EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE COMMISSIONING BOARD AND CLINICAL COMMISSIONING GROUPS (RESPONSIBILITIES AND STANDING RULES) (AMENDMENT) REGULATIONS 2019

2019 No. 789

1. Introduction

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

2. Purpose of the instrument

2.1 The instrument amends the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 ("the 2012 Regulations"), which provide for a range of matters relating to the functioning and commissioning responsibilities of the National Health Service Commissioning Board (known as NHS England) and clinical commissioning groups (CCGs). The amendment updates the 2012 Regulations (as amended) to reflect revised rates of NHS-funded Nursing Care payable by the relevant body (NHS England or CCGs).

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 and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

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 Section 6E of the National Health Service Act 2006 (the 2006 Act) was inserted by section 20 of the Health and Social Care Act 2012. It enables the Secretary of State to impose requirements by regulations on NHS England and CCGs when they are exercising their functions of commissioning health services. These requirements are known as the "Standing Rules" because they are intended to set core, ongoing

requirements for the health service. The first set of Standing Rules was made as part of the 2012 Regulations.

6.2 Part 6 of the 2012 Regulations makes provision about NHS Continuing Healthcare and NHS-funded Nursing Care. Regulation 20 sets out the flat rate and high band payments payable in respect of NHS-funded Nursing Care. The amendment to Regulation 20 increases both of the rates payable for NHS-funded Nursing Care (FNC).

6.3 Under section 6E(9) of the 2006 Act, where regulations under section 6E are made to come into force on a day other than 1 April, the Secretary of State must publish a statement explaining the reasons for making the regulations so as to come into force on such a day, and lay the statement before Parliament. This instrument will come into force later than 1 April due to a delay in order for additional analysis be undertaken, and further quality assurance of the data collected to set the FNC rate. Therefore, the regulations will come into force on 26 April, and a statement is being laid.

7. Policy background

What is being done and why?

7.1 NHS-funded Nursing Care is the funding provided by the NHS to care homes providing nursing, to support the provision of nursing care by a registered nurse for those assessed as eligible. If an individual does not qualify for NHS Continuing Healthcare, the need for care from a registered nurse should be determined. If the individual has such a need and it is determined that the individual's overall needs would be most appropriately met in a care home providing nursing care, then this would consequently lead to eligibility for NHS-funded Nursing Care. Once the need for such care is agreed, the relevant body's responsibility to pay a flat rate contribution to the care home towards registered nursing care costs arises.

7.2 There are two rates of NHS-funded Nursing Care payable, the flat rate and the higher rate. The single band of NHS-funded nursing care was introduced on 1 October 2007 and replaced the previous low, medium and high bands of nursing care. The single band is a contribution towards the cost of services provided by a registered nurse, involving either the provision of care or the planning, supervision or delegation of the provision of care, but it does not cover services which do not need to be provided or supervised by a registered nurse. All individuals newly eligible for NHS-funded nursing care since 1st October 2007 have been placed on the flat rate. The NHS is responsible for this funding. Accommodation and social care costs are the responsibility of either the local authority and/or the individual (subject to the outcome of a needs assessment and financial assessment). Individuals who were in receipt of the high band of NHS-funded Nursing Care under the three-band system that was in force until 30 September 2007 are entitled to continue on the high band until:

a) on review, it is determined that they no longer have any need for nursing care;

b) on review, it is determined that their needs have changed, so that under the previous three-band system, they would have moved onto the medium or low bands. In this situation, the individual should be moved onto the standard rate /single band;

c) they are no longer resident in a care home that provides nursing care;

d) they become eligible for NHS continuing healthcare; or

e) they die.

CCGs must continue to make NHS-funded nursing care contributions in respect of those individuals who were deemed eligible for this funding prior to 1st April 2013, until such time as any of the circumstances listed above apply.

7.3 The rates currently set out in the 2012 Regulations (as amended) are £158.16 per week for the flat rate payment and £217.59 per week for the high band payment.

7.4 Following a Supreme Court judgment on the FNC rate in Wales, which due to similarity of legislation had implications for the FNC rate in England, and following the setting of the 2018-19 NHS-funded Nursing Care rate, the Department of Health and Social Care committed to look at the evidence on the costs of providing nursing care by a registered nurse. The Department of Health and Social Care commissioned an independent study of the costs of FNC, which has been undertaken by LaingBuisson. The findings of the study have been combined with a 3.1% efficiency expectation of nursing home providers, and an expectation that no more than 10% of nursing hours are delivered by agency nurses. The result of this is the NHS-funded Nursing Care rate being increased by £7.40 per week for the flat rate.

7.5 These Regulations amend the rates set out in the Standing Rules to £165.56 per week for the flat rate payment and £227.77 for the high band payment, an increase of 4.7%. The Secretary of State will announce the changes to the rates in April 2019 with effect from 26 April 2019 for the financial year 2019-20. These Regulations provide the first opportunity to insert the published rates for 2019-20 in the 2012 Regulations, to enable health care bodies paying for NHS-funded Nursing Care to do so at the new rates in parallel to the formal changes to the regulations.

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

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 None.

10. Consultation outcome

10.1 There is no statutory requirement to consult on this amendment.

10.2 There was no formal consultation on the amendment to the rates of NHS-funded Nursing Care. This amendment follows from the recommendation of a study undertaken by LaingBuisson into the cost of providing nursing care to NHS-funded Nursing Care eligible individuals, combined with an both an overall, and an agency, efficiency ask of care providers.

11. Guidance

11.1 Guidance on NHS-funded Nursing Care is available in the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care November 2018

(Revised)[1] and in the NHS-funded Nursing Care Practice Guidance July 2018 (Revised)[2].

12. Impact

12.1 There is a positive impact on business, charities or voluntary bodies who provide nursing home services, with an increase in the rate and therefore the money they receive for providing nursing services to NHS-funded Nursing Care eligible individuals from CCGs.

12.2 The impact on the public sector is a negative financial impact on CCGs, who pay NHS-funded Nursing Care rates through their existing allocation.

12.3 An Impact Assessment has not been prepared for this instrument because the rate does not reflect a change in policy.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is that there is a flat rate of funding covering the provision of nursing care by a registered nurse. This is provided regardless of the size of the care home or business, meaning small businesses will not be negatively impacted.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is reviewing annually and updating as required.

14.2 The regulation does not include a statutory review clause.

15. Contact

15.1 Colin Staniland at the Department of Health and Social Care Telephone: 0207 210 6232 or email: colin.staniland@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Sarah Gravenstede, Deputy Director for Strategy and Projects, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Caroline Dinenage at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

[1]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746063/20181001_National_Framework_for_CHC_and_FNC_-_October_2018_Revised.pdf
[2]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764197/NHS-funded_Nursing_Care_Practice_Guidance_2018.pdf