EXPLANATORY MEMORANDUM TO

THE NHS BUSINESS SERVICES AUTHORITY (AWDURDOD GWASANAETHAU BUSNES Y GIG) (ESTABLISHMENT AND CONSTITUTION) (AMENDMENT) ORDER 2017

2017 No. 959

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument amends the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes Y GIG) (Establishment and Constitution) Order 2005 in relation to England and Wales to remove counter fraud and security functions from the statutory remit of the NHS Business Services Authority ("the BSA") in relation to the health service in England, and counter fraud functions of the BSA in relation to the health service in Wales.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The instrument amends the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) Order 2005 ("the principal Order" (S.I. 2005/2414)), which established the BSA. The principal Order was amended by the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2006 (SI 2006/632) ("the 2006 Order").

4.2 The amendments made by the 2006 Order (made as a composite order) required the BSA to exercise the Secretary of State's counter fraud and security management functions in relation to the health service in England, and certain counter fraud functions of Welsh Ministers in relation to the health service in Wales. The 2006 Order provides that the functions are exercisable subject to and in accordance with directions that might be given by the Secretary of State, in relation to England, and Welsh Ministers, in relation to Wales. (Both the principal Order and the 2006 Order were made under the National Health Service Act 1977 but now have effect as if made under section 28 of the National Health Service Act 2006 and section 22 of the National Health Service (Wales) Act 2006, by virtue of section 4 of and paragraph 1,

Part 1 of Schedule 2 to, the National Health Service (Consequential Provisions) Act 2006.)

4.3 From 1 November 2017 the Secretary of State will no longer require the BSA to undertake his counter fraud or security management functions in relation to the health service in England. On that day, a new special health authority is to be established in relation to England which will be required to exercise the Secretary of State's health service counter fraud functions. That role will no longer fall to the BSA and this Order therefore removes from the BSA's statutory remit health service counter fraud functions. Security functions in relation to the health service are also removed as the BSA will not be required to undertake work of this nature. Health service security functions of the Secretary of State are not being conferred on the new special health authority: the background to this is further explained in paragraph 7.2 below.

4.4 The establishment of the new special health authority to operate in relation to England is being provided for in the NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017 (SI 2017/959). That instrument is being made on the same day as this, and, like this Order, is also to come into force on 1 November 2017. (A third Order is also being made as part of this package of statutory instruments, the NHS Counter Fraud Authority (Investigatory Powers and Other Miscellaneous Amendments) Order 2017 (SI/959) which amends various legislative provisions relating to investigatory powers and certain other duties in relation to whistleblowing and checks on the eligibility of individuals to provide NHS primary care services.)

4.5 Counter fraud functions in respect of the health service in Wales which were provided for in the 2005 Order as amended were, as mentioned above, exercisable subject to and in accordance with directions. However, Welsh Ministers did not in fact give such directions, and instead made arrangements with the BSA for it to carry out some health service counter fraud functions for them pursuant to section 83 of the Government of Wales Act 2006. On the creation of the NHS Counter Fraud Authority ("the NHSCFA") as described in paragraphs 4.3 and 4.4, Welsh Ministers plan to make new arrangements under section 83 with the new special health authority, for the discharge of certain of their counter fraud functions in relation to the health service in Wales.

4.6 Provision for the transfer of staff undertaking the BSA's counter fraud functions in England is made in the Order mentioned in paragraph 4.4 above which establishes the NHSCFA. That Order also makes provision in respect of the transfer of property and liabilities from the BSA to the NHSCFA, and for continuity in relation to the assumption of functions by the NHSCFA that were previously exercised by the BSA.

4.7 The enabling powers in section 28 of the National Health Service Act 2006 and section 22 of the National Health Service (Wales) Act 2006 require consultation with bodies representing officers likely to be transferred or affected by transfers in pursuance of the order. This Order does not make provision for the transfer of staff and consultation has not been undertaken in respect of this instrument, as the Department and Welsh Ministers consider that staff transfers are a matter for the instrument establishing the new special health authority mentioned in paragraphs 4.3 and 4.4 above. Statutory consultation in relation to the instrument establishing that body is explained in the Explanatory Memorandum laid with that instrument.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The application of this instrument is England and Wales.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 The policy background to the establishment of the NHSCFA to undertake the Secretary of State's counter fraud functions in relation to England is set out in detail in the Explanatory Memorandum accompanying the NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017. The removal of the Secretary of State's counter fraud functions from the BSA's statutory remit is part of this policy of re-organisation, to aid efficiency by avoiding duplication of functions between the two special health authorities.

7.2 In addition to removing the counter fraud functions from the BSA's remit, the security management functions it currently undertakes in relation to England only will also be removed. In practice, security management in the NHS is carried out at a local level in order to effectively respond to threats to patients, staff and property rather than being centrally managed and directed. The BSA's security management role was the dissemination of best practice to NHS bodies and preparation of guidance, which is now in place. NHS bodies themselves appoint suitably qualified security management specialists to implement a security management strategy, with associated policies, procedures and physical security measures approved by the body concerned as appropriate. As standards are now regarded by the Department as being embedded within the practices of NHS bodies, the Department considers that those organisations themselves are best placed to further develop and apply security management policies and practices taking account of local circumstances to deal with security matters in the most effective way.

7.3 In relation to Wales, the function at article 3(j) in the principal Order is being removed from the BSA's remit to reflect the re-organisation undertaken by the Secretary of State. This provision is not in fact relied on as a statutory vehicle for the discharge of Welsh Ministers' counter fraud functions and as mentioned above, arrangements under section 83 of the Government of Wales Act 2006 are instead relied on. Section 83 allows Welsh Ministers to make arrangements with public authorities in England and Wales to carry out functions of Welsh Ministers. Welsh Ministers plan to make new arrangements with the NHSCFA on its establishment.

Consolidation

7.4 The Department is not considering consolidation of the principal Order at this time.

8. Consultation outcome

8.1 No consultation has been undertaken in respect of this specific Order in England, but a consultation has been carried out with affected BSA staff about the creation of an

independent special health authority to carry out the Secretary of State's counter fraud functions and the transfer of staff to the new body. The proposal has been broadly welcomed at staff engagement events. Welsh Ministers have consulted with BSA, the NHS Counter Fraud Service Wales and Local Health Board and Trusts as employers of Local Counter Fraud Specialists in Wales.

9. Guidance

9.1 A stakeholder engagement plan is in place to communicate with health service stakeholders about the establishment of the NHS Counter Fraud Authority and its delivery of the counter fraud service in relation to the health service in England.

10. Impact

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

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

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

12. Monitoring & review

12.1 This instrument will not be subject to monitoring or review.

13. Contact

13.1 Mark Richardson at the Department of Health Telephone: 0207 972 1044 or email: mark.richardson@dh.gsi.gov.uk can answer any queries regarding the instrument