 so that it is in place for when the scope of the NHS BSA checks is increased to cover relevant social security benefits. A further review of qualifying criteria will take place in the latter part of 2015 to reflect the changes in entitlement by virtue of qualifying conditions due to the further roll out and implementation of the Universal Credit. As a matter of administrative practice, the Department for Work and Pensions will review these regulations as part of their wider review of the operation of sections 131 and 132 of the Welfare Reform Act 2012.

13. Contact

13.1. Amanda Hillman at the Department for Work and Pensions, Telephone: 0207 449 7314 or e-mail: Amanda.Hillman@DWP.GSI.GOV.UK; and

Cameron Robson at the Department of Health, Telephone 0113 2546083 or e-mail: Cameron.Robson@DH.GSI.GOV.UK can answer any queries with regard to these two instruments.