EXPLANATORY MEMORANDUM TO

THE CARE AND SUPPORT (BUSINESS FAILURE) REGULATIONS 2014

2014 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The instrument makes provision as to the interpretation of "business failure" for the purposes of temporary duties on local authorities in England and Wales and on Health and Social Care trusts in Northern Ireland ("HSC trusts"), under the Care Act 2014 ("the Act"), to meet care and support needs of adults or support needs of carers, in circumstances where care providers are unable to carry on because of "business failure".

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

3.1 None

4. Legislative Context

4.1 Sections 48 to 52 of the Act impose duties ("temporary duties") on local authorities in England and Wales and on HSC trusts to ensure that the care and support needs of adults and support needs of carers continue to be met in circumstances where care providers become unable to carry on because of business failure.

4.2 In relation to local authorities in England, the temporary duties apply where a provider registered with the Care Quality Commission**a** (CQC) in respect of carrying on a regulated activity becomes unable to carry on that activity because of business failure.

4.3 In relation to local authorities in Wales, the temporary duties apply where a provider registered under Part 2 of the Care Standards Act 2000 in respect of an establishment or agency**b** becomes unable to carry on or manage that establishment or agency because of business failure, and was providing accommodation or other services to an adult under arrangements made by a local authority in England or Scotland

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a The Commission is set up by the Health and Social Care Act 2008

b Section 4 of the 2000 Act sets out the meaning of "establishment" and "agency". By way of example, "establishment" includes a care home, and "agency" includes a domiciliary care agency.

or an HSC trust, or which were paid for by direct payments made by such an authority or trust.

4.4 In relation to HSC trusts, the temporary duties apply where a person registered under Part 3 of the Health and Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 in respect of an establishment or agency**a** becomes unable to carry on or manage the establishment or agency because of business failure and was providing accommodation or other services to an adult under arrangements made by a local authority in England, Wales or Scotland, or which were paid for by direct payments made by such an authority.

4.5 In relation to local authorities in Scotland, certain duties are imposed under Part 2 of the Social Work (Scotland) Act 1968. These duties are considered to make sufficient provision for the meeting of needs in response to a provider failure, and so the Care Act (and accordingly, this instrument) does not extend to Scottish local authorities in this regard.

4.6 In each case the authority or HSC trust in question must, for so long as it considers necessary, meet those needs of the adult which the failed provider was meeting before being unable to carry on (because of business failure).

4.7 The instrument makes provision for these purposes as to the interpretation of "business failure" and as to circumstances in which a provider is to be treated as unable to carry on because of business failure.

4.8 Local authorities currently have functions which would generally extend to meeting the needs of those individuals who have suffered a gap in care services because of business failure. The Act imposes clear new duties on local authorities in order to ensure that people's needs do not remain unmet in these circumstances.

5. Territorial Extent and Application

5.1 This instrument extends to the United Kingdom.

6. European Convention on Human Rights

The Minister of State for Care and Support has made the following statement regarding Human Rights:

In my view the provisions of the Care and Support (Business Failure) Regulations 2014 are compatible with the Convention rights.

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a Article 8 of the 2003 Order sets out the meaning of "establishment" and "agency". By way of example, "establishment" includes a care home, and "agency" includes a domiciliary care agency

7. Policy background

7.1 There is a diverse market for care and support services in the UK. Public, private and voluntary sector organisations can all provide these services. As in any market, some providers leave whilst new providers join it. Providers may leave the market for a number of reasons. Examples include a provider selling on its property for residential use or a provider's business being taken over by a competitor. Most exits from the market are handled responsibly by providers who ensure that those receiving care services continue to do so in line with contractual liabilities. This process is normally managed in an orderly way that does not cause interruption of services for the people receiving care.

7.2 Occasionally however, care providers do exit the market in a way that adversely impacts on their ability to manage the closure of the service in a planned way.

7.3 It is unacceptable for care users to be left without the services they need. The interruption of care services, or the worry that this might happen, can affect the wellbeing of care users. It can place stress on them, their families, friends and carers.

7.4 Currently, when a care provider becomes unable to meet needs because of business failure, local authorities have functions which would generally extend to meeting the needs of those individuals whose needs the provider was meeting before failing and they have done so effectively.

