EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (PRIMARY DENTAL SERVICES AND GENERAL OPHTHALMIC SERVICES) (MISCELLANEOUS AMENDMENTS AND TRANSITIONAL PROVISION) REGULATIONS 2015

2015 No. 416

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

This Instrument amends –

a) the National Health Service (General Dental Services Contracts) Regulations 2005 (S.I. 2005/3361) ("the GDS Regulations") which set out the framework for general dental service contracts;

b) the National Health Service (Personal Dental Services Agreements)) Regulations 2005 (S.I. 2005/3373)("the PDS Regulations") which set out the framework for personal dental services agreements; and

c) the General Ophthalmic Services Contracts Regulations 2008 (S.I. 2008/1185) ("the GOS Regulations") which set out the framework for general ophthalmic services contracts.

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

3.1 None

4. Legislative Context

4.1 NHS primary dental services and primary ophthalmic services are provided under Parts 5 and 6 of the National Health Service Act 2006 (the 2006 Act) respectively. Under these Parts, the National Health Service Commissioning Board (NHS England) must, to the extent that it considers necessary to meet all reasonable requirements, secure the provision of primary dental services and primary ophthalmic services throughout England by entering into general dental services contracts (GDS contracts) or personal dental services agreements (PDS agreements) with dental contractors, and general ophthalmic services contracts (GOS contracts) with ophthalmic contractors. The GDS and PDS Regulations made under Part 5 prescribe the mandatory contractual terms that must be contained in a GDS contract and a PDS agreement. The GOS Regulations made under Part 6 make similar provision in relation to GOS contracts.

4.2 These regulations make amendments in relation to ophthalmic and dental dispute resolution, extension of dental pilots and the introduction of the Friends and Family Test in dental practices.

4.3 The Friends and Family test was introduced into the National Health Service in 2013. In line with proposals to extend it to National Health Service community services, NHS dental contractors will be required as a contractual term to offer their patients the opportunity to provide feedback about their experience of their visit to the dental practice from 1st April 2015 in line with guidance issued by NHS England. This instrument amends the GDS and PDS Regulations to that effect.

4.4 The GDS and PDS Regulations implement the Capitation and Quality Scheme 2 (Scheme 2) which is a pilot scheme to trial new ways of providing and remunerating NHS dental services, by providing for a temporary variation of specific mandatory terms for contractors who have elected to enter into Capitation and Quality Scheme 2 Agreements. The terms of service that apply to Scheme 2 Agreements are set out in the National Health Service (Dental Services) (Capitation and Quality Scheme 2 Agreements) Directions 2013 (the 2013 Directions)[a]. This instrument implements an extension of this Scheme until 31st March 2016 to enable dental pilot contractors to participate in the next proposed phase of the testing of the reformed dental contract by entering into prototype contracts (see paragraphs 7.8 – 7.17 below) or return to the GDS contracts or PDS agreements they held before entering the pilot programme. The 2013 Directions will be amended to reflect the extension to the Scheme 2 pilots.

4.5 Providers of GDS, PDS and GOS services may choose to be a "health service body" and so for their contracts to be an "NHS contract" for the purposes of section 9 of the 2006 Act. If they do, they may also choose to cease to be such a body and so for their contracts to cease to be an NHS contract. Disputes between bodies that are health service bodies under NHS contracts have to be resolved via the dispute resolution procedure operated by the National Health Service Litigation Authority ("NHSLA"), rather than via the courts.

5. Territorial Extent and Application

5.1 This Instrument applies to England only.

6. European Convention on Human Rights

6.1 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?

NHS dental services - Friends and Family Test

7.1 The Friends and Family Test (FFT) is a feedback tool that supports the fundamental principle that people who use NHS services should have the opportunity to provide feedback on their experience that can be used to improve services. The proposed requirement is that practices must provide an opportunity for people who use the practice to give anonymous feedback through the FFT, except where it would be inappropriate to do so, and to use the standard wording of the FFT question and the responses exactly, as set out below. The standard wording of the FFT is:

[a] Signed on 13th March 2013.

- *"How likely are you to recommend our dental practice to friends and family if they needed similar care or treatment?"*

7.2 Practices will also be required to include at least one follow-up question which allows the opportunity to provide free text. This enables people to provide more detailed feedback about their care, if they wish to do so.

