EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (CHARGES TO OVERSEAS VISITORS) (AMENDMENT) (NO. 2) REGULATIONS 2020

2020 No. 654

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument amends the National Health Service (Charges to Overseas Visitors) Regulations 2015 (S.I. 2015/238) (the 2015 Regulations) and subsequent Amendments ("the Charging Regulations").

2.2 The *New Decade New Approach* agreement includes a commitment that the eligible family members of the people of Northern Ireland (whether that person has British or Irish citizenship or both) can apply for immigration status in the UK on broadly the same basis as the family members of an Irish citizen in the UK. They should also have access to the same benefits and services that family members of Irish citizens in the UK have. It is therefore necessary to amend the Charging Regulations to ensure that eligible family members of the people of Northern Ireland are exempt from charges for relevant NHS services.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P or 83T of the Standing Orders of the House of Commons relating to Public Business. It is not likely to be scheduled for debate.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

6. Legislative Context

6.1 The Charging Regulations provide for relevant NHS bodies in England to make and recover charges from overseas visitors for relevant services provided to them, unless the overseas visitor, or the service they receive, is covered by one of a number of

exemption categories as set out in the Charging Regulations. An overseas visitor is anyone not ordinarily resident in the UK, which, for non-EEA nationals subject to immigration control, requires the immigration status of indefinite leave to remain in the UK.

6.2 In May 2020 the Home Office announced in the Statement of changes in Immigration Rules (CP 232), that eligible family members of the people of Northern Ireland will be able to apply for UK immigration status on broadly the same terms as eligible family members of Irish citizens in the UK, using the EU Settlement Scheme. This change is considered necessary to ensure adherence with the terms of the Belfast Agreement.

6.3 The Home Office legislation is due to come into force 24th August 2020.

7. Policy background

What is being done and why?

7.1 This instrument amends the Charging Regulations to provide an exemption from charge category to eligible family members of the people of Northern Ireland.

7.2 This is being done due to commitments the UK government made in the *New Decade, New Approach* agreement for the restoration of devolved government in Northern Ireland.

7.3 Under the Belfast Agreement, people of Northern Ireland have a unique birth-right to identify, and be accepted as, Irish or British or both, as they may choose. The change to the Immigration Rules made by the Home Office meets the commitment given in the *New Decade, New Approach* agreement that eligible family members of the people of Northern Ireland will be able to apply for UK immigration status on broadly the same terms as the family members of Irish citizens in the UK.

7.4 The new Immigration Rules allow eligible family members of a relevant person of Northern Ireland to apply for settled or pre-settled status under the EU Settlement scheme on broadly the same terms as eligible family members of Irish citizens in the UK. These family members should also have the same access to benefits and services.

7.5 Currently, the qualifying family members of people of Northern Ireland who are Irish citizens with a right to reside in the UK have freedom of movement and do not require leave to enter or remain in the UK. Section 39 of the Immigration Act 2014, which sets out groups that cannot be ordinarily resident in the UK, therefore does not apply to them. Consequently, they will be ordinarily resident in the UK (and entitled to free NHS care) as long as they meet the common law test for this, broadly that they are living here voluntarily and on a properly settled basis for the time being.

7.6 However, currently, the non-EEA family members of people of Northern Ireland who are British citizens living in the UK do require leave to enter or remain. As such, they cannot be ordinarily resident in the UK, even if they meet the common law test, until they acquire indefinite leave to remain. Prior to that they will normally be required to pay the immigration health charge when applying to temporarily reside in the UK for a period of six months or more. They are then exempt from charge under Regulation 10 of the Charging Regulations whilst their leave is valid, excluding assisted conception services.

7.7 Once the Immigration Rules change so that family members of a British citizen who is a relevant person of Northern Ireland apply under the EUSS scheme, they will no

longer be subject to the immigration health charge, so Regulation 10 will not exempt them.

7.8 In order to ensure both sets of family members have the same level of entitlement to free NHS care, this instrument exempts from charge those family members who i) are ordinarily resident in the UK (under the common law test), ii) have settled or pre-settled status on the basis of a relationship with a relevant person of Northern Ireland under the EU settlement scheme, and iii) meet the right to reside conditions EEA nationals are required to meet under the Immigration (EEA) Regulations 2016.

7.9 The definition of a relevant person of Northern Ireland can be found in the statement of changes to the Immigration Rules, laid before Parliament on 14 May 2020. It is as follows:

a person who:

(a) is:
  (i) a British citizen; or
  (ii) an Irish citizen; or
  (iii) a British citizen and an Irish citizen; and

(b) was born in Northern Ireland and, at the time of the person's birth, at least one of their parents was:
  (i) a British citizen; or
  (ii) an Irish citizen; or
  (iii) a British citizen and an Irish citizen; or
  (iv) otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

7.10 An eligible family member of an Irish citizen is the same as a relevant family member of an EEA citizen as defined in Appendix EU of the Immigration Rules. It is as follows:

a person who has satisfied the Secretary of State, including by the required evidence of family relationship, that they are (and for the relevant period have been), or (as the case may be) for the relevant period (or at the relevant time) they were:

(a) the spouse or civil partner of a relevant EEA citizen, and:
  (i) the marriage was contracted or the civil partnership was formed before the specified date; or
  (ii) the applicant was the durable partner of the relevant EEA citizen before the specified date (the definition of 'durable partner' in this table being met before that date rather than at the date of application), and the partnership remained durable at the specified date; or

(b) the durable partner of a relevant EEA citizen, and:
  (i) the partnership was formed and was durable before the specified date; and
  (ii) the partnership remains durable at the date of application (or it did so for the relevant period or immediately before the death of the relevant EEA citizen); or

(c) the child or dependent parent of a relevant EEA citizen; or

(d) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen, as described in sub-paragraph (a) above; or

(e) the dependent relative, before 1 January 2021, of a relevant EEA citizen (or of their spouse or civil partner, as described in sub-paragraph (a) above) and the family relationship continues to exist at the date of application

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is not being made under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The instrument does not consolidate legislation.

10. Consultation outcome

10.1 There has been no public consultation in relation to this instrument.

Charging policy is a devolved matter. The Devolved Administrations have been engaged in relation to the changes in this instrument but are responsible for taking forward any amendments to charging regulations in Scotland, Wales and Northern Ireland. This instrument makes no provision that could otherwise fall within devolved competence.

11. Guidance

11.1 Extensive Guidance to the NHS on how to implement the Charging Regulations is available. This will be amended to take account of this instrument in time for it coming into force in August.

12. Impact

12.1 There is no significant, impact on business, charities or voluntary bodies.

12.2 There is no significant, impact on the public sector. Providers of NHS funded care will need to adjust their practices when undertaking their duties to make and recover charges so that they do not incorrectly charge those provided for in this instrument, for instance by considering if the overseas visitor is the family member of the people of Northern Ireland. Given their experience in applying the Charging Regulations and adapting to amendments, it is not anticipated that this change will require additional resources.

12.3 An Impact Assessment has not been prepared for this instrument because it is not within the scope of the Better Regulation Framework as the cost falls below the £5m threshold and other relevant criteria also do not apply.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Charging Regulations are continually monitored by officials in the NHS Cost Recovery programme to ensure they work as intended.

15. Contact

15.1 Craig Keenan at the Department of Health and Social Care (craig.keenan@dhsc.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Deborah Persaud, Deputy Director for NHS Cost Recovery Team, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Edward Argar, Minister of State for Health at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.