EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (NATIONAL INSURANCE CREDITS) AMENDMENT REGULATIONS 2007

2007 No. 2582

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The changes ensure that earnings credited for incapacity for work or approved training which were erroneously awarded because of official error, will still count towards the satisfaction of the contribution conditions for Incapacity Benefit (where a claim for that benefit links to an earlier claim using the same contributions record), for State Pension and for Jobseeker's Allowance. They preclude certain decisions from being revised for official error under regulation 3 of the Decisions and Appeals Regulations. Finally, they ensure that certain Classes of contributions can be treated as paid timeously for benefit purposes.

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

3.1 None.

4. Legislative Background

4.1 The changes are being made because a substantial set of mismatches between the data held on National Insurance credits on the DWP's Pension Service Computer System (PSCS) and the National Insurance Recording System (NIRS 2) system has been identified. Many thousands of National Insurance Records need to be reconciled with the information held on PSCS. Estimates are that up to 30,000 people may have been underpaid and about 90,000 may have been overpaid as a result of incorrect records.

4.2 The issue for DWP is how it handles existing benefit awards that have relied on the current NIRS2 records where these records now change. The benefits affected are Jobseeker's Allowance, Incapacity Benefit, Bereavement Benefits and State Pension.

4.3 The decision has been made to make good the underpayments - for which no legislative changes are needed. Legislation is however needed to ensure both that those current benefit awards which are based on an incorrect record where correction would result in the awards being reduced are maintained, and that existing contribution records the alteration of which would result in future benefit claims being affected adversely are kept intact.

4.4 A Ministerial Statement was made on 23 July outlining the problem that had been identified and the department's response, including the intention to regulate.

5. Territorial Extent and Application

5.1 This instrument extends to Great Britain.

6. European Convention on Human Rights

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

7. Policy background

Amendments to the Social Security (Credits) Regulations 1975

7.1 Regulation 2 of these Regulations inserts three new regulations into the Credits Regulations.

7.2 *Regulation 8D* is required for those Incapacity Benefit (IB) claimants who make a claim for IB which links with a previous claim. In certain circumstances, IB claims link with previous claims and for entitlement purposes the periods of incapacity for work which relate to those claims are treated as a single period of incapacity for work.

7.3 From a claimant's perspective the expectation would be that he would return to the same stage of IB entitlement as when he previously left IB – for example his IB would now be paid at the same (possibly higher) rate.

7.4 Where a linking claim is made it is the claimant's National Insurance contributions record at the beginning of the (total, single) period of incapacity for work which is relevant for an IB claim. However, if the contribution record was corrected between claims, it would be possible for there to be no entitlement at all when the second claim was made, because that second claim could be based on a now-deficient contributions record.

7.5 The amendment will ensure that the contribution record which led to the previous entitlement to IB is matched in relation to the second claim. Accordingly, the level of entitlement will be unchanged on the later claim.

7.6 A related amendment is to be made to regulation 4A the Social Security (Incapacity Benefit) Regulations 1994, by regulation 6 of the Social Security (Miscellaneous Amendments) (No.5) Regulations 2007. That amendment will ensure that days which were days of incapacity for work in relation to the original claim will be treated as days of incapacity for work in relation to the later claim. This will ensure that-

(a) the later claim to IB will link back to the original claim as would be expected by the claimant when we left IB at the end of the original claim; and
(b) the claimant will be entitled to the same rate of IB in the later claim as he was entitled to at the end of the original claim (in IB the higher rates of benefit depend on the length of the claimant's period of incapacity for work).

7.7 *New regulations 8E and 8F* are required to ensure that contributions erroneously awarded because the claimant has been credited with earnings because he is incapable of work or has undertaken approved training, will still count towards satisfaction of the contribution conditions for State Pension (provided pensionable age is reached no later than 31 May 2008), and for Jobseeker's Allowance.

7.8 When someone claims benefit because they are incapable of work or they undertake approved training, their future contribution record is protected by crediting them the equivalent Class of contribution as if they are working and earning a wage. These credits count as contributions and are later used when determining entitlement to other contributory benefits e.g. State Pension and Jobseeker's Allowance.

7.9 If these credits are removed from the claimant's record because they have been awarded erroneously then there would be a gap in the contribution record which may affect entitlement. As the error is an official one it would be unreasonable to let this happen. The amendments ensure that there will be no gap.

The reason why the State Pension provision will apply to people reaching pensionable age no later than 31 May 2008 is to ensure that the accuracy of pension forecasts sent to this group in advance of pensionable age will not be compromised. Similarly, allowing these credits to count also for people claiming on the basis of the unadjusted record in the future or

where they have been getting bereavement benefits will maintain consistency.