7.5 The White Paper 'Caring for our future: *Reforming care and support'* which in large part prefigured the Act, made it clear that local authorities should continue to have the lead role in this area. The Government carried out a specific public consultation ('Oversight in Adult Social Care') into proposals for market oversight and provider failure to form part of the Act. The majority of respondents to this consultation felt that local authorities have effectively managed exits from the market but that duties in respect of local authorities' roles in the event of a market exit should be clarified.

7.6 The Act therefore imposes clear duties ("temporary duties") on local authorities in England and Wales and on HSC trusts in order to ensure that people are not left without the care they need if their care provider becomes unable to carry on providing care because of business failure. The Act requires that regulations are made as to the interpretation of business failure. The instrument makes provision for this purpose.

7.7 The relevant sections in the Act were relatively uncontentious with both stakeholders and Parliamentarians during the passage of the Care Bill through Parliament, echoing the broad agreement found in earlier consultation and engagement.

7.8 The temporary duties are only triggered when the business has failed and there follows closure of the care service - both events need to have happened. This means that an authority does not have to step in if the service continues but the business is declared insolvent; it is fairly common for an insolvency practitioner to continue to trade a failed business whilst looking to sell it as a 'going concern' or provide an opportunity for the existing management or another operator to deliver a turnaround plan. In these instances, local authorities would not be required to intervene to meet care and support needs when the business has failed because the service would be continuing. This recognises that the wellbeing of people receiving care and support in these circumstances is likely to be maintained best by their service not being interrupted unnecessarily, whilst having the reassurance that the local authority will provide a backstop that ensures their needs will continue to be met, were the service to close following a business failure.

7.9 The instrument generally interprets business failure by reference to different types of insolvency situations that will trigger the temporary duties if there follows an inability to continue providing the service. In defining business failure for this purpose, the policy has been to balance the importance of the authority taking action to ensure people's needs are met when their provider ceases to operate, against the need to avoid detracting from the core responsibility of the provider itself for arranging care and support services for those people for whom it cares.

7.10 Prior to the public consultation, the instrument was drafted in consultation with the Insolvency Service and Devolved Administrations and was subject to scrutiny from a group of external stakeholders made up of representatives from the care provider sector, provider umbrella groups, representatives of care users and local authorities to ensure that the appropriate insolvency situations have been captured.

7.11 In relation to unincorporated charities, as they cannot be declared insolvent, the business failure test was founded on the definition of "inability to pay debts" in relation to companies under section 123 of the Insolvency Act 1986. The reason for not extending this test to organisations other than unincorporated charities under the instrument was informed by the policy consideration of capturing the more common and conclusive forms of insolvency wherever possible. The test of business failure in relation to unincorporated charities includes the service of a written demand from a creditor on the trustees of a charity. In relation to the potential uncertainties involved in this (for example, the trustees having a good defence), the Department believes the test of business failure as formulated is justified as this does not have direct implications for providers. The test of failure applies for the purposes of local authorities and trusts' duties to meet the needs of individuals - and only when followed by inability of the provider to carry on (see for example sections 48(1), 50(1)(a) and 51(1)(a) of the Act). Should a provider continue to carry on the care service despite meeting the "business failure" test, those duties would not be triggered.

7.12 The instrument comes into force on the day on which section 52(12) of the Act comes fully into force. Section 52(12) has been commenced for the purposes of making regulations on 1 October 2014 by a commencement order (S.I. 2014/2473). It is intended that section 52(12) will be brought into force for remaining purposes, by a further commencement order, in April 2015. Insofar as the instrument interprets "business failure" for the purposes of section 50 of the Act (business failure duties of local authorities in Wales) it comes into force for those purposes on the day on which section 50 of the Act comes fully into force. It is intended that section 50 will be brought into force in April 2016.

8. Consultation outcome

8.1 The consultation on the package of regulations relating to Part 1 of the Care Act was published on 5 June 2014, and ran for ten weeks to 15 August. In order to reach a comprehensive and varied pool of experience and expertise, the consultation contained a mix of digital and face-to-face meetings and events with the full spectrum of stakeholders, including: people receiving care and support and their carers; social workers and other frontline practitioners; local authority finance managers, commissioners and elected members; voluntary and private social care providers; national representative groups and other charities and trusts; and NHS agencies, housing departments, DWP Job Centre Plus and other key partners involved in the reforms. In total, the consultation drew over 4,000 responses from many different sources. Responses were carefully analysed and, where appropriate, changes were made to regulations.

