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STATUTORY INSTRUMENTS

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**2018 No. 755**

**NATIONAL HEALTH SERVICE, ENGLAND**

**The National Health Service (Existing  
Liabilities Scheme) (England) Regulations 2018**

<i>Made</i>	- - - -	<i>25th June 2018</i>
<i>Laid before Parliament</i>		<i>29th June 2018</i>
<i>Coming into force</i>	- -	<i>1st August 2018</i>

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 71 and 272(7) and (8) of the National Health Service Act 2006<sup>(1)</sup>.

In accordance with section 71(1) of that Act, these Regulations are made with the consent of the Treasury.

**PART 1**

**General**

**Citation, commencement and application**

1.—(1) These Regulations may be cited as the National Health Service (Existing Liabilities Scheme) (England) Regulations 2018.

(2) These Regulations come into force on 1st August 2018.

(3) These Regulations apply to England only.

**Interpretation**

2. In these Regulations—

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(1) 2006 c. 41. Section 71 was amended by section 142 of, and paragraph 85 of Schedule 5 and Part 4 of Schedule 15 to, the Health and Social Care Act 2008 (c. 14); by paragraph 18 of Schedule 4, paragraphs 17 and 19 of Schedule 7, paragraphs 1 and 28 of Schedule 14, paragraph 10(1) and (3) of Schedule 17 and paragraph 9(1) and (3) of Schedule 19 to the Health and Social Care Act 2012 (“the 2012 Act”); and by paragraph 24(3) of Schedule 5 and paragraph 18(9) of Schedule 7 to the Care Act 2014 (c. 23). The powers conferred by the National Health Service Act 2006 which are exercised by the Secretary of State in making these Regulations are exercisable only in relation to England by virtue of section 271(1) of that Act.

“the 1996 Regulations” means the National Health Service (Existing Liabilities Scheme) Regulations 1996<sup>(2)</sup>;

“the 2006 Act” means the National Health Service Act 2006;

“the appointed day” means the day on which these Regulations come into force;

“eligible body” means a body specified in regulation 4;

“relevant function” means—

- (a) arranging for the provision of, or providing services for the purposes of, or exercising functions in relation to, the health service continued under section 1(1) of the 2006 Act<sup>(3)</sup>;
- (b) a power exercised by virtue of section 7 of the Health and Medicines Act 1988<sup>(4)</sup> including where exercised by virtue of paragraph 15 of Schedule 2 to the National Health Service and Community Care Act 1990<sup>(5)</sup> before the repeal of that paragraph<sup>(6)</sup>.

## PART 2

### The Scheme

#### Existing Liabilities Scheme

**3.—**(1) The Existing Liabilities Scheme (“the Scheme”)<sup>(7)</sup> established under the 1996 Regulations shall continue to exist in accordance with, and as if it had been established under, these Regulations.

(2) The Secretary of State is to continue to administer the Scheme.

#### Eligible Bodies

**4.** A body is an eligible body if—

- (a) the body is—
  - (i) an NHS Trust,
  - (ii) an NHS foundation trust, or
  - (iii) a Special Health Authority; and
- (b) the body has—
  - (i) before 1st April 1995 exercised any relevant function; or

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(2) [S.I. 1996/686](#).

(3) The National Health Service was originally established under the National Health Service Act 1946. Following a number of amendments to that Act and reorganisations of the administration of the health service, the 1946 Act was repealed and consolidated in the National Health Service Act 1977, section 1 of which included a provision that required the Secretary of State to continue the provision of the health service (now found in section 1(1) of the National Health Service Act 2006).

(4) [1988 c. 49](#).

(5) [1990 c. 19](#).

(6) Paragraph 15 of Schedule 2 to the National Health Service and Community Care Act 1990 was repealed on 1st March 2007 by paragraph 1 of Schedule 4 to the National Health Service (Consequential Provisions) Act 2006 ([c. 43](#)).

(7) The 1996 Regulations were made in exercise of powers conferred by section 126(4) of the National Health Service Act 1977 ([c. 49](#)) and powers conferred by section 21 of the National Health Service and Community Care Act 1990 ([c. 19](#)) (“the 1990 Act”). Section 21 of the 1990 Act was re-enacted by section 71 of the National Health Service Act 2006. By virtue of paragraph 1(2) of Schedule 2 to the National Health Service (Consequential Provisions) Act 2006, anything done under a provision repealed by the NHS Act 2006 continues to have effect as if done under any re-enactment of the repealed provision. These Regulations are made in exercise of the powers conferred by sections 71 and 272(7) and (8) of the National Health Service Act 2006.

- (ii) had transferred to it the liabilities of any other body which exercised any relevant function before that date.

