

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE (CHARGES TO OVERSEAS VISITORS)
(AMENDMENT) REGULATIONS 2017

2017 No. 756

1. Introduction

- 1.1 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

- 2.1 This instrument amends the NHS (Charges to Overseas Visitors) Regulations 2015 (“the 2015 Regulations”) to:
- extend the obligation to charge for NHS-funded services provided in respect of overseas visitors to include secondary and community services provided by other non-NHS providers;
 - require that, except in certain circumstances, an estimate of the full charge of a service is secured in advance of the service being provided; *and*
 - amend existing exemptions from charge.
- 2.2 Other amendments are also being made both to facilitate these changes and to update the 2015 Regulations where necessary.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None. However, we wish to explain that whilst this instrument is being laid more than 21 days before its first tranche of provisions come into force (on 21 August 2017), the timing of the laying means that the instrument will be before Parliament predominately during recess. We regret this timing, but the instrument is being laid at the earliest opportunity following the general election. Some of the provisions in the instrument do not come into force until 23 October 2017 to allow preparation time for the persons affected. It is considered to be in the public interest not to delay the laying of the instrument as it seeks to ensure that additional income for the NHS is secured once it comes into force. This is important given the financial pressures the NHS is under and assists in ensuring the long term sustainability of the NHS.

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 Section 175 of the National Health Service Act 2006 (“the 2006 Act”) provides the Secretary of State with a power to make regulations for the making and recovery in such manner as may be prescribed, of charges for services provided under the 2006

Act (NHS services) which are provided in respect of a person not ordinarily resident in Great Britain.

- 4.2 This instrument amends the 2015 Regulations, which set out the requirement on certain NHS bodies to make and recover charges for relevant services provided in respect of overseas visitors. The 2015 Regulations also provide exemptions, both in respect of the type of services provided (under Part 3) and the circumstances in which overseas visitors are exempt (under Part 4).
- 4.3 The 2015 Regulations have previously been amended by the NHS (Charges to Overseas Visitors) (Amendment) Regulations 2015 and the Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) Regulations 2016.

5. Extent and Territorial Application

- 5.1 This instrument extends to England only.
- 5.2 This instrument applies to England only.

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 This instrument amends the 2015 Regulations and implements changes in policy around the charging of overseas visitors for NHS services. The policy changes in this instrument are the result of further work undertaken by the Department of Health's Visitor and Migrant NHS Cost Recovery Programme ("the Programme") since 2015.
- 7.2 The Programme itself focuses on income generation for the NHS from the following three distinct channels:
- Income from the Immigration Health Charge (also known as the "Immigration Health Surcharge" or "surcharge"), paid by the vast majority of non-EEA nationals coming to the UK to live, work or study for six months or more; *and*
 - Income from the member states of the European Economic Area and Switzerland (EEA) via the three cross-border healthcare arrangements (European Health Insurance Card (EHIC), S1 and S2); *and*
 - Income from directly chargeable patients (typically people who reside outside the EEA, who are living in the UK unlawfully or people who reside within the EEA but who are not 'insured' by another member state).
- 7.3 In December 2015, the Department of Health ran a consultation¹ that included a range of future policy proposals, questions and calls for evidence in relation to possible additional sources of income generation from overseas visitors and migrants using

¹ The Department of Health (2015) *Making a fair contribution: A consultation on the extension of charging overseas visitors and migrants using the NHS in England* is available to download at www.gov.uk/government/consultations/overseas-visitors-and-migrants-extending-charges-for-nhs-services or from the Visitor and Migrant NHS Cost Recovery Team, Room 506, Richmond House, 79 Whitehall, London, SW1A 2NS

NHS-funded services. The Government's response² to the 2015/16 consultation was published in February 2017, confirming its intention to bring forward secondary legislation from April 2017. This instrument is the first stage of the changes.

- 7.4 Other policy proposals included in the consultation - including the extension of charging into areas of primary care - will be subject to further policy development, engagement and contractual negotiations before any proposals for further legislation or guidance are brought forward. More detail on the consultation process and outcomes is set out in section eight of this explanatory memorandum.

Case for legislative change

- 7.5 Since the Visitor and Migrant Cost Recovery Programme was launched in July 2014 the income identified from overseas visitors and migrants in England (and, in the case of the surcharge and EEA income, in Scotland, Wales and Northern Ireland as well) has risen from £89 million in 2012/13 to £290 million in 2015/16. A significant portion of this increase resulted from the introduction of the surcharge which recovered £164 million in its first year of operation (2015/16).
- 7.6 Whilst the 2015 Regulations have allowed the NHS to identify more income than previously, further legislative change is required to support more efficient, effective and equitable cost recovery processes with NHS-funded services, whilst still ensuring that certain groups of overseas visitors, or certain services, should be exempt from charge for public health reasons or to protect the most vulnerable.
- 7.7 As such, this instrument will:
- extend charging to apply to non-NHS providers of NHS-funded secondary and community care;
 - exempt from charge palliative care services that are provided by palliative care charities or community interest companies;
 - exempt from charge services provided as part of the telephone advice line commissioned by a Clinical Commissioning Group or the National Health Service Commissioning Board (which is known as NHS 111);
 - require all relevant organisations to obtain upfront payment for the full estimated cost of care unless doing so would prevent or delay the provision of immediately necessary or urgent treatment. In practice this will always apply to non-urgent care;
 - require charging for secondary and community care delivered outside of a hospital setting;
 - require NHS Trusts and Foundation Trusts to 'flag' an overseas visitor's NHS record (identified using the patient's "unique identifier" or NHS number) to indicate whether the person is chargeable;
 - remove assisted conception services from those services that a surcharge payer (or those who are exempt from paying the surcharge or who have had the surcharge waived) can receive free of charge;

