

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE (OPTICAL CHARGES AND PAYMENTS)
AMENDMENT (No. 2) REGULATIONS 2008

2008 No. 1657

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

2. Description

2.1 These regulations aim to increase protection of public funds spent through NHS optical vouchers. The regulations will allow Primary Care Trusts (PCTs) to issue "stop notices" to unsuitable providers, which means that no further payments for NHS optical vouchers will be made to that supplier. A PCT may also apply for a national "stop order". Appeal mechanisms are built into the regulations to ensure that suppliers are able to contest questionable decisions. These regulations amend the National Health Service (Optical Charges and Payments) Regulations 1997.

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

3.1 None.

4. Legislative Background

4.1 These Regulations are made under powers in the Health Act 2006 that will, from 1st August 2008, be incorporated into the NHS Act 2006 at sections 180-181.

5. Extent

5.1 These instruments apply to England.

6. European Convention on Human Rights

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

7. Policy background

7.1 The Government recognises that certain groups of the general public should be entitled to help towards the cost of glasses and contact lenses.

7.2 Help towards the cost of glasses and contact lenses is given via an NHS optical voucher, the values of which are reviewed annually. The voucher scheme is intended to provide children and people on a low income with a voucher that

they may use either to buy from a basic range of spectacles or put towards a more expensive pair of their choice, or alternatively put towards the cost of contact lenses. The value of the voucher is determined by the power of the prescription required by the patient. There are 10 voucher bands ranging in value from £35.50 to £196.10 at 2008/09 prices.

- 7.3 NHS optical vouchers are issued following a sight test carried out under the ophthalmic regulations, i.e. an NHS funded sight test, and at the same time as the patient is issued with a prescription. In addition, there are specific, limited circumstances where a voucher may be issued subsequently, such as when a patient becomes eligible for an optical voucher within three months of the sight test having taken place.
- 7.4 Any supplier of optical appliances may redeem optical vouchers-provided they comply with law on the sale and supply of optical appliances. There is no requirement, nor power to require, that the supplier be approved by the local PCT, unlike in the case of the NHS sight testing service. PCTs will redeem any voucher that is presented to them and which has been properly issued. Where a voucher has not been properly issued, the PCT may decline to redeem that voucher and, if there is a history, may take criminal or civil action to recover previous claims if they have been made inappropriately.
- 7.5 However, currently under the law PCTs are unable to prevent unsuitable suppliers from redeeming NHS optical vouchers, other than in relation to particular claims which have been made inappropriately. The NHS can decline to make a payment when the particular voucher has not been properly issued, but cannot refuse future payments to a supplier if they are found guilty of, for example, fraud, or in any other way prevent them from dealing with NHS vouchers.
- 7.6 Malpractice in relation to sight tests can be dealt with by, for example, removal of a provider from a PCT list, and from 1 August by termination of the contract between the PCT and the provider. But no such power exists in relation to optical vouchers. Continuing with current arrangements would leave a weakness in the regulatory framework and maintain a potential vulnerability to fraud. In order for this to be changed new legislation is necessary.
- 7.7 The regulations give PCTs the power to exclude any person from redeeming optical vouchers where they had reason to doubt the appropriateness of such a person having access to public monies in this way. This does not place any general restriction on who may redeem optical vouchers. As now, anyone who supplies optical appliances is permitted to redeem vouchers in respect of optical appliances, which they have supplied to NHS patients to whom the vouchers were issued. They may do this unless and until the PCT judges that they are unsuitable to do so and serves a notice as to cessation of payments ("a notice") on them - in effect, this is a 'blacklist' power. In doing this PCTs will be, pursuant to directions, performing the function of the Secretary of State (the regulations refer to the Secretary of State giving notice but the PCT will be empowered to exercise the Secretary of State's functions under the Regulations).

