

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE PENSION SCHEME AND INJURY BENEFITS
(AMENDMENT) REGULATIONS 2008

2008 No. 2263

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

The memorandum contains information for the Joint Committee on Statutory Instruments and for publication on the Office of Public Sector Information website.

2. **Description**

- 2.1 This instrument amends three statutory instruments relating to pensions and benefits provided to National Health Service staff.
- 2.2 The instrument makes provision for returning deferred members of the 1995 NHS Pension Scheme to join and transfer existing pension benefits to the 2008 NHS Pension Scheme following a break in membership of five years or more.
- 2.3 The instrument also makes various miscellaneous amendments to clarify the working of certain regulations.

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

- 3.1 Regulations 3(h) and (j) make amendments with retrospective effect from 1 April 2004.

- 3.2 Regulations 3(b) and 6 make amendments with retrospective effect from 14 December 2007.
- 3.3 Regulations 19, 22(8)(b), 25(2)(a), 28(b), 29(d), 33(b), 35, 36, 41(d), 47, 48, 52(a)(i), 54(2)(a), (h) and (j), 57(b), 59(b), 62, 67, 68, 73(d), 76(b) and (c), 82(a)(i) and 88 make amendments with retrospective effect from 1 April 2008.
- 3.4 Regulations 3(d), (e) and (i) and 54(2)(d), (e) and (i) make amendments with retrospective effect from 1 August 2008.

4. Legislative Background

4.1 **Part 1** of the SI amends the National Health Service Pension Scheme Regulations 1995 (S.I.1995/300) (**the 1995 scheme**) which were made under sections 10 and 12 of, and schedule 3 to, the Superannuation Act 1972

4.2 **Part 2** of the SI amends the National Health Service Pension Scheme Regulations 2008 (SI 2008/653) (**the 2008 scheme**) which were made under sections 10 and 12 of, and schedule 3 to, the Superannuation Act 1972

4.3 **Part 3** of the SI amends the National Health Service (Injury Benefits) Regulations 1995 (S.I. 1995/866) which were made under section 10 of, and Schedule 3 to, the Superannuation Act 1972.

4.4 **Part 4** of the SI provides an option to persons detrimentally affected by these Regulations to elect for those provisions not to apply in certain circumstances.

5. Territorial Extent and Application

5.1 The instrument applies to England and Wales.

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 Following a review of the NHS Pension Scheme led by the NHS Employers organisation¹ in partnership with NHS trade unions (the NHS Review Partners), a new pension scheme for new entrant staff was introduced from 1 April 2008.

Changes already implemented from 1 April 2008

7.2 From 1 April 2008, the two NHS schemes have run in parallel as follows:

- Members of the existing 1995 final salary scheme continue membership of that scheme which has a 1/80th accrual rate (existing self-employed general medical and dental practitioners continue to accrue benefits based on 1.4% of uprated career average earnings) with a normal retirement age of 60 applying to both groups.
- New entrants starting on or after 1 April 2008 join the 2008 final salary scheme which has a 1/60th accrual rate (or for new general medical and dental practitioners benefits based on 1.87% of uprated career average earnings) with a normal retirement age of 65 applying to both groups.

Changes from 1 October 2008

7.3 The Review Partners also recommended that from 1 October 2008 members of the existing 1995 scheme who return to the NHS after a break of five years or more would be required to join the 2008 Pension Scheme for future service. On return, such members will also be given the option to transfer their 1995 scheme

¹ Initially led by the NHS Confederation which transferred responsibility for the Review to NHS Employers a part of the Confederation which represents NHS Trusts in England and Wales

deferred benefits to the 2008 Scheme on a cash equivalent transfer basis or to leave the 1995 scheme portion of benefits deferred for payment at age 60.

7.4 The amendments covered in this Explanatory Memorandum implement these recommendations and also make further technical and consequential changes to both the 1995 and 2008 schemes as explained in more detail in the following paragraphs.