² The Department of Health (2017) *Making a fair contribution Government response to the consultation on the extension of charging overseas visitors* is available to download at www.gov.uk/government/consultations/overseas-visitors-and-migrants-extending-charges-for-nhs-services or from the Visitor and Migrant NHS Cost Recovery Team, Room 506, Richmond House, 79 Whitehall, London, SW1A 2NS

- add the exemption for reciprocal healthcare agreements to the list of those exemption categories that are not ones that, in the event that the exemption ceases to apply to an overseas visitor part way through a course of treatment, allow for the remainder of that course of treatment to continue to be free of charge;
- amend the exemption applicable to refugees, asylum seekers and some supported failed asylum seekers to clarify that their dependants are also exempt from charge;
- remove the current exemption category for ship workers (making owners of UK-registered ships liable for the healthcare costs of their crews when they are in the UK in the course of their employment); and
- remove Barbados from the list of countries in Schedule 2 with which the UK has reciprocal healthcare agreements.

7.8 Further detail on the above points, plus additional amendments connected with the above provisions can be found in the following sub-sections.

Non-NHS providers of NHS-funded care and Out-of-Hospital care

- 7.9 Under the 2015 Regulations, the organisations that are required to make and recover charges are ‘relevant NHS bodies’, namely NHS Trusts, NHS Foundation Trusts and Local Authorities exercising public health functions within the meaning of the NHS Act 2006. The 2015 Regulations also provided an exemption from charge for “services provided otherwise than at, or by staff employed to work at, or under the direction of, a hospital.”
- 7.10 Following the 2015/16 Consultation, the Government took the decision to standardise the rules at the next available opportunity. This means that through this instrument, all NHS-funded secondary and community care - with the exception of those services that are expressly exempted from charge in the 2015 Regulations - will be chargeable to non-exempt overseas visitors wherever, and by whomever, they are provided. Regulation 10 of this instrument amends regulation 9 of the 2015 Regulations by removing the exemption from charge for services provided outside a hospital.
- 7.11 Regulation 2(3) of this instrument also alters the definition which describes which organisations are responsible for implementing the charging rules, changing it from a “relevant NHS body” to simply a “relevant body.” The definition of relevant body brings into the scope of the 2015 Regulations non-NHS providers of NHS-funded secondary care. The measures that affect non-NHS providers will come into force on 23 October 2017, allowing sufficient time for these organisations to implement the relevant new processes. Regulation 3 of this instrument makes the necessary changes to regulations 2-7 of the 2015 Regulations by substituting “relevant NHS body” with “relevant body” throughout. However, where regulation 5 of this instrument inserts a new regulation 3A which is an obligation to record information against an overseas visitor’s consistent identifier, that obligation is only placed on NHS Trusts and NHS Foundation Trusts. See paragraph 7.28.
- 7.12 The measure expanding the scope of the 2015 Regulations to cover non-NHS providers does however, at regulation 10(3)(c) of this instrument, explicitly exempt

palliative care services - where these are provided by registered charities or community interest companies³ (i.e. hospices).

- 7.13 Further, regulation 10(3)(a) of this instrument amends regulation 9 of the 2015 Regulations to add to the list of exempt services those services that are provided as part of the NHS111 telephone advice line so that those services do not become chargeable to overseas visitors as a consequence of removing the exemption for out of hospital care or widening the scope of organisations that must apply the 2015 Regulations, as the intention of those amendments was not to cover this type of service.
- 7.14 Both the removal of the exemption for out-of-hospital care and the addition of non-NHS providers of NHS-funded care to the scope of the 2015 Regulations are measures designed to close respective loopholes. This will mean that there is parity in the system and all overseas visitors will be subject to the same charging regime, wherever their NHS treatment is delivered.

Upfront charging of the estimated total cost of care

- 7.15 The Department of Health is aware that NHS Trusts and Foundation Trusts have experienced difficulties in recovering charges for services provided to overseas visitors once a patient has been discharged and that, in some cases, it is difficult or impossible to trace overseas visitors with an outstanding NHS debt to be repaid.
- 7.16 The guidance that accompanies the 2015 Regulations has for some time set out that payment in advance should be secured where possible, and should always be taken in full before non-urgent services are provided. The 2015 Regulations set out that relevant NHS bodies were not prevented from securing payment in advance, although did not mandate that they did so (regulation 7(14) of the 2015 Regulations).
- 7.17 As the Department of Health considers that upfront charging is a vital tool to improving cost recovery rates within the NHS and ensure patients make informed choices about their care, this practice is being explicitly set out in this instrument at regulation 4. It amends regulation 3 of the 2015 regulations to require that relevant bodies must secure the full estimated amount of charges in advance of providing treatment to a chargeable overseas visitor. This requires that the assessment of a patient's chargeable status is considered at the beginning of the treatment process, which in addition to helping to improve cost recovery rates, may also provide greater clarity to overseas visitors.
- 7.18 In recognition of the fact that there are, of course, situations where the clinical need of the patient means that it will not be possible for a provider to secure an advance payment (or to clarify whether the patient is a chargeable overseas visitor), the requirement does not apply where doing so would prevent or delay the provision of immediately necessary or urgent services (regulation 4(3) of this instrument). It should be noted that these services are not exempt from charge and should still be billed when provided to chargeable overseas visitors.
- 7.19 The definitions of "immediately necessary service" and "urgent service" that are included in this instrument (regulation 4(6)) are heavily influenced by the wording used in the 2015 Guidance, the drafting of which took account of comments received

