EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (HEALTH CHARGE) ORDER 2015

2015 No. [DRAFT]

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

2. Purpose of the instrument

2.1 This Order will require non-EEA nationals applying for entry clearance or leave to or remain in the UK for a limited period to pay an immigration health charge. Affected migrants will be required to pay the charge as part of the application process and a separate charge is payable in respect of each application made, including in respect of dependants.

2.2 The Order sets out the detail of how the charge will operate. It details how the amount of charge the applicant is liable to pay will be calculated. The Order sets the amount of the charge at an annual rate of £200 per migrant (a lower rate of £150 per annum will apply to students and their dependants), to be payable in respect of the full period which could be granted to a person in respect of the paragraph under the Rules under which they are applying. The Order sets out when the charge must be paid and the consequences of non-payment. Exemptions from the charge are set out at Schedule 2. More detail on the charge and how it will operate is set out in section 7 of this document.

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

3.1 None.

4. Legislative Context

4.1 This Order will be made under sections 38 and 74(8) of the Immigration Act 2014, which provide the Secretary of State with a power, by Order, to require certain migrants to pay an immigration health charge. The Order is subject to the draft affirmative procedure.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom, in as much as it will apply to any person applying for entry clearance in relevant categories, irrespective of which part of the UK they will be coming to live in, and to persons applying for leave to remain to extend their stay within the UK, irrespective of where they currently, or will, reside.

6. European Convention on Human Rights

6.1 The Immigration and Security Minister, James Brokenshire MP, has made the following statement regarding Human Rights:

6.2 In my view, the provisions of the Immigration (Health Charge) Order 2015 are compatible with the Convention rights.

7. Policy background

Migrant access to the NHS: current position on charging

7.1 All temporary non-EEA migrants who come to the UK for more than six months are currently likely to qualify for free NHS care either upon their arrival or very shortly after by reason of being ordinarily resident in the UK under current case-law. Compared to other countries, many of which operate health insurance requirements, this approach is overly generous and has been the subject of longstanding public concern.

7.2 A comprehensive study into migrant use of the NHS, commissioned by the Department of Health in 2013, estimates that the total cost of visitors and temporary migrants accessing NHS services in England alone to be up to £2 billion per annum. Around £950 million per annum of this cost is spent on temporary non-EEA migrants, such as students, workers and those coming to the UK for family reasons, from whom no charges are currently recoverable. This largesse is unsustainable for the NHS, particularly in the current economic climate. This position is also inconsistent with general Government policy on migrant access to benefits and social housing; access to which is generally confined to those non-EEA migrants with permanent residence status (indefinite leave to enter or remain), refugee or humanitarian protection status or discretionary leave granted to exceptional cases.

The purpose of the Order

7.3 This Order implements section 38 of the Immigration Act 2014, which provides the Secretary of State with a new power, by Order, to require certain migrants to pay an immigration health charge. The aim of this provision is to ensure that temporary, non-EEA migrants contribute to the NHS in a manner commensurate with their limited immigration status. The intention is that health charge payers will be able to access the NHS in the same way as a permanent resident, i.e. they will receive NHS care generally free of charge (but may be charged for services a permanent resident would also pay for, such as dental treatment). NHS charging is legislated for in separate secondary legislation which is made by the health ministries in England and the devolved administrations.

The amount of the charge

7.4 In specifying the amount of the charge the Secretary of State for the Home Department has considered the range of health services that will be available without charge to those given immigration permission. The Secretary of State has also considered other matters, such as the need to ensure the UK remains competitive as a place for the brightest and best migrants to come.

7.5 Schedule 1 to the Order sets the amount of the charge at £200 per annum per migrant, with a discounted rate for students of £150 per annum. Dependants will generally pay the same amount as the main applicant. Setting the charge at this level will ensure that migrants contribute to the availability of NHS services whilst maintaining the UK's competiveness in a global market. The charge is set well below the average per capita cost of treating temporary migrants - the average per capita cost of temporary migrants is £800 per year, and non-EEA students £700 per year. The charge is also a lower cost over the period of stay than the cost of basic private medical insurance. Private medical insurance for students and working migrants is also a common requirement in many of our competitor nations, such as Australia and the USA and the costs there are higher.