7.5 **1995 scheme changes – *exclusion of certain returning deferred members and option to transfer 1995 benefits out to the 2008 scheme***

(1) Regulation 3(a) inserts a definition of “the 2008 scheme” into regulation A2 (interpretation). This term is used in new regulation M7 that makes provision for transfers from the 1995 scheme to 2008 scheme. (See amending regulation 13)

(2) Regulation 4 amends regulation B2 (1) (Restrictions on membership) so that from 1 October 2008 the following members will not be eligible to re-join the 1995 scheme

- Deferred members who return to NHS employment after a break of five years or more
- Former deferred members who left before 1 April 2008 and subsequently transferred their benefits to another scheme, if they have had a break in service of five years or more

Technical amendments are also made so that the newly defined term ‘the 2008 scheme’ is now used in paragraphs (1)(i) and (2)(a) of regulation B2.

A further amendment is made at B2(3) so that the Secretary of State may allow returners in the groups above to re-join the 1995 scheme if the criteria set out in that regulation is met:

- staff whose employment is transferred out on a compulsory basis and who return after a break of less than five years
- staff whose employment is transferred out and back into the NHS on a compulsory basis and who have a normal retirement age of 60 in their current pension scheme

(3) Regulation 10 amends regulation L1 (preserved pension) so that references to ‘NHS employment’ in that regulation do not include employment for which a member is eligible to join the 2008 Scheme.

This change is made so that 1995 scheme deferred members who are:

- required to join the 2008 scheme for future service, and
- choose not to transfer their 1995 benefits to the 2008 scheme

will be able to claim their NHS deferred benefits at age 60 whilst continuing in NHS employment and will be able to claim 1995 deferred benefits early on health grounds if they are unable to engage in regular employment of like duration to the NHS job they were in at the date they left the 1995 scheme.

(4) Regulation 13 inserts new regulation M7 “Member’s right to transfer a preserved pension to the National Health Service Pension Scheme 2008”

This new regulation provides for deferred members who are excluded from the 1995 scheme on return to the NHS (see amendments at paragraph (2) above) to have one opportunity to transfer their 1995 benefits to the 2008 scheme on a cash equivalent basis within the time limits stipulated.

7.6 2008 scheme changes – inclusion of certain returning 1995 deferred members and option to transfer 1995 benefits into the 2008 scheme.

The 2008 scheme provisions that cover the final salary scheme for ‘officer’ members (members other than general medical or dental practitioners) are in Part 2 of the 2008 regulations and the provisions that cover the career average earnings scheme for all general medical or dental practitioners are in Part 3 of the 2008 regulations.

(1) Admission of former 1995 Scheme members to the 2008 Scheme

Amending Regulations	2008 Scheme “Officer” regulation amended	Amending Regulations	2008 Scheme “Practitioner” regulation amended
30	2.B.1(5) (eligibility: general),	60	3.B.1(5) (eligibility: general)
31(b)	2.B.2 (restrictions on eligibility: general)	61	3.B.2 (restrictions on eligibility: general)

The above amendments are made so that returning 1995 scheme members who are prevented from re-joining that scheme (because of the amendments described at paragraph 7.5 (2)), will be able to join the 2008 scheme for future service

(2) Transfer of 1995 Scheme benefits to the 2008 Scheme

Amending Regulations	2008 Scheme “Officer” regulation amended	Amending Regulations	2008 Scheme “Practitioner” regulation amended
45	New regulation 2.F.17 (Transfers across from the NHS Pension Scheme 1995)	77	New regulation 3.F.17 (Transfers across from the NHS Pension Scheme 1995)

2.F.17 and 3.F.17 are new regulations that will work in conjunction with new regulation M7 of the 1995 scheme (see 7.5 (4)), to provide deferred members of that scheme who join the 2008 scheme (because they have had a break in pensionable employment of over five years) with one opportunity to transfer their 1995 benefits into the 2008 section of the scheme, on a cash equivalent basis within the time limits stipulated.

