EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (MISCELLANEOUS AMENDMENTS RELATING TO OPHTHALMIC SERVICES) REGULATIONS 2010

2010 No. 634

1. This explanatory memorandum has been prepared by 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.

2. Purpose of the instrument

2.1 The National Health Service (Miscellaneous Amendments Relating to Ophthalmic Services) Regulations 2010 (the Amendment Regulations) amend the Primary Ophthalmic Services Regulations 2008 (the POS Regulations), the General Ophthalmic Services Contracts Regulations 2008 (the GOS Contracts Regulations) and the National Health Service (Optical Charges and Payments) Regulations 1997 (the Optical Charges Regulations) to correct drafting errors and to clarify these Regulations. The instrument also refers to an increase in the NHS sight test fee of approximately 2.2%.

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

3.1 As this instrument largely corrects drafting errors in the amended legislation, it was considered appropriate to apply the procedure for free issue to this instrument.

3.2 The instrument amends the definition of NHS sight test fee to reflect an increase of 2.2% in that fee which is set out in payments and charges directions made by the Secretary of State. This represents the third phase of a three year fee settlement covering the financial years 2008 to 2011 agreed with the representatives of optical contractors.

4. Legislative Context

4.1 Sections 115 to 125 and 179 to 182 of the National Health Act 2006 make provision for NHS ophthalmic services to be provided by PCTs. NHS ophthalmic services provide free sight testing and financial help with the cost of glasses and contact lenses and the cost of the repair and replacement of glasses and contact lenses for eligible people. Regulations made under these provisions provide for NHS sight tests, the contractual framework under which ophthalmic services are provided, and for payments in respect of ophthalmic services to be made to contractors and eligible persons who have paid for services.

4.2 The Primary Ophthalmic Services Regulations 2008 deal with NHS sight tests. The General Ophthalmic Services Contracts Regulations 2008 deal with ophthalmic services contracts between PCTs and contractors providing NHS ophthalmic services. The National Health Service (Optical Charges and Payments) Regulations 1997 deal with charges and payments relating to glasses and contact lenses provided by the NHS. The Amendment Regulations include

a range of amendments to these Regulations, which largely correct and clarify drafting errors in these Regulations.

4.3 Amending regulations 2(2)(a), (c) and (d) amend regulation 2(1) of the POS Regulations to amend the definitions of additional services, mandatory services and mobile services. Regulation 3(2)(a) to (c) makes similar amendments to regulation 2(2) of the GOS Contract Regulations.

4.4 Amending regulation 2(2)(b) inserts a definition of child into the POS Regulations. Amending regulation 2(2)(e) corrects the definition of sight test form in regulation 2(1) of the POS Regulations. Amending regulation 2(3) inserts a new regulation 2A into the POS Regulations, which prescribes mobile services as other primary ophthalmic services. Amending regulation 2(4) and 3(5) amend the POS Regulations and GOS Contracts Regulations to remove a power to charge for missed appointments. Amending regulations 2(5) and 3(6)(b) respectively amend regulation 6 of the POS Regulations and paragraph 1 of Schedule 1 of the GOS Contracts Regulations to set out who can apply for ophthalmic services for a child and for an adult who is incapable of making such an application or authorising such an application to be made on their behalf.

4.5 Amending regulation 3(3) and (4) correct drafting errors in regulations 4(3) and regulation 6 of the GOS Contracts Regulations. Amending regulation 3(6)(a) amends paragraph 1(1) of Schedule 1 to the GOS Contracts Regulations to provide that a contractor may provide mandatory services.

4.6 Amending regulation 3(7) amends the GOS Regulations to give proper effect to section 121(5) of the National Health Act 2006 by inserting a new paragraph 2A into Schedule 1. This provides that contractors must inform patients of their right to express a preference to be seen by a particular performer if there is more than one performer available and that contractors must try to meet this preference unless the performer has reasonable grounds for not carrying out the service. Amending regulation 3(8) to (10) corrects drafting errors in Schedule 1 and Schedule 2 to those Regulations.

4.7 Regulation 4 amends the definition of “NHS sight test fee” in regulation 1 of the Optical Charges Regulations to refer to the increase in the sight test fee of 2.2%.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

- ***What is being done and why***

7.1 NHS sight tests provided under a general ophthalmic services contract in an ophthalmic contractor's premises are provided as mandatory services under the POS and GOS Contracts Regulations. In circumstances where a patient cannot attend a contractor's premises, NHS sight tests are provided under a general ophthalmic services contract for additional services as mobile services in day centres, residential centres or in a patient's own home. Mandatory services, additional services and mobile services are defined in the POS and the GOS Contracts Regulations. Amending regulation 2(2)(a), (c) and (d) amend the definitions of additional services, mandatory services and mobile services respectively in the POS Regulations. Amending regulation 3(2) makes similar amendments to the definitions of additional services, mandatory services and mobile services in the GOS Contracts Regulations. These amendments are being made to clarify these definitions. Amending regulation 2(2)(b) inserts a definition of child into the POS Regulations, and amending regulation 2(2)(e) amends the definition of sight test form in regulation 2(1) of those Regulations. Regulation 2(3) inserts a new regulation 2A into the POS Regulations which prescribes mobile services as other primary ophthalmic services to clarify the legal status of this already existing service, although no new services are to be provided as a result of this clarification.