³ It should be noted however that this exemption does not apply to NHS bodies providing equivalent palliative care services.

from the British Medical Association, and discussions with NHS England (the operational name for the NHS Commissioning Board).

- 7.20 The definition of “immediately necessary service” in this instrument includes all antenatal, intrapartum and postnatal services provided in respect of a pregnant patient, or a patient who has recently given birth, or to the newborn baby. The purpose of this blanket inclusion of all such services in the definition is to help to ensure the safety of pregnant patients and their babies both in routine procedures and where complications occur during pregnancy or childbirth, and where services are required in the days (or weeks as the case may be) following birth. The definition also includes any other relevant service that the treating clinician determines is required promptly to save the patient’s life, to prevent the patient’s condition from becoming immediately life-threatening, or to prevent permanent serious damage from occurring.
- 7.21 This instrument deliberately does not provide a definition of “treating clinician” in recognition that who this is will depend on the particular circumstances of the case. Following discussions with NHS England, the Department of Health is satisfied that it will be clear who the treating clinician is without further definition needing to be required.
- 7.22 An “urgent service” is defined as any service that the treating clinician determines is not an immediately necessary service but which should not wait until the recipient can be reasonably expected to leave the United Kingdom. The time period before a patient can be expected to leave the United Kingdom will vary according to the personal circumstances of the individual, for example the period is likely to be longer for a failed asylum seeker who is facing difficulties in leaving the United Kingdom than for a tourist visiting the UK on a short term basis.
- 7.23 This instrument sets out other relevant provisions to make the policy of upfront charging work, including (in regulation 4(3)) that the person from whom the advance payment should be secured is the person that it appears will be the person liable for the eventual charge for the service when it is provided. In most cases the person liable to pay will also be the patient but there are some circumstances where it is a third party. These are explained in more detail in the section below on liability for payment of charges.
- 7.24 This instrument also sets out (in regulation 4(4)) that if there is more than one provider of services (or “relevant body”) involved in the provision of a package of healthcare⁴ that each provider is responsible for securing, in respect of the services it will be responsible for delivering, both the payment of the estimate of charges in advance and settling the final balance once the services have been provided.
- 7.25 The estimate of the charges (or “advance payment sum”) that will be incurred will be based on the anticipated diagnostics, treatment, length of stay (if an inpatient) and any complications or co-morbidities which are expected or known. The estimate should be calculated in the same way that the final charge would be calculated, i.e. it is usually based on the National Tariff Payment System or equivalent.
- 7.26 The final “actual charge” will take account of any changes in the treatment required, if any complications arose or further diagnostics were required. It will also take account of where costs were less than anticipated at the beginning of treatment. Therefore, the

⁴ For example a maternity pathway where the patient has antenatal care provided by one ‘relevant body’ and delivers her baby and receives postnatal care from a different ‘relevant body,’ the two provider organisations would be responsible for securing payment separately for the services they have delivered.

“actual charge” can be either higher or lower than the “advance payment sum” which would have been taken upfront. When the actual charge is calculated, relevant bodies should deduct from the charge any amount that they have recovered from the person liable for the actual charge and refund to them any excess payment that they may have paid for the service in question. If the person liable for the actual charge is not the same as the person who paid the advance payment sum, the person who paid the advance payment sum can seek a refund under provisions contained within new regulation 5 of the 2015 Regulations (as set out in regulation 7 of this instrument). This is explained in more detail in the section below on repayment of charges.

- 7.27 This instrument makes other amendments to the 2015 Regulations to make provision for upfront charging – e.g. the amendment to regulation 7 of the 2015 Regulations (regulation 9 of this instrument).

Obligation to record patient chargeable status

- 7.28 This instrument (through regulation 5) inserts a new regulation (3A) to place a legal obligation on NHS Foundation Trusts and NHS Trusts to record against a patient’s NHS record (distinguishable through the “consistent identifier”, i.e. their NHS number⁵) certain information when the Trust establishes that they are an overseas visitor for the purposes of the 2015 Regulations. The Trust must record the fact that the patient has been determined to be an overseas visitor, the date of that determination and whether an exemption applies. In practice, this will include marking a patient’s record with the correct red or green ‘banner’ and ensuring that the decision to charge or exempt from charge is noted for audit purposes. As well as establishing a record, the information is aimed to ensure consistency and more efficiency within the charging process. Where charging information already exists on a patient’s record, it will be for each NHS Foundation Trust or Trust to determine if they agree or if they wish to assure themselves that the information held on the patient’s chargeable status is still correct. Guidance will make it clear that a Trust should update the record, if necessary, including removing a person’s chargeable status if the Trust becomes aware and is satisfied that the individual is not, or is no longer, chargeable.
- 7.29 The use of banners containing information as to a person’s chargeable status is already employed in the NHS, in particular to flag where an overseas visitor is a person who has paid the surcharge or is exempt from that payment or had the requirement waived. The requirement in this instrument is an extension of this existing process which first came into force in April 2015.