7.3 As well as submit data, in the format required, to NHS England each month, practices must submit monthly reports to NHS England that include at least:

- the number of responses in each category, and
- the number of responses collected by each method

7.4 In addition, practices will be required to publish their results locally. Practices can decide how they publish their results, but if they wish to publish free text comments locally, patients must be able to opt out of their comments being published. This could be presented as follows: 'please tick this box if you DO NOT wish your comments to be made public.'

7.5 NHS England has produced guidance for NHS dental practices setting out that practices can use a range of methods to enable patients to provide feedback. The opportunity must be available to all patients and practices are encouraged to make their collection methods as inclusive as possible. They can use more than one method of collecting feedback, including feedback cards, website, tablets, SMS or phone calls, to suit the needs of their patients.

7.6 NHS England has also produced a range of support materials for providers to help them explain the FFT to their patients. Providers will have to make their patients aware that they have the opportunity to provide feedback via posters or leaflets, as well as notices on websites. NHS England has also published advice on how feedback can be collected from people who may not be able to answer the FFT question on their own.

7.7 The Friends and family test in NHS dental services – summary of the guidance published by NHS England on 15th September 2014, referred to above, is available at http://www.england.nhs.uk/wp-content/uploads/2014/09/nhs-dent-serv-guid.pdf. Hard copies of this guidance are available from the NHS England Insight Team, Room 7E56, Quarry House, Quarry Hill, Leeds, LS2 7UE.

NHS dental services - Capitation and Quality Scheme 2 – Pilot Extension

7.8 The Coalition Agreement committed the Government to introducing a new NHS dental contract with the aim of improving oral health and increasing access to NHS dentistry and to pilot before making any changes.

7.9 The principles of the reformed system are:

- a clinical approach focussed on thorough assessment and prevention as well as treatment, which supports a pathway approach to care;
- measurement and remuneration for quality of care; and
- remuneration that supports continuing care and a focus on prevention as well as treatment/activity.

7.10 The Government began piloting key elements needed to design a reformed system in 2011 (The Capitation and Quality Scheme introduced by S.I. 2011/1182).

7.11 The Capitation and Quality Scheme 2 Pilot programme (the Scheme 2) was implemented in 2013 by the National Health Service (Primary Dental Services) (Miscellaneous Amendments and Transitional Provisions) Regulations 2013 (S.I. 2013/364). The regulations which implemented this Scheme cease to have effect on 31 March 2015.

7.12 The Government announced early in 2014 the plan to move to a more advanced stage of testing in 2015/16 (prototypes).

7.13 The learning from the both Capitation and Quality Schemes has informed the development of this next stage of testing. See the two reports that have been published in relation to the schemes:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212999/NHS-dental-contract-pilots-early-findings.pdf

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/282760/Dental_contract_pilots_evidence_and_learning_report.pdf

7.14 In the new prototype stage, dental practices will continue to deliver a care pathway and the same broad set of quality measures tested by the pilots. However, the prototypes will differ in that they will test new ways of remunerating contractors.

7.15 It is planned to test two blends of capitation and activity as remuneration models in the prototype contracts. Contractors participating in the Scheme 2 pilots are currently paid for services using a capitation based payment mechanism. Contractors providing services under GDS contracts and PDS agreements are paid for services based on dental activity, which is calculated as units of dental activity (UDAs) for particular services provided. The proposed prototype contracts will pilot a contract that blends both of these payment models -

- In blend A – Capitation will be used as the basis of remuneration for oral health reviews and preventive care (current Band 1 type care) and activity payments are used for all treatment (Band 2 and Band 3 type care)
- In blend B - Capitation will be used as the basis of remuneration for oral health reviews, preventive care and routine treatment (Band 1 and Band 2 type care) and activity payments are used for more complex treatment (Band 3 type care)

7.16 It is envisaged that a number of current participants in the Scheme 2 pilots will move to a prototype contract (providing they meet the eligibility criteria for participating in the prototypes. The eligibility criteria has been published and is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/395384/Reform_Document.pdf

7.17 We expect the prototypes to begin in autumn 2015 and legislation to introduce them is in progress. Once these prototypes have been implemented, and those contractors participating in the Scheme 2 have either moved to a prototype contract, or returned to their usual GDS contracts or PDS agreements, the Scheme 2 will end. There are no

plans to run prototype contracts and the Scheme 2 side by side beyond 31 March 2016. The six month overlap period is to allow a managed transition for those contractors currently participating in the Scheme 2.