7.2 Under the POS and GOS Regulations contractors can charge patients for missed appointments. The amending regulations 2(4) and 3(5) remove this power from both sets of Regulations. This power is not underpinned by primary legislation, and was mistakenly carried over from old Regulations dealing with general ophthalmic services.

7.3 Amending regulations 2(5) and 3(6)(b) respectively amend regulation 6(1) of the POS Regulations and paragraph 1(2)(a) of Schedule 1 to the GOS Contracts Regulations. The amending regulations bring both sets of provisions into line and clarifies both the provisions and the policy intention behind these provisions. The amending regulations provide that applications for NHS ophthalmic services in respect of a child, may be made on behalf of any child by either parent, the guardian or other adult person who has the care of the child, a person duly authorised by a local authority in whose care the child has been committed under the Children Act 1989, or a person duly authorised by a voluntary organisation which is accommodating the child under the provisions of that Act. Amending regulation 2(5) also amends regulation 6(1) of the POS Regulations to bring it into line with paragraph 1(2)(b) of Schedule 1 to the GOS Contracts Regulations in respect of applications for sight tests by any adult who is incapable of making such an application, or of authorising such an application to be made on their behalf.

7.4 Amending regulation 3(6)(a) amends paragraph 1 of Schedule 1 to the GOS Contracts Regulations to provide that a contractor will have a discretion to provide mandatory services, which will bring this provision into line with similar provisions in other primary healthcare legislation governing medical and dental services.

7.5 Amending regulation 3(7) inserts a new paragraph 2A into Schedule 1 of the GOS Regulations to provide that a patient has a right to express a preference

to receive services from a particular performer. This amendment gives proper effect to section 121(5) of the National Health Act 2006 and requires contractors to inform patients of their right to express a preference to be seen by a particular performer, provided there is more than one performer available. Guidance relating to how patients will be informed about their right to express a preference to receive services from a particular performer will be drafted in consultation with the representative bodies and published on the Department's website. Contractors must try to meet this preference unless there is no other performer available, or the preferred performer has reasonable grounds for not carrying out the service. This amendment also brings these Regulations into line with other primary healthcare legislation.

7.6 Amending regulation 3(3) and (4) and 3(8) to (10) corrects drafting errors in the GOS Contracts Regulations and the schedules to those Regulations.

7.7 Children and people who satisfy certain eligibility criteria are entitled to free NHS sight tests. The NHS sight test fee is increased by payments and charges directions made by the Secretary of State for Health under section 120 of the National Health Service Act 2006, which are published on the Department of Health website www.dh.gov.uk. This fee is increased annually. The annual increase for the 2010 to 2011 financial year is 2.2%. This fee was set as part of negotiations with the representative bodies for the sector through the Optometric Fees Review Committee as part of a three-year fee agreement from 2008 to 2011. The Optical Charges Regulations are amended by amending regulation 4 to make reference to this increase to assist PCTs in calculating the maximum amount payable in respect of people entitled to partial help with the cost of a sight test.

- ***Consolidation***

7.8 The instrument includes amendments to the Optical Charges Regulations. The Department is considering a consolidation of these Regulations during 2010/11.

8. Consultation outcome

8.1 As the instrument only clarifies and corrects existing legislation a full public consultation was not undertaken. Representatives of the Association of Optometrists, the Federation of Ophthalmic and Dispensing Opticians, the Association of British Dispensing Opticians and the British Medical Association were consulted on the draft Amendment Regulations. In response to comments from stakeholders guidance will be issued on the obligation to notify patients of their right to express a preference of performer when more than one performer is available.

9. Guidance

9.1 In addition to the guidance referred to in paragraphs 7.1.4 and 8.1 above, Primary Care Trusts, NHS Trusts and the optical profession will be advised of the new amendments by way of a letter and through the Department of Health and NHS Primary Care Commissioning websites.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument, as it has no significant impact on business, charities or voluntary bodies.

11. Regulating small business

11.1 The legislation applies to small businesses but largely corrects existing legislation.

12. Monitoring & review

12.1 The legislation will be kept under review but as the instrument itself updates, clarifies and corrects existing legislation no formal review is planned.

13. Contact

Derek Busby at the Department of Health, New King's Beam House, 11th Floor, 22 Upper Ground, London SE1 9BW, Tel: 020 7633 4159 or email: derek.busby@dh.gsi.gov.uk can answer any queries regarding the instrument.