Calculating the amount due

7.6 The charge will be collected by the Home Office as part of the immigration application process (subject to certain exceptions set out below). The amount of charge will be calculated with reference to the maximum period of leave which could be granted under the relevant application route if the applicant qualifies. Where an immigration application is made outside of the Immigration Rules, the amount of the charge will be determined by the annual amount specified in Schedule 1 multiplied by 2.5. This is because the majority of applications outside the immigration rules are for discretionary leave which is usually granted for 30 months (i.e. two and a half years).

7.7 Where the maximum period of leave to enter or remain includes part of a year, the amount payable for six months or less will be half the specified annual amount. Where the part of the year is for more than six months, the full specified annual amount will be payable.

7.8 The Order provides the Secretary of State with discretion to reduce, waive or refund the charge. As a matter of policy, refunds will be issued where a person's immigration application is refused (or otherwise rejected as invalid). Where a person is in the UK, the refund will issue once any right to an administrative review or appeal has been exhausted. Where a person is not granted the maximum period of leave with the result that they have made an overpayment of the charge, the overpayment will also be refunded. This discretionary power also provides the flexibility for the Home Secretary to respond to exceptional cases where, on consideration of the individual facts, a reduction, waiver or refund may be warranted.

Consequences of a failure to pay the charge

7.9 Payment of the charge will be a mandatory requirement for affected migrants. Where an applicant fails to pay the right amount of charge, they will be given the opportunity to rectify their payment within a specified time frame. If the outstanding charge is not paid within that specified period, however, the application will be refused or treated as invalid as appropriate, in accordance with established practice where the person does not pay the correct visa fee.

7.10 An immigration application must also be refused where a person cancels or otherwise reclaims their payment of the charge before a decision has been made with regard to their immigration application. Where a person has already been granted entry clearance or leave to remain but has failed to pay the charge, that entry clearance or leave to remain must be revoked or cancelled as appropriate. This provision has been inserted due to experience of people making an application for entry clearance, paying the requisite fee with a credit or debit card, and re-claiming the money from their credit card company or bank once an entry clearance decision has been made in order to avoid payment of the visa fee. In anticipation of this being a similar possibility in the case of a health charge payment, the Order makes clear that the charge has not been paid where the money is reclaimed.

Exemptions from the charge

7.11 Schedule 2 to the Order provides exemptions from the requirement to pay the charge. Visitors under Part 2 of the Immigration Rules and temporary non-EEA migrants applying for entry clearance of six months or less under the Immigration Rules will also not pay it. These groups will remain, as is generally the case now, liable to separate NHS overseas visitor treatment charges applied by the NHS in each part of the UK in respect of secondary care hospital treatment, as will illegal migrants.

7.12 It should be noted however, that temporary non-EEA migrants who pay the charge, and who subsequently request a short-stay extension (of less than six months) to their leave to remain within the United Kingdom will pay the charge. The Government is mindful of the fact that these migrants will have been lawfully in the UK for some time, will have paid the charge and may be making use of NHS services. It would be inappropriate to remove from this group the continued benefits associated with paying the charge purely on the grounds that they are making an application for a short stay extension.

7.13 Tier 2 intra-company transfer migrants (ICT) and their dependants will be exempt from the charge and will continue to receive NHS care free of charge. The ICT route brings the most highly-skilled international workers to the UK. UK workers benefit from working with these migrants, by sharing expertise and making use of reciprocal ICT arrangements in other countries. The ICT route also brings investment to the UK, boosting our economy and creating jobs for resident workers, not just migrant workers.