2. F.17 provides for the member to be credited with a period of service in the 2008 Scheme on completion of a transfer. 3. F.17 provides for practitioner members to receive a period of pensionable service that will count for the purposes of calculating the 45 year service limit and a pay credit in the 2008 (career average) scheme that will count for the purpose of calculating scheme benefits.

(3) Qualifying service in the 2008 Scheme

Amending Regulations	2008 Scheme “Officer” regulation amended	Amending Regulations	2008 Scheme “Practitioner” regulation amended
28(a)	2.A.5(1)(b) (meaning of “qualifying service”),	57(a)	3.A.5(1)(b) (meaning of “qualifying service”)

The amendments to (1) (b) of regulations 2.A.5 and 3.A.5 are made so that where a member transfers 1995 deferred benefits to the 2008 scheme on a cash equivalent basis, the period of NHS employment that qualified the member for 1995 benefits will count as qualifying service in the 2008 scheme.

(4) 45 year overall limit on pensionable service where a member has benefits in both the 1995 and the 2008 Schemes

Amending Regulations	2008 Scheme “Officer” regulation amended	Amending Regulations	2008 Scheme “Practitioner” regulation amended

26(b)	2.A.2 (meaning of “pensionable service”)	55	3.A.3 (meaning of “pensionable service”)
Amending Regulations	Part 4 2008 Scheme amendment to		
85	4.D.1 (pensionable service limit),		

New paragraphs (8) and (9) inserted into regulations 2.A.2 and 3.A.3 **respectively** will ensure that, if a member chooses not to transfer deferred 1995 scheme benefits into the 2008 scheme, the member’s pensionable service across both schemes will be taken into account for the purpose of determining the maximum of 45 years pensionable service.

Part 4 of the 2008 regulations contains provisions relating to members who have both officer (Part 2) and practitioner (Part 3) membership of the 2008 scheme. The amendment to regulation 4.D.1 (pensionable service limit), ensures that the member’s pensionable service across both parts of the 2008 scheme and any service deferred in the 1995 scheme will be taken into account for the purpose of determining the maximum of 45 years pensionable service

(5) Former members of the NHS Pension Schemes for Scotland, Northern Ireland and the Isle of Man (other Health Service Schemes)

Amending Regulations	2008 Scheme “Officer” regulation amended	Amending Regulations	2008 Scheme “Practitioner” regulation amended
25 (2) (b) and (c)	2.A.1 (interpretation: general)	54(2)(b) and (c)	3.A.1 (interpretation: general)
41 (a)(b)(c)	2.F.8(right to apply for acceptance of transfer value payment from	73(a)(b)(c)	3.F.8(right to apply for acceptance of transfer value payment from another scheme)

	another scheme)		
42	2.F.9 (procedure for applications under 2.F.8)	74	3.F.9 (procedure for applications under 3.F.8)
43	2.F.10 (acceptance of transfer value payments)	75	3.F.10 (acceptance of transfer value payments)
44	2.F.11 (calculation of transferred in pensionable service)	76(e) and (f)	3.F.11 (calculation of transferred in pensionable service)

In common with the NHS Scheme for England and Wales, other UK Health Service Schemes also operate a 1995 (normal pension age 60) Scheme and a 2008 (normal pension age 65) Scheme. The above amendments are made so that members leaving one of the 1995 Health Service Schemes and re-joining another will be required to join the new 2008 NHS Scheme if they have had a break in service of over five years. Such members will be able to transfer their 1995 benefits (held in their previous Health Service Scheme) to the 2008 section of their new Health Service Scheme on a cash equivalent basis or leave them as deferred benefits in the previous scheme.