Amendments to the Social Security Decisions and Appeals Regulations 1999

7.10 Regulation 3(2). Section 9 of the Social Security Act 1998 provides the power for the Secretary of State to revise benefit decisions. It is a permissive power in that it says that he 'may' so revise. However, his default position is that he would always want and expect to revise, particularly where it is known that benefit is being overpaid; he has made regulations which set out the cases and circumstances where he would revise - these include where decisions have been made in official error. But in exceptional circumstances, *and on a case by case basis only*, he may decide not to exercise this power. It is not the policy intention nor would it be an appropriate use of the power to preclude revising for the whole of a particular class or type of case.

7.11 What this means is that because the errors identified by the scan are official errors (and so covered by existing regulations) he could not use the power to exclude all the cases unless he considered and decided each one individually. So, as the law stands the Secretary of State has no option but to reconsider and potentially revise those decisions identified by the HMRC scan where benefit is being overpaid.

7.12 If we do not regulate to overcome this problem then, whilst the Secretary of State could not in law recover the benefit which has been overpaid because they arise from official error, affected customers could have their benefit reduced or even extinguished from a current date.

7.13 The solution is to regulate so that the decisions in the identified cases should not be capable of being revised. This will have the effect of making the affected benefit payments properly payable under legislation. In this way no overpayments are generated and the customer's existing award is not affected.

7.14 Regulation 3(2) will exclude those decisions which would otherwise fall to be revised for official error under regulation 3(5) of the Decisions and Appeals Regulations from that regulation.

Amendments to the Crediting and Treatment of Contributions, and National Insurance Numbers Regulations

7.15 Regulation 4. This provides for National Insurance credit records to be updated for benefit purposes.

7.16 Where the scan identifies incorrect credit records the intention is that these will be updated so that future claims would be based on the corrected record. To this end it is proposed that people of working age whose contribution records show a shortfall as a result will be invited to pay Class 3 voluntary contributions. HMRC will produce regulations to treat these contributions as paid timeously. DWP need to make a similar provision to allow the contributions to count towards the satisfaction of the contribution conditions for future claims for basic State Pension and Bereavement Benefits. **New regulation 6B achieves this.**

7.17 DWP also need to ensure that Class 2 contributions paid late will count for benefit purposes. One of the effects of the computer errors has been that Class 2 contributors have not received quarterly bills for periods when the incapacity credit has been incorrectly awarded. They would be unaware that they had been over-credited and so removing the wrongly awarded credits will generate liabilities for the Class 2 payer. Where a person seeks to close the gap the policy is that this late payment, which is what it would be, would still count towards future benefit entitlement. **New regulation 6B achieves this.**

7.18 The amendment also ensures that any future official errors which result in the need to pay Class 2 or 3 contributions outside the normal time limits will be similarly accepted.

7.19 Both for the payment of Class 2 and Class 3 contributions as above there will be a time limit of six years in which to make payment beginning on the date that the contributor was first advised of the error in his contribution record.

Consultation

7.20 The regulations are subject to statutory consultation with SSAC. They have indicated they are content with the draft regulations. None of the amendments were the subject of consultation with outside bodies. This was not necessary as they are of a technical nature designed to reflect the policy intention.

Guidance

7.21 There are no arrangements for publicity as people will not be aware they are affected by these issues until contacted by the Department. It is only possible to identify who affected by this issue by examining the information about individual National Insurance Records passed to DWP by HMRC. Then the Pension Service and Jobcentre Plus will write to people who have been underpaid benefit and will pay any monies owing. HMRC will write to anyone who may need to consider paying further National Insurance Contributions.

7.22 The Department has sent letters to Help the Aged, Age Concern, Citizen's Advice Bureau and the Local Government Association to advise them of the issue and the actions the Department is taking. DWP staff have been briefed on the issue and how to respond to enquiries. Further guidance will be issued advising them about the actions required in individual cases.

Consolidation

7.23 The public will be able to read a consolidated version of the affected Regulations in The Law Relating to Social Security ("The Blue Volumes") on the DWP website.

8. Impact

8.1 A full impact assessment has not been prepared for this instrument as there is no impact on business, charities or voluntary bodies.

8.2 The impact on the public sector is low. The regulations will mean that an estimated 90,000 awards of benefit will be legitimised which might otherwise be overpaid. The main purpose of the regulations is to avoid people having benefit awards revised when the overpayment is caused by errors on government computer systems. However the regulations will also mean that the Department does not need to undertake a significant examination of large numbers of individual cases to identify potential overpayments caused by official error and then adjust entitlement to income related benefits. Therefore the regulations will help to reduce any potential administrative impact on other services provided by the Department. Estimates are that the regulations may save administrative costs to DWP of up to £8m that might otherwise be incurred. This estimate is subject to revision when details about individual cases are received from HMRC in November.

9. Contact

Lyndon Walters at the Department for Work and Pensions can answer any queries regarding this instrument. He can be contacted on tel: 020 7962 8047 or by e-mail to: lyndon.walters@dwp.gsi.gov.uk