Liability for payment of charges

- 7.30 In most cases, the person liable for charges under the 2015 Regulations is the recipient of the service. The exceptions are:
- Children under 18 (liability rests with the person who has parental responsibility);
 - Patients who are employed, engaged or work in any capacity on board a ship, are present in the UK in the course of their employment, engagement or work, and require healthcare (liability for costs rests with the shipowner of the vessel on which the patient works); *and*

⁵ For an explanation of the NHS number, see www.nhs.uk/NHSEngland/thenhs/records/nhs-number/Pages/what-is-the-nhs-number.aspx

- Patients who work on an aircraft, are present in the UK in the course of their employment, and require healthcare (liability for costs rests with the patient’s employer).
- 7.31 This instrument (through regulation 6) amends the 2015 Regulations (regulation 4) to provide for the situation where a liability for charges applicable to a particular relevant service changes part-way through the provision of that relevant service.
- 7.32 Whilst it is recognised that this change of liability is unlikely to occur very often, the particular circumstances could include, for example:
- Where the provision of a relevant service begins on the eve of the patient’s 18th birthday and continues after the patient’s birthday.

Repayment of charges by relevant bodies

- 7.33 Regulation 5 of the 2015 Regulations is substituted for a provision setting out the amended rules relating to claims for repayment reflecting the introduction of upfront charging. A person who has paid a sum to a relevant body (“the claimant”) may make a claim for that sum to be repaid to them if they satisfy certain conditions. The relevant body is obliged to repay the claimant where it has received the required evidence from the claimant and:
- it is satisfied that a charge should not have been made under the 2015 Regulations (e.g. because the patient is an exempt overseas visitor or the service in question is not a relevant service); *or*
 - the patient has not been provided with the healthcare services for which payment has already been made, or they will not be in the reasonably foreseeable future (e.g. where a scheduled operation has been significantly delayed); *or*
 - the person who paid an advance payment sum no longer appears to be the person liable for the charges for the service when it is provided (or if the service has been provided, was not the person liable). This would cover, for example, situations where there was an unforeseen change in circumstances in between the payment of the advance payment sum and the claim for repayment; *or*
 - payment was received for a service when in fact an exemption under regulation 6A(2)(b) (provision relating to victims of female genital mutilation and supported individuals), should have been applied so that no recovery was made.
- 7.34 The substituted regulation 5 does not provide for refunds of excess payments that were made for services in advance of the provision of that service. Where the person liable for the eventual actual charge for a service overpaid in advance for that service, the excess will be refunded under provisions in regulation 3 of the 2015 Regulations, which are inserted by regulation 4(4) of this instrument. Where the advance payment was paid by a person other than the person liable for the actual charge, a refund may be sought under regulation 5 (see above).

Amendment to exempt services

- 7.35 Regulation 9 of the 2015 Regulations provides for certain services that are exempt from charge, regardless of the status of the person in respect of whom they are provided. This instrument amends this list through regulation 10 to:

- Remove the exemption for services provided outside a hospital (or otherwise than by staff employed to work at, or under the direction of, a hospital);
- Include an exemption in respect of services provided as part of the telephone advice line commissioned by a Clinical Commissioning Group or the National Health Service Commissioning Board (which is known as NHS 111); *and*
- Include an exemption in respect of palliative care that is provided by a palliative care charity (for example a hospice charity) or a community interest company. The 2015 Regulations are amended to provide definitions of these types of body. The exemption is provided on the basis that the services provided are only part-funded by the NHS, with a significant portion of the payment stemming from other sources (for example public donations and charity fundraising).

Assisted conception services

- 7.36 Since it was introduced in 2015, the surcharge has allowed those who have paid it, are exempt from paying it or who have had the payment waived, access to the NHS in England on the same basis as a person who is deemed ‘ordinarily resident.’
- 7.37 Since its initial design, the Department of Health has kept under review the policy rationale underpinning the surcharge and the range of NHS-funded services to which it allows access without further charge. The 2015/16 Consultation questioned whether there are services currently available free at the point of use to surcharge payers that could be considered incompatible with the shorter-term relationship they had with the UK.
- 7.38 The consultation looked particularly at assisted conception services. Whilst some surcharge payers will go on to apply for indefinite leave to remain in the UK, many will return to their home countries at the end of their visas. Thus, embarking on one or more courses of *in vitro* fertilisation (IVF) or other assisted conception services – which can take months or even years – is not deemed compatible with the short-term nature of surcharge visas. This proposal was supported by the majority of respondents to the 2015/16 consultation.
- 7.39 Therefore, from 21 August 2017, NHS-funded assisted conception services will not be included in the exemption from charge applicable to people who are caught within surcharge arrangements (i.e. those who have paid the surcharge, or who are exempt from paying it (with certain exceptions) or in respect of whom it has been waived). This means that, unless another exemption applies, where NHS assisted conception services are provided to a person who is exempt under surcharge arrangements, overseas visitor charges will apply. This is brought forward through regulations 11, 12 and 13 of this instrument, which insert a new regulation (9A) and amend regulation 10 and 11 respectively.
- 7.40 An equivalent provision has been introduced in respect of the exemption from charge in the 2015 Regulations applicable to people who would be exempt under surcharge arrangements but for their applications for leave (which were granted and remain valid) being made before the surcharge was introduced.
- 7.41 Assisted conception services in the context of this instrument are defined as “*any medical, surgical or obstetric services provided for the purpose of assisting a person to carry a child.*” This definition was based on the definition of “treatment services” in section 2 of the Human Fertilisation and Embryology Act 1990. Broadly speaking,