8.2 The Devolved Administrations launched parallel consultations inviting a wide range of stakeholders from their territories to comment on the instrument. A wide range of responses have been received from independent community organisations, independent regulatory bodies, local authorities, HSC trusts and voluntary sector organisations.

8.3 A number of respondents commented on the proposals for this instrument. The majority felt that defining business failure by reference to different insolvency situations was a practical and proportionate approach that "*consolidates current practice and arrangements*". Some local authorities argued that continuity of care would be at risk should an organisation enter a voluntary arrangement with its creditors as this was a clear indicator that an organisation was in financial difficulty. Provision has therefore been made to include Company Voluntary Arrangements and Individual Voluntary Arrangements in the instrument.

8.4 Some contributors felt that the notion of business failure should be "*widened*" so that, in addition to insolvency-type situations, the temporary duties on local authorities are triggered when the business

ceases to operate because of failure to meet the CQC's fundamental standards or other quality standards. Whilst the Department recognises that it is important for local authorities to have a clear understanding of their role in these types of situations, we have decided not to adopt a wider approach as it could detract from the core responsibility of the provider for maintaining high standards. Moreover, this would also detract from the policy to limit the discharge of temporary duties to situations where there is an element of loss of control over events on the part of the provider.

8.5 Local authorities in England have powers under section 19 of the Act to intervene to meet needs which appear to them to be urgent. Those powers would be available to authorities if the urgent needs arose from quality failings. We have therefore made clear in the statutory guidance outlining local authorities' roles and responsibilities when managing business failure and other service interruptions, that those powers may also be used in the context of quality failings of providers if that is causing people to have urgent needs. We will be exploring similar possibilities in relation to Scotland, Wales and Northern Ireland.

8.6 The Government response to the consultation was published on 23 October and can be found here:

https://www.gov.uk/government/consultations/updating-our-care-and-support-system-draft-regulations-and-guidance

9. Guidance

9.1 Statutory guidance to support implementation of Part 1 of the Care Act was subject to public consultation as part of the consultation on regulations under that part. The guidance is published at https://www.gov.uk/government/publications/care-act-2014-statutory-guidance-for-implementation on 23 October. This guidance is not itself the subject of Parliamentary scrutiny.

9.2 The guidance contains a chapter outlining local authorities' roles and responsibilities when managing business failure and other service interruptions.

9.3 Local authorities in Wales and HSC trusts will not be required to act under the guidance but will need to take it into account insofar as it is relevant to their discharge of functions**.** The Welsh Government will issue guidance to Welsh local authorities on how they should discharge their functions under section 50 of the Act (temporary duty on local authority in Wales). This guidance will be issued in conjunction with guidance to Welsh local authorities on the discharge of their functions under section 189 of the Social Services and Well-being (Wales) Act 2014 (provider failure: temporary duty on local authority). Both these sections are expected to be commenced in April 2016. The guidance to Welsh local authorities will be issued as part of a code on the exercise

of social services functions under section 145 of the Social Services and Well-being (Wales) Act 2014. Local authorities will be required to act in accordance with requirements contained in the code and to have regard to guidelines contained within it.

9.4 The Scottish Government and the Northern Irish Government will also be introducing guidance for this area in due course.

10. Impact

10.1 A separate impact assessment has not been prepared for this instrument. The instrument is part of a package of legislative measures and the relevant impact assessment can be requested via careactconsultation@dh.gsi.gov.uk or Department of Health, Richmond House, 79 Whitehall, London SW1A 2NS and is available online at http://www.legislation.gov.uk/ukpga/2014/23/resources.

10.2 The instrument is not expected to represent an additional cost burden for either the public or private sector. This is because it interprets "business failure" for the purposes of duties imposed under the Act itself. Local authorities currently have functions which would generally extend to meeting the needs of those individuals who have suffered a gap in care services because of business failure and have done so effectively. Further, the duties under the Act are temporary insofar as they only require authorities to meet needs for so long as they consider necessary. The Act also enables authorities to recover the costs incurred in meeting needs.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 The Government has committed to keeping the impact of the package of regulations under Part 1 of the Act under review. We will monitor the impacts of implementation of the policies contained within the Act and regulations under it on an ongoing basis. This will include continuing to work closely with care providers, local government and other stakeholders to understand the impact of implementation of the reforms.

13. Contact

Stephen Airey at the Department of Health Tel: 0207 210 5717 or email: Stephen.airey@dh.gsi.go.uk can answer any queries regarding the instrument.