#### Liabilities of Eligible Bodies

##### **Liabilities of eligible bodies to which the Scheme applies**

5.—(1) The Scheme applies to any liability in tort owed by an eligible body to a third party in respect of, or consequent upon, personal injury or loss where—

- (a) the personal injury or loss falls within paragraph (2), and
- (b) the liability is owed in consequence of an act or omission on the part of any person employed or engaged by the eligible body in connection with any relevant function of that body.

(2) Personal injury or loss falls within this paragraph if it arises out of or in connection with a breach before 1st April 1995 of a duty of care owed by the eligible body to any person in connection with the diagnosis of any illness, or the care or treatment of any patient.

(3) Where the liability meets the criteria in—

- (a) paragraph (1); and
- (b) regulation 9(1) of the National Health Service (Liabilities to Third Parties Scheme) (England) Regulations 2018<sup>(8)</sup>,

the Secretary of State must determine whether the Scheme or the scheme provided for in the regulations referred to in sub-paragraph (b) is to apply.

(4) In paragraphs (1)(b) and (2) a reference to an eligible body includes a reference to a body the liabilities of which have been transferred to an eligible body as mentioned in regulation 4(b)(ii).

#### Payments out of the Scheme

##### **Payments out of the Scheme**

6.—(1) Where a payment falls to be made by an eligible body in connection with a claim in respect of a liability to which the Scheme applies, the Secretary of State may pay to that body or on that body's behalf an amount determined by the Secretary of State under regulation 7.

(2) Except to such extent as the Secretary of State may determine, no payment may be made under paragraph (1) in respect of the following—

- (a) any liability admitted by an eligible body without first obtaining the Secretary of State's written consent;
- (b) any liability determined by a Court in proceedings which are conducted by an eligible body otherwise than in consultation with the Secretary of State;
- (c) any payment falling to be made by an eligible body where the body has not complied with any condition imposed by the Secretary of State relating to a claim;
- (d) any payment falling to be made by an eligible body where, without first obtaining the Secretary of State's written consent, the eligible body agrees—
  - (i) to be bound by the determination of any person or body as to the making of a payment by that eligible body in respect of a liability; or
  - (ii) to make any other payment in respect of the liability otherwise than in the course of legal proceedings or in consequence of a settlement of legal proceedings agreed to by that eligible body.

### **Determining the amount of any payment to be made out of the Scheme**

7.—(1) In respect of each claim in respect of a liability to which the Scheme applies, the Secretary of State must determine the amount of any payment which is to be made under regulation 6(1).

(2) In determining the amount of the payment to be made in the circumstances specified in each of paragraphs (3) to (8), the Secretary of State must have regard to the matters specified in the appropriate paragraph.

(3) Where an award of damages has been made by a Court against the eligible body, those matters are the amount of—

- (a) the award;
- (b) the legal and associated costs awarded to the claimant; and
- (c) any legal and associated costs incurred by or on behalf of the eligible body.

(4) Where legal proceedings are the subject of a settlement agreed to by the eligible body, those matters are the amount of—

- (a) any sum paid or payable by the member in relation to the claimant's claim for damages;
- (b) the eligible body's contribution towards any legal and associated costs incurred by the claimant; and
- (c) any legal and associated costs incurred by or on behalf of the eligible body.

(5) Where in any legal proceedings a Court has declined to award damages against the eligible body, those matters are the amount of any legal and associated costs incurred by or on behalf of the eligible body but only to the extent to which those costs are not recoverable either from the claimant or from the Legal Aid Agency under regulations made by virtue of section 26(5) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (costs in civil proceedings)<sup>(9)</sup>.

(6) Where an eligible body has, otherwise than in the course of legal proceedings, agreed to make a payment in settlement of a claim, those matters are the amount of—

- (a) the payment agreed; and
- (b) any legal or associated costs incurred by or on behalf of the eligible body in connection with the claim.

(7) Where, otherwise than in the course of legal proceedings, an eligible body has agreed to make any contribution towards legal or associated costs incurred by a person in connection with that person's claim against the eligible body in respect of a liability to which the Scheme applies, those matters are the amount of—

- (a) the payment agreed; and
- (b) any legal or associated costs incurred by or on behalf of the eligible body in connection with the claim.

(8) Where an eligible body has agreed to be bound by the determination of any person or body as to the making of a payment by that eligible body in respect of a liability to which the Scheme applies, those matters are the amount of—

- (a) the payment;
- (b) any legal or associated costs incurred by the claimant in connection with the claim; and
- (c) any legal or associated costs incurred by or on behalf of the eligible body in connection with the claim.

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<sup>(9)</sup> 2012 c. 10.

### **Power to make payments on account**

8.—(1) Where a payment falls to be made by an eligible body in connection with a claim in respect of which an amount may become payable by the Secretary of State under regulation 7, the Secretary of State may make a payment on account of any amount which may become payable.