any medicines, surgery or procedures that are required to diagnose and treat infertility so a person can have a child. It includes procedures such as intrauterine insemination (IUI), *in vitro* fertilisation (IVF) and egg and sperm donation. The definition is not intended to refer to antenatal or maternity services.

- 7.42 This instrument inserts a provision to cover the transition where courses of assisted conception services have already begun. Any course of assisted conception treatment that has begun before 21 August 2017 to a person exempt from NHS charges under surcharge arrangements (or the equivalent provisions for people who were granted their current period of leave before the introduction of the surcharge) will continue to fall within the exemption (i.e. there will not be a charge for the remaining services that form part of that course of treatment).
- 7.43 Further, assisted conception services that are commissioned by NHS England, rather than local clinical commissioning groups, under specified provisions that apply in respect of certain serving members of the armed forces, veterans or their partners will also remain exempt under the exemptions applicable to people covered under surcharge arrangements (and the equivalent provision set out above).
- 7.44 In many cases, where the services are commissioned by NHS England as above, there may be no charge because the recipient is not an overseas visitor or because other exemptions in the 2015 Regulations apply, although it is possible that will not always be the case. A minor tidying amendment has also been made to the exemption applicable in respect of overseas visitors exempt from charge under surcharge arrangements. This amendment updates the exemption to reflect changes made to the Immigration (Health Charge) Order 2016 last year.

Refugees, asylum seekers, supported individuals

- 7.45 This instrument amends the exemption category for refugees, asylum seekers and failed asylum seekers being supported by the Home Office (regulations 15(a), 15(b) and 15(d) respectively) to clarify that any dependants of such a person is also exempt from charge, which has always been the policy.

Employees on ships

- 7.46 Through regulation 15, this instrument removes the exemption from charge which had previously applied in the case of ship workers who were employed or engaged to work on a ship registered in the UK (regulation 23 of the 2015 Regulations).
- 7.47 The removal of this exemption from charge does not mean that the ship worker in this situation will be required to pay. Instead, the liability for the costs of care in this situation must be borne by the shipowner where the ship worker is in the UK in the course of their employment.
- 7.48 The removal of this exemption was proposed in the 2015/16 consultation and supported by the majority of respondents. It is designed to align the liability of the costs of NHS-funded healthcare for ship workers in the UK in the course of their employment, whether they are working on ships registered within or outside the UK.

Reciprocal agreements

- 7.49 Regulation 16 of this instrument removes Barbados from the list of countries with which the UK has a reciprocal healthcare agreement. The reciprocal agreement between the UK and Barbados came to an end on 1 October 2016, following mutual

agreement between the two countries. From 1 October 2016 overseas visitors from Barbados have been liable for charges for NHS hospital treatment unless a different exemption category applies to them, or to the service they access, under the 2015 Regulations. This amendment therefore updates the 2015 Regulations to reflect the current legal position in respect of this reciprocal agreement.

Consolidation

- 7.50 This is the third amendment to the 2015 Regulations. The measures addressed in this amendment are the first in a series of changes the Government announced in the response⁶ to the Consultation. Further policy development is being considered with respect to further amendments and consideration will be given to consolidation as further amendments are considered.

8. Consultation outcome

- 8.1 From 7 December 2015 to 7 March 2016, the Department of Health undertook a full 13-week public consultation entitled Making a fair contribution: A consultation on the extension of charging overseas visitors and migrants using the NHS in England on extending charging for overseas visitors into areas of NHS care that are currently free to all⁷. The proposals within it applied to England only. It explored a range of potential measures to further extend charging of overseas visitors and migrants who use the NHS in England.
- 8.2 The Department of Health sought responses from a wide-ranging audience including healthcare professionals and other NHS staff; professional bodies; charities and migrant welfare groups and the public. The consultation was launched by the Secretary of State through a press release and further publicised during the consultation using Government digital channels and social media. In addition, the Department supported a number of meetings with voluntary sector organisations and the Royal Medical Colleges to discuss the issues raised.
- 8.3 The Department of Health received a total of 418 formal responses to the consultation, predominantly through the online ‘Citizen Space’ portal but also in the form of hard copies sent to the Department and comments emailed to nhscostrerecovery@dh.gsi.gov.uk. We also received some informal comments which we have reviewed but not included in the 418 figure. Only those organisations that have subsequently confirmed that they are content to be quoted in the response have been named in this document. An estimated breakdown of respondents by main groups is set out in the table below.
- 8.4 Out of the 418 formal responses, it is estimated that 162 were received from members of the public, 146 were from staff working in NHS organisations, 48 were from charities or migrant welfare groups, 18 from professional bodies and 44 were from other backgrounds.