7.14 Certain vulnerable groups will be exempt from paying the charge and will continue to receive free NHS care. These are – children looked after by the local authority, migrants making an application for asylum, humanitarian protection, or a claim that their removal from the United Kingdom would be contrary to article 3 of the European Convention on Human Rights. A person who applies for limited leave under the Home Office concession known as the destitute domestic violence concession will also be exempt[1], as will a person applying for leave to remain relating to their identification as a victim of human trafficking. A person making an immigration application as a dependant of a person applying under the categories set out in this paragraph is also exempt from the charge.

7.15 The charge will not apply to migrants who are exempt from immigration control, such as accredited foreign diplomats and their dependants and serving members of HM Armed Forces and visiting Armed Forces exempt under the Immigration Act 1971 as such a person does not need to apply for entry clearance or leave while they are exempt. A dependant of a member of HM Armed Forces or those exempt under the armed forces provisions of the Immigration Act 1971 applying for entry clearance or leave to remain under the Immigration Rules will be exempt from the charge under this Order.

7.16 Those making an immigration application connected to an EU obligation, such as an application under the Turkish European Communities Association Agreement, are exempt from payment of the charge under the Order.

7.17 Nationals of Australia and New Zealand will not pay the charge, in recognition of current international agreements between these two States and the UK for the provision of healthcare without charge for their nationals. A British Overseas Territory citizen who is resident in the Falklands Islands is also exempt, in line with our commitments to the Islands.

Income from the charge

7.18 The impact assessment published alongside this explanatory memorandum estimates that the charge could raise £195m per annum, and around £1.7 billion (Present Value) over 10 years. It is important to note however that the impact assessment contains high-level estimates only. This is because income from the charge may be affected by a number of variables not easily accounted for, such as potential changes to future visa volumes or to the average length of leave applied for/granted. The Home Office will distribute income from the charge between the four health administrations in the UK, using the Barnett Formula.

[1] The policy is published at https://www.gov.uk/government/publications/application-for-benefits-for-visa-holder-domestic-violence. A copy is also available on request from the Home Office.

Relationship with NHS charging Regulations

7.19 The immigration health charge will apply only to temporary non-EEA migrants. Those on visit visas will not pay the charge; nor will illegal migrants. These groups will remain subject to the separate NHS overseas visitor charging regulations administered by the health services in each part of the UK, where charging applies. The Immigration (Health Charge) Order 2015 does not make any changes to the operation of these charging regulations.

Data sharing

7.20 Overseas Visitor Managers (OVMs) in NHS hospitals are already tasked with determining whether or not a patient is chargeable for their healthcare. It is important therefore that OVMs, as part of their existing processes, are able to identify those patients that have paid the charge. To that end, the Home Office is looking to develop arrangements through which it can inform the four health ministries of those migrants who have paid the charge, should these ministries wish to hold this information. Data sharing arrangements are currently being developed with the Department of Health in England and discussions are underway with the other devolved health ministries. The fact that a person has paid the health charge will also be evidenced by the physical fact of having been granted an entry clearance or a biometric residence permit by the Home Office in non-visitor categories.

8. Consultation outcome

8.1 A full public consultation was held from 3 July-28 August 2013 and prior to inclusion of the measures in the Bill that received Royal Assent as the Immigration Act in May 2014. The consultation document - '*Controlling Immigration – Regulating Migrant Access to Health Services in the UK'*- sought public views on proposals for action in immigration legislation to better regulate migrant access to free NHS services. Responses to the consultation informed the development of this policy and were summarised in the Government's consultation report published 22 October 2013.

9. Guidance

9.1 Detailed guidance relating to the charge will be placed on the gov.uk website.

10. Impact

10.1 The impact on business, charities or voluntary bodies is set out in the Impact Assessment published alongside this explanatory memorandum.

10.2 The Impact Assessment set out the expected impacts upon the public sector (primarily the Home Office and the NHS).

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Home Office will keep the operation of the charge under review, with support from, amongst others, the Department of Health and devolved health ministries. This will include reviewing the policy and its administration after six months' operation. Parliament will receive an assessment of income generated by the health charge after the first year of operation.

13. Contact

Elizabeth Coley at the Home Office Tel: 020 7035 8703 or email: Elizabeth.Coley@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.