On completion of such a transfer, an ‘officer’ member will be credited with an amount of pensionable service for the purposes of calculating benefits and an amount of pensionable service for the purposes of calculating the 45 year service limit. A practitioner member will be credited with a period of pensionable service that will count for the purposes of calculating the 45 year service limit and a pay credit in the 2008 (career average) scheme that will count for the purpose of calculating scheme benefits

7.7 Miscellaneous amendments made to both the 1995 Scheme and Parts 2 and 3 of the 2008 scheme

(1) Correction of cross references to the National Health Service Act 2006 and the National Health Service (Wales) Act 2006

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation amended	2008 Scheme “Practitioner” regulation amended
3(b)	A2 (Interpretation)		
6	D2(contributions by employing authorities)		
25(2)(a) and 54(2)(a)		2.A.1 (Interpretation: general)(25)(2)(a)	3.A.1 (Interpretation: general)(54(2)(a))

Amending regulations 3(b), 25(2)(a) and 54(2)(a) insert the correct references to section 83(2)(b) of the NHS Act 2006 in the definitions of “APMS contract” and “APMS contractor” in both schemes.

Amending regulation 6 inserts the correct reference to section 22(4)(b) of the National Health Service (Wales) Act 2006 into regulation D2(10)(a)(ii) of the 1995 Regulations.

The amendments to the 1995 Scheme are made retrospectively from 14 December 2007; the amendments to the 2008 Scheme are made retrospectively from that scheme’s inception date of 1 April 2008.

(2) General Ophthalmic Practitioners

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation amended	2008 Scheme “Practitioner” regulation amended
3(d),(e),(h),(i) and (j)	A2 (Interpretation)		
54(2)(d), (e),(h),(i), and (j)		N/A	3.A.1 (Interpretation: general)

1995 amending regulations 3 (d) and (e) insert, with effect from 1 August 2008, new definitions of "general ophthalmic services" and "GOS contract", required by the introduction of the "General Ophthalmic Services Contracts

Regulations 2008" in England on that date. The amendments ensure ophthalmic medical practitioners, in both England and Wales, can pension the same payments they could prior to 1 August 2008.

1995 amending regulations 3 (h) and (j) correct, with effect from 1 April 2004, the omission of "ophthalmic provider" from the definition of "type 1 medical practitioner". The amendments ensure ophthalmic providers can pension the same payments that they were able to pension before 1 April 2004.

1995 amending regulation 3 (i) adjusts, with effect from 1 August 2008, the definition of "ophthalmic provider" inserted by regulation 3 (h), to reflect the different authority and listing arrangements applicable in England and in Wales.

2008 amending regulations 54(2) (d) and (e) insert, with effect from 1 August 2008, new definitions of "general ophthalmic services" and "GOS contract", required by the introduction of the "General Ophthalmic Services Contracts Regulations 2008 in England on that date. The amendments ensure ophthalmic medical practitioners in both England and Wales can pension the same payments they could prior to 1 August 2008.

2008 amending regulations 54(2) (h) and (j) correct, with effect from 1 April 2008, the omission of "ophthalmic provider" from the definition of "type 1 medical practitioner". The amendments ensure ophthalmic providers can pension the same payments they are able to in the NHS Pension Scheme 1995.

2008 amending regulation 54(2) (i) adjusts, with effect from 1 August 2008, the definition of "ophthalmic provider" inserted by regulation 54(2)

(h), to reflect the different authority and listing arrangements applicable in England and in Wales

(3) Practitioners with an agreement or contract with more than one Primary Care Trust (PCT) or Local Health Board (LHB)

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation amended	2008 Scheme “Practitioner” regulation amended
3(f)	A2 (Interpretation)		
22(9)(a)	Schedule 2 (paragraph 23 (accounts and actuarial reports))		
25(2)(d) and 54(2)(f)		2.A.1 (Interpretation: general) (25(2)(d))	3.A.1 (Interpretation: general) (54(2)(f))
53(b) and 83		2.J.14(employing authority record keeping and contribution estimates) (53)(b)	3.J.14 (employing authority and certain member record keeping and contribution estimates) (83)

These amendments update the definition of ‘Host Trust or Board’ in both schemes so that it may cater for circumstances where a practitioner or Non-GP Provider has an agreement or contract with more than one PCT or LHB. Further changes require non-GP Providers and Practitioners to provide an annual certificate of their pensionable earnings in respect of any agreements or contracts they have with one or more Trusts or Boards.