⁶ The Department of Health (2017) *Making a fair contribution Government response to the consultation on the extension of charging overseas visitors* is available to download at www.gov.uk/government/consultations/overseas-visitors-and-migrants-extending-charges-for-nhs-services or from the Visitor and Migrant NHS Cost Recovery Team, Room 506, Richmond House, 79 Whitehall, London, SW1A 2NS

⁷ Available to download at www.gov.uk/government/uploads/system/uploads/attachment_data/file/483870/NHS_charging_acc.pdf

- 8.5 The consultation asked a total of 37 questions, of which 20 were ‘closed’ style questions and the remainder asked for comments. The questions fell into 14 themes, including:
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| 1. Equalities and health inequalities | 2. NHS Primary medical care |
| 3. NHS Prescriptions | 4. NHS Primary dental care |
| 5. NHS Primary eye care services | 6. Accident and Emergency (A&E) services |
| 7. Ambulance Services | 8. Assisted conception services |
| 9. Non-NHS providers of NHS care and Out-of-Hospital care | 10. NHS Continuing Healthcare or NHS-funded Nursing Care |
| 11. Defining Residency for EEA Nationals | 12. Recovering NHS debt of visitors resident outside the EEA |
| 13. Overseas visitors working on UK-registered ships | 14. Further areas for consideration |
- 8.6 Measures that are addressed through this instrument can be linked to the consultation proposals and responses covered by themes (1), (8), (9), and (13). Further work is being done on the proposals and responses covered by themes (2), (3), (4), (5), (6), (7), (10), (11), (12) and (14).
- 8.7 Most of the Government's proposals were supported by the majority of respondents, i.e. of those who answered each question on if they agreed with the particular proposal, more than 50% replied that they either 'agreed' or 'strongly agreed' with it.
- 8.8 Two of the proposals had more than 50% of those who answered the question answer 'disagree' or 'strongly disagree'. These were:
- charging overseas visitors for treatment provided in A&E departments, Walk-in Centres, Urgent Care Centres and Minor Injuries Units; *and*
 - charging overseas visitors for treatment delivered by NHS Ambulance Trusts and for air ambulances.
- The Department of Health is undertaking further work on these proposals before a final decision is taken as to whether or not to make the changes.
- 8.9 Sixty-two per cent of the 372 respondents who answered question 23 agreed or strongly agreed to the proposal to remove the right to access NHS-funded fertility (or assisted conception) treatment from those who have paid the immigration health surcharge. This proposal is being brought forward in this instrument. Alongside this, however, there is an exemption for assisted conception services that are commissioned by NHS England under special rules applicable to services provided for serving members or veterans of the UK armed forces and their partners. Charging will also not apply where assisted conception services are provided as part of a course of treatment which began before 21 August 2017.
- 8.10 Fifty-eight per cent of the 379 respondents who answered question 26 agreed or strongly agreed to the proposal to standardise the rules so that NHS-funded care is chargeable to non-exempt overseas visitors wherever, and by whomever, it is

provided. This proposal is being brought forward in this instrument through the removal of the exemption which previously prevented charges being made for services that were provided otherwise than at, or by staff employed to work at, or under the direction of an NHS hospital. It will also be fulfilled through the broadening of the scope of the 2015 Regulations to include non-NHS providers of NHS-funded services, who will – from 23 October 2017 – have the same obligations to make and recover charges from overseas visitors as NHS Foundation Trusts and Trusts.

- 8.11 An exemption has been provided for in relation to non-NHS providers of NHS-funded care as a result of comments provided through the consultation exercise and responding to question 27. Non-NHS providers of palliative (i.e. end of life) care indicated that the NHS provides only part of these charitable organisations' expenditure, with the rest from donations and other charitable endeavours.
- 8.12 Fifty-one per cent of the 351 respondents who answered question 35 agreed or strongly agreed to the proposal to remove the exemption from NHS charges for overseas visitors working on UK-registered ships (although the costs will be borne by the shipowners rather than the ship workers themselves). Despite a significant minority of responders being against this proposal, having considered their points, the Government considered that there should be a level playing field for overseas visitors in the UK in the course of their employment, whether on UK-registered ships or non-UK registered ships, and that the costs of their care should be borne by shipowners rather than tax payers. This instrument gives effect to this proposal.
- 8.13 This instrument also contains a number of measures that are in addition to those related to the proposals set out in the consultation. These include the measures that:
- require all relevant organisations to obtain upfront payment for the full estimated cost of care unless doing so would prevent or delay the provision of immediately necessary or urgent treatment (the 2015 Regulations permit advance charging by those required to recover charges for services, but do not compel it, so these new provisions build upon existing regulations and practice);
 - require NHS Trusts and Foundation Trusts to flag an overseas visitor's NHS record (using the patient's 'unique identifier' or NHS number) to record that the patient is an overseas visitor (and whether an exemption applies) once this has been determined by the NHS Trust or Foundation Trust; *and*
 - add the exemption for reciprocal healthcare agreements to the list of those exemption categories that are not ones that, in the event that the exemption ceases to apply to an overseas visitor part way through a course of treatment, allow for the remainder of that course of treatment to continue to be free of charge. The intention will be to communicate any planned revocation of reciprocal agreements in advance, where possible, so individuals who may benefit from such an agreement have advanced warning of upcoming changes.
- 8.14 The Secretary of State has had regard to his public sector equality duty, his duty to have regard to the need to reduce health inequalities between the people of England, other statutory duties as Secretary of State and to the Family Test. The Department of Health will continue to review the impact of the 2015 Regulations on vulnerable groups as further policy development is undertaken.