(2) A payment on account may be made to, or on behalf of, the eligible body.

(3) Where the amount of any payment on account exceeds the amount subsequently determined under regulation 7 as being the amount of payment to be made in connection with the claim, the excess is recoverable from the eligible body.

### Miscellaneous

### **Duty of eligible bodies to provide information**

9.—(1) In this regulation “specified” means specified by the Secretary of State in a notice under paragraph (2).

(2) The Secretary of State may by notice in writing require an eligible body to provide the Secretary of State with specified information.

(3) Specified information includes—

(a) the nature of any relevant function carried on, during the period falling before 1st April 1995 by the eligible body or by any body the liabilities of which have been transferred to the eligible body as referred to in regulation 4(b)(ii);

(b) any event of which the eligible body is aware which it considers might give rise to a liability to which the Scheme applies.

(4) The eligible body must comply with a notice under paragraph (2) and must—

(a) provide the information within 28 days of receiving the notice or within such further period as the Secretary of State may in writing allow;

(b) provide the information in the form specified (if any); and

(c) submit the information in the manner specified (if any).

### **Directions and guidance**

10.—(1) The Secretary of State must make the following information available to eligible bodies in such form and at such times as the Secretary of State considers appropriate—

(a) any directions which the Secretary of State gives to a relevant body with respect to the exercise by that body of its functions in connection with administering the Scheme; and

(b) any guidance which the Secretary of State gives to a relevant body as to the manner in which the Scheme is to be administered.

(2) “Relevant body” means a body directed by the Secretary of State under any enactment to carry out functions in connection with the administration of the Scheme.

### **Revocations and savings**

11.—(1) Subject to paragraph (2), the instruments specified in the first column of the table set out in the Schedule are, in relation to England only, revoked to the extent stated in the third column of that table.

(2) Where a claim under the Scheme is made before the appointed day—

(a) any determination as to whether the Scheme applies to the liability; and

- (b) any determination as to whether to make a payment in respect of the liability (and the amount of any such payment),

is to be made in accordance with the 1996 Regulations and for these purposes those Regulations are to continue to apply.

**Transitional provision**

**12.**—(1) Where a period of time specified in the 1996 Regulations is current on the appointed day, and a period of time is also specified in a corresponding provision of these Regulations, these Regulations have effect as if the corresponding provision of these Regulations had been in force when the period began to run.

(2) Except as stated in regulation 11(2)—

- (a) anything done, if effective immediately before the appointed day, has effect after the appointed day as if done under or for the purposes of the corresponding provision of these Regulations; and
- (b) any matter that is ongoing under or for the purposes of the 1996 Regulations immediately before the appointed day is to be treated as ongoing under these Regulations.

Signed by authority of the Secretary of State for Health and Social Care.

25th June 2018

*O'Shaughnessy*  
Parliamentary Under-Secretary of State,  
Department of Health and Social Care

We consent

21st June 2018

*Craig Whittaker*  
*Paul Maynard*  
Two of the Lords Commissioners of Her  
Majesty's Treasury

## SCHEDULE

Regulation 11

**Table**

<i>Instrument</i>	<i>Reference</i>	<i>Extent of revocation</i>
The National Health Service (Existing Liabilities Scheme) Regulations 1996	<a href="#">SI 1996/686</a>	The whole instrument
The National Health Service (Existing Liabilities Scheme) (Amendment) Regulations 1997	<a href="#">SI 1997/526</a>	The whole instrument
The National Health Service (Existing Liabilities Scheme) (Amendment) Regulations 1999	<a href="#">SI 1999/1275</a>	The whole instrument

**EXPLANATORY NOTE***(This note is not part of the Regulations)*

The NHS Existing Liabilities Scheme covers clinical negligence claims made against NHS bodies in England in respect of clinical negligence liabilities arising from an act or omission that took place prior to 1st April 1995. It was established by the National Health Service (Existing Liabilities Scheme) Regulations 1996 (“the 1996 Regulations”).

This instrument consolidates the 1996 Regulations and the instruments which amended them, in respect of their application to England. Regulation 11 revokes those instruments but regulation 11(2) saves the 1996 Regulations to a certain extent: where a claim in respect of liability is made before the coming into force of these Regulations but the payment falls to be made on or after that time, the 1996 Regulations apply in relation to both the determination as to whether the Scheme applies, and whether a payment is to be made, in respect of that liability.

Regulation 12(1) provides that where a period of time specified in the 1996 Regulations is current, and the corresponding provision in these Regulations also states a period of time, these Regulations apply as if the corresponding provision of these Regulations had been in effect at the start of the period.

Regulation 12(2) provides that these Regulations rather than the 1996 Regulations apply in relation to certain circumstances despite those circumstances arising before the coming into force of these Regulations.

An impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.