NHS dental and ophthalmic services - Changes relating to dispute resolution

7.18 Currently, if a GDS, PDS or GOS contractor has been a "health service body" and decides to stop being a health service body, as indicated above, NHS England must agree to that request and vary their contract or agreement accordingly. However, at the time of the variation, there may be outstanding disputes between the parties relating to the time when the contract or the agreement was an NHS contract, or such disputes may emerge later.

7.19 In the case of *NHS England v Bargain Dentist.Com and others* [2014] EWHC 1994(QB), the court determined, in terms, that the relevant legislation governing contracts for NHS dental services, which contains similar provisions on this issue to the relevant legislation governing GOS contracts, did not allow for litigation in court about alleged liabilities for breaches of a contract that predated its variation from an NHS contract to a non-NHS contract.

7.20 An implication of this judgement is that if a GDS, PDS or GOS contractor owes NHS England money under an NHS contract (e.g. because of overpayments to dental contractors or inappropriate ophthalmic claims), and the contract is varied so that it is a non-NHS contract, NHS England can only initiate proceedings to recover that money after the variation has taken effect with the contractor's consent. This is the anomaly that these Regulations seek to rectify.

7.21 The changes provide, in terms, that following the variation of an NHS contract to a non-NHS contract, the GDS, PDS or GOS contractor is still to be regarded as a "health service body", and accordingly the contract or the agreement is to continue to be regarded as an NHS contract, for the purposes of all disputes that relate to the pre-variation period. Additionally, NHS England is given the right post variation to refer disputes that relate to the time when the contract or the agreement was an NHS contract to the NHSLA for determination. In this respect, NHS England is now on the same footing as the contractor.

7.22 There is a significant risk to the public purse if NHS England is unable to recover money owed under a GDS contract or a PDS agreement in the case of NHS dental services, or a GOS contract in the case of NHS ophthalmic services, simply because it has been required to vary the contract or agreement so that it becomes a non-NHS contract but, for whatever reason, NHS England has not commenced proceedings for recovery of the money before it does so.

7.23 A transitional provision has been included to ensure that any pipeline cases that are already the subject of court proceedings are not affected by this change.

Consolidation

7.24 Plans to consolidate the GDS, PDS and GOS Regulations will be kept under review.

8. Consultation outcome

8.1 The Department of Health consulted the British Dental Association (BDA) on all aspects of this instrument. The BDA accepted the proposed changes relating to the extension of Scheme 2 pilots and the introduction of FFT, but expressed concerns about the amendments relating to changes to the dispute resolution procedure referred to above in paragraphs 7.18 to 7.23. The Department consulted the Optometric Fees Negotiating Committee (OFNC) in relation to regulations 10 to 12 of this instrument which also deal with the dispute resolution changes referred to above. The OFNC also expressed concerns about these amendments.

8.2 To address the concerns in relation to the dispute resolution changes, the Department held a meeting with both bodies to clarify what was being done and why. Following this meeting, amendments were made to the draft regulations to clarify the drafting and to address the concerns which had been raised. We consulted both bodies again on the amended regulations and both bodies have subsequently indicated that they accept the amendments, saying that they found the clarifications helpful.

9. Guidance

9.1 Guidance on the Friends and Family Test has been issued by NHS England (see paragraph 7.7 above)**.**

10. Impact

10.1 There is no impact on charities or voluntary bodies.

10.2 NHS dental contractors are exempt from the Small and Micro Business Assessment as they are considered part of the public sector due to their provision of primary dental services for the NHS. Public sector organisations are exempt under this test and as a result an Impact Assessment has not been prepared.

10.3 These regulations do not alter the right of GOS contractors to vary the status of their NHS contract but are modest amendments required to protect the recovery of NHS funds. The regulations require no action on the part of contractors and therefore impose no costs. If contractors decide to vary their contract as a result of these regulations we anticipate there will be no significant financial impact for them in doing so.

11. Regulating small business

11.1 The Regulations apply to small businesses, including firms employing up to 20 people. As these Regulations concern the provision of NHS dental and ophthalmic services in England on the basis of nationally determined terms of service, it is not possible to differentiate between contractors according to their operational turnover or size. This is to ensure the application of agreed nation-wide standards and practices in the provision of such services as part of the nationally determined contractual framework.

12. Monitoring and Review

12.1 Monitoring of PDS Agreements, and GDS and GOS contracts is the responsibility of NHS England.

13. Contact

Derek Busby at the Department of Health (Tel: 0207 210 5603 or email: derek.busby@dh.gsi.gov.uk) can answer any queries regarding this Instrument.