8.15 The complete Government response to the consultation⁸ – published on 6 February 2017 - contains details on the proposals, the outcomes and the next steps, as well as more comprehensive analysis of the responses to each of the individual questions.

9. Guidance

9.1 Frontline staff working in NHS hospitals already have access to a comprehensive package of guidance to help them implement the 2015 Regulations. The principle vehicle is through the Guidance⁹ document, which is being updated to reflect the changes made through this instrument. The Guidance is accompanied by a package of eLearning training managed by eLearning for Healthcare¹⁰ and the Cost Recovery Toolbox.¹¹ The Department will shortly publish an updated version of the Guidance that will accompany and reflect the changes brought about through this instrument. It will be available to download prior to this instrument coming into force via its GOV.UK microsite (www.gov.uk/dh/nhscostrecovery). Further Guidance will be made available from 23 October 2017 relating to the provisions to require upfront charging in certain circumstances and for non-NHS providers of NHS funded secondary and community care to make and recover charges. The eLearning and the Toolbox will also be updated to reflect the changes made through this instrument.

9.2 The Department of Health is working with partners including NHS Improvement¹², NHS England, eLearning for Healthcare and other non-statutory organisations such as NHS Providers and NHS Partners to ensure that the frontline staff responsible for implementing the rules are aware of the changes that are being brought in through this instrument. This includes engagement with non-NHS providers of NHS-funded care that will be subject to the 2015 Regulations when relevant provisions come into force on 23 October 2017.

9.3 The programme will use a wide range of channels to communicate information effectively to the NHS and non-NHS providers, to increase understanding of the changes, engage in discussion and to identify areas of concern. Information will be made available directly to overseas visitor managers, Trusts and commissioners through key websites, social media sites and stakeholder communication channels.

9.4 The Department of Health and NHS Improvement are leading a joint piece of work with a cohort of NHS Foundation Trusts and Trusts with the highest opportunity to increase their overseas visitor income. This work includes piloting new ways of working, evaluating different processes and testing new technologies. The results will

⁸Available to download at:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/590027/Cons_Response_cost_recovery.pdf

⁹ The Department of Health (2016) *Guidance on implementing the overseas visitor hospital charging regulations 2015* currently available to download at:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/496951/Overseas_visitor_hospital_charging_accs.pdf

¹⁰ eLearning for Healthcare training package on Overseas Visitor NHS Cost recovery is accessible to NHS staff through either an eLearning for Healthcare account or through the Electronic Staff Record. The package can be found at www.e-lfh.org.uk/programmes/overseas-visitors-cost-recovery/

¹¹A variety of documents designed for use by Overseas Visitor Managers and other frontline professionals, including template letters, posters and leaflets are available to download via the GOV.UK NHS cost recovery microsite here: www.gov.uk/government/collections/nhs-visitor-and-migrant-cost-recovery-programme

¹² An organisational arrangement between the statutory bodies Monitor and the NHS Trust Development Authority.

be considered as they emerge and feed into the upcoming period of delivery design and implementation as well as any future regulatory changes.

- 9.5 To assist in this work, the Cost Recovery Support Team has been re-established. Having been successful in supporting a number of Trusts through the changes made in 2015, the Team – made up of subject matter experts on secondment from the NHS frontline and elsewhere – will deploy out to the cohort of Trusts to assist them to implement systems and processes for improved identification of, and recovery of charges from overseas visitors. This will focus most notably on the new measure to charge upfront for services not deemed immediately necessary or urgent.
- 9.6 Queries from the NHS, from non-NHS providers and the public on the 2015 Regulations can be taken at nhscostrecovery@dh.gsi.gov.uk.

10. Impact

- 10.1 The impact on business is not in scope of the Better Regulation Framework. Where businesses are affected, it will either be in the case that:
- They are under contract to provide services to the NHS (non-NHS providers of NHS-funded care); *or*
 - They are a shipowner of a UK-registered ship and are now liable to pay the costs of NHS healthcare for ship workers employed or otherwise engaged on these vessels who require treatment whilst in the UK in the course of their work.
- 10.2 Non-NHS providers of NHS-funded care are subject to the same legal and contractual requirements as NHS organisations and can be expected to undertake the same due diligence when using NHS resources correctly. The work they undertake under NHS contract is considered out of scope of the Better Regulation Framework.
- 10.3 The impact on shipowners is also not in scope of the Better Regulation Framework as changing the financial cost of a transaction is not considered to be a regulatory burden. In removing the exemption that has previously applied in relation to ship workers employed on UK-registered ships, the Department of Health is enabling recovery of the costs from the employer of the relevant individual, meaning that NHS treatment is no longer a zero-cost option.
- 10.4 There may be a small impact on some charities or voluntary bodies where they are under contract to provide services to the NHS. The Department of Health has sought to minimise the burden where charitable organisations receive a combination of NHS funding and charitable funding by exempting these organisations where they provide palliative care. This exemption will be kept under review and broadened or narrowed as necessary. Charities or voluntary bodies that provide services on behalf of the NHS will be expected to abide by the 2015 Regulations like any NHS organisation. Work is ongoing to reduce the administrative burden by electronic means, including increasing the amount of information pertaining to a patient's chargeable status visible via the NHS Spine.
- 10.5 The impact on the public sector is that NHS bodies providing hospital services will have new obligations in respect of the making and recovery of charges in full and upfront before providing non-urgent services to overseas visitors.