- 7.8 The Regulations lay down that refusal to make records available for inspection or to comply with other conditions are mandatory grounds for disqualification from redeeming optical vouchers as long as the refusal continues.
- 7.9 If a supplier, who is a General Ophthalmic Services contractor or an individual included on an ophthalmic performers list, has their contract terminated or is removed from an ophthalmic performers list, on the grounds of fraud, a notice should be issued that no further payments for redemption of optical vouchers will be made to them from a specific date. This is a mandatory notice and PCTs do not have discretion in this area. This power does not apply when a person has been suspended – they must actually have been removed from a performers list.
- 7.10 If a contractor should be disqualified from providing General Ophthalmic Services for reasons other than fraud, the PCT will have discretion to disqualify them from redeeming vouchers if it thinks it justified, and there will be a right of appeal for the contractor to the Family Health Services Appeal Authority (“FHSAA”), an independent statutory tribunal.
- 7.11 PCTs have to give a month's notice to suppliers, who will be able to appeal against the decision.
- 7.12 PCTs are also able to apply to the Family Health Services Appeal Authority for a “stop order” of anyone to whom a notice has been issued, in the same way as they can in respect of any person who is rejected for inclusion in, or removed from a list. The “Stop Order” would be in relation to the particular supplier and will prevent that supplier from receiving payment for vouchers issued anywhere in England. In such a case, the PCT shall notify that supplier that it has so applied.
- 7.13 The intention is to strengthen efforts to combat fraud. Introducing a 'blacklisting' system will prevent repeat offences and will have a deterrent effect for those considering abusing the system. Preventing such abuse before it occurs is considered the best course of action.
- 7.14 Consideration was given to having lists of approved redeemers of optical vouchers but this possibility was rejected at an early stage as possibly infringing European law. Such a system in relation to a purely commercial relationship would be cumbersome and impose unnecessary bureaucratic restriction. In addition, as this is a supply of commercial products, it might, by placing an undue burden on potential EU suppliers, who would need to be on the list of an English PCT, be unlawful. However, the procedure set out in these Regulations can be applied to any supplier of optical goods which wishes to accept and seek payment for optical vouchers, wherever based.
- 7.15 In addition, a determination to be made under previously existing powers makes it a condition of receiving payments for optical vouchers that individuals or companies must make available records relating to the transaction when required by a PCT. The regulations then make clear that failure to comply with this condition would also be sufficient reason for PCTs to refuse to make payments, as it would give grounds for concern that the

money could not be accounted for and therefore there would be a clear risk of public funds being misused.

7.16 The representatives of providers have been supportive of the aims of the proposals on optical vouchers. Consultation has taken place with the representatives of optical suppliers and with the NHS and the NHS Counter Fraud and Security Management Service. The proposed changes were supported by consultees who shared the aims behind the Department's policy of wishing to protect patients and public funds against the unsafe and unscrupulous dispensing of spectacles. Consultation took place from September 2007 until February 2008. Representatives of stakeholders expressed the wish to work with officials on guidance and this was also done during this period.

7.17 Helping to stop inappropriate redemption of optical vouchers should contribute towards fairer competition and improved protection of the public. Businesses, which redeem vouchers inappropriately, are likely to be competing unfairly with other businesses and may not be dispensing adequately to patients, which could place them at risk. Smaller businesses are amongst those likely to benefit from a measure, which helps protect fair competition.

8. Impact

8.1 An impact assessment was undertaken and the conclusion of the assessment was that costs on business would be less than the threshold of £5 million, which is required for a full impact assessment.

8.2 The regulations only come into play when the PCT has reason to suppose that an ophthalmic supplier is guilty of malpractice, for example fraud, so therefore place no additional burden on suppliers generally. The power would allow the NHS to decline to redeem vouchers presented from particular suppliers where they were satisfied that this action was justified.

8.3 Costs would only arise when the discretionary power in these regulations is exercised. Therefore, the costs from these regulations would be small, as PCTs would be expected to use only when they had good grounds for concern and of their action being successful. For the public sector, there will be savings if the payment of inappropriate claims is prevented.

8.4 We do not consider that these Regulations have any additional implications for equality.

9. Contact

Derek Busby at the Department of Health Tel: 020 7 633 4159 or e-mail: derek.busby@dh.gsi.gov.uk can answer any queries regarding the instrument.