- 10.6 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.
- 10.7 By undertaking all measures outlined in this instrument, the Impact Assessment forecasts an aggregate monetised benefit with a present value of approximately £1,400 million could be generated over the full 10 year appraisal period (see Table 1 of the Impact Assessment) when valued in accordance with the standard Department of Health Impact Assessment methodology. This is the central scenario which forecasts benefits significantly outweighing the forecast costs.
- 10.8 It should be noted that there are inherent uncertainties surrounding each estimate, including:
- Low returns from upfront charging;
 - Higher than estimated administrative costs introduced by the new measures;
 - Low returns from indirectly increasing compliance with cost recovery more widely if NHS Trusts and non-NHS providers new to the processes perform poorly in recovering income; *and*
 - Higher than estimated indirect costs as NHS Trusts performing poorly at cost recovery increase resources to address this.
- 10.9 Given the above uncertainties, the Impact Assessment has estimated a ‘worst case scenario’ equivalent which, under the same methodology as described above, forecasts an aggregate cumulative monetised benefit with a present value of approximately £400 million could be generated over the full 10 year appraisal period. The Impact Assessment therefore concludes that the likelihood of the regulatory measures generating a net cost impact overall is extremely low.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 A proportion of the circa £2 million undiscounted, aggregate cost over ten years anticipated to accrue to employers of overseas workers on UK-registered ships may fall on small businesses. Because this measure changes the financial cost of a transaction it is not considered to be a regulatory burden and as such would not be applicable to a “Regulating Small Businesses” assessment. The Department of Health took steps to engage with the maritime industry through the 2015/16 consultation and will continue to do so as this instrument is being implemented.
- 11.3 A proportion of the roughly £2m undiscounted, aggregate costs anticipated to accrue to non-NHS providers of NHS-funded care over the full ten year forecast may be attributable to small businesses. Although the proportion has not been quantified, the minor value of the aggregate costs (average approximately £200k per year in total) demonstrates it will be marginal. Note that these costs are out of scope of the Better Regulation framework given that the organisations are only affected where activity is on behalf of the NHS.

12. Monitoring & review

- 12.1 Prior to the introduction of the Visitor and Migrant Cost Recovery Programme, the NHS could not provide an accurate assessment of its performance in recovering payments due from those overseas visitor patients who are chargeable for their treatment. In order to be able to monitor progress in maximising the recovery of costs

incurred through the treatment of chargeable visitors and migrants who use the NHS, the Programme started to measure, by Trust, the following metrics:

- Invoiced income
- Actual cash recovered
- Bad debt – provision
- Written-off debt

- 12.2 Since autumn 2016, these metrics (currently available for Q3 (audited) and Q4 (unaudited) of 2016/17) are included in the new Model Hospital dashboard, along with EEA activity data and levels of reported NHS debt from non-EEA patients. This allows all Trusts and Foundation Trusts to assess their own levels of activity as well as ‘benchmark’ themselves against self-nominated peers.
- 12.3 An independent formative evaluation of the Cost Recovery Programme was undertaken by Ipsos MORI on behalf of the Department of Health over the first two years of the Programme. The final report was recently published¹³ and the findings have been used to inform current and future programme design. Specifically, the Department of Health is addressing the reported lack of awareness and/or agreement with the principles that underpin NHS cost recovery by frontline staff with the assistance of NHS Improvement and NHS England. The particular focus is with clinicians working in Trusts and Foundation Trusts to ensure they are aware of their role in cost recovery and re-emphasise that this will not involve making decisions on which patients are or are not chargeable.
- 12.4 Whilst it is difficult to quantify specific improvements at an organisational level that are expected as a result of this instrument, the Department of Health anticipates an increase in both income identified and costs recovered from directly chargeable patients. It also expects non-NHS providers of NHS-funded care to be able to demonstrate compliance with the 2015 Regulations as amended.
- 12.5 The results from the pilots led by the Department of Health and NHS Improvement with a cohort of Trusts will allow for further monitoring of the impact of this instrument where possible. This work will have a particular focus on the new legal requirement to charge patients upfront for non-urgent care.
- 12.6 Table 1 of the Impact Assessment (published alongside this Memorandum) estimates that the measures contained within this instrument will generate a cumulative net benefit over the 10 year appraisal period with a present value of approximately £1,400 million when valued in accordance with the standard Department of Health Impact Assessment methodology.
- 12.7 There will also be a full review of the Cost Recovery Programme post-implementation, expected in 2019. This will be undertaken to understand the extent to which the Programme’s objectives have been achieved, and whether the costs and benefits are in line with expectations.

¹³ Ipsos MORI (2017) *Overseas visitor and migrant NHS cost recovery programme: formative evaluation – final report* is available to download via www.gov.uk/government/publications/evaluation-of-overseas-visitor-and-migrant-nhs-cost-recovery

13. Contact

- 13.1 Tim Brown, Programme Director at the Department of Health (Telephone: 0113 254 6071 or email: nhscostrerecovery@dh.gsi.gov.uk) can answer any queries regarding the instrument.