(4) Out of Hours Services (OOH Services)

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation	2008 Scheme “Practitioner” regulation

		amended	amended
3(g)	A2 (Interpretation)		
25(2)(e) and 54(2)(g)		2.A.1 (Interpretation: general) (25(2)(e))	3.A.1 (Interpretation: general) (54(2)(g))

These amendments update the definition of “OOH Services” in both schemes to include references to Alternative Provider Medical Services (APMS) contracts and contractors. A reference to practices providing Primary Medical Services (PMS) is also inserted into the 1995 regulations.

(5) Electronic communications and applications for benefits

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation amended	2008 Scheme “Practitioner” regulation amended
3(a)	A2 (Interpretation)		
11	L2 (Refunds)		
18	T1 (Claims for benefits)		
49 & 79		2.J.2(claims for benefits) (49)	3.J.2(claims for benefits)(79)

These amendments make changes to both schemes so that the Secretary of State may agree to accept applications for benefits and supporting documentation in an electronic format.

(6) Consent of HMT required before a member’s contribution rate is changed

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation amended	2008 Scheme “Practitioner” regulation amended

5(a)	D1 (contributions by members)		
32 & 63(a)		2.C.2 (Members contribution rate) (32)	3.C.2 (Members contribution rate) (63(a))
33(a) and 64		2.C.5 (contributions by employing authorities: general)(33(a))	3.C.3 (contributions by employing authorities: general)(64)

These regulations amend both schemes so that the consent of HMT is required before any change is made to the member's contribution rate. Regulation 33(a) and 64 further amend the 2008 Scheme so that HMT consent is also required before any change is made to the employer's contribution rate.

(7) Ill Health Review Periods

Amending Regulations	1995 Scheme regulation amended	2008 Scheme "Officer" regulation amended	2008 Scheme "Practitioner" regulation amended
7	E2B reassessment of ill health condition determined under regulation E2A		
34 & 66		2.D.9 re-assessment of entitlement to an ill-health pension determined under regulation 2.D.8 (34)	3.D.8 re-assessment of entitlement to an ill-health pension determined under regulation 3.D.7 (66)

The ill health retirement provisions of both schemes operate on a two tier basis. Where, at the time a lower ²tier 1 pension is awarded, it is agreed that a member’s entitlement may be re-assessed against the tier 2 condition, regulations permit a member to request a re-assessment within the three year period following retirement.

The above regulations vary the ‘three year period’ for members who return to NHS employment during that period. Such a member will be able to ask for a review within a maximum period of one year after starting work again in the NHS. However, if at that time the member returns to NHS employment, there is less than one year left until the end of the original ‘three year period’, the original three year period will still apply. This amendment is made so that the period of time allowed for a review is brought into line with the one year period during which a member who is in receipt of a higher tier 2 pension may retain that pension following a return to NHS employment.

(8) Lump sum on death payable when a pensioner or pension credit member dies

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation amended	2008 Scheme “Practitioner” regulation amended
8	F2 (member dies after pension becomes payable)		
20	T8(interest on late payment of benefits)		
23	Schedule 2A (para 7 pension credit member dies after		

² Tier 1 ill health pensions are based on accrued service only, tier 2 ill health pensions are based on accrued service plus 2/3rds of the member’s prospective service to normal retirement age.

	pension credit benefit becomes payable) and (para 14 interest on late payment of benefits)		
37 & 69		New regulation 2.E.20A (Pension payable when member dies on or after reaching age 75)(37)	New regulation 3.E.20A (Pension payable when member dies on or after reaching age 75)(69)
38 & 70		2.E.21 (payment of lump sums on death)(38)	3.E.21 (payment of lump sums on death)(70)
39 & 71		2.E.25 (dual capacity membership: death benefits)(39)	3.E.25 (dual capacity membership: death benefits)(71)
50 & 80		2.J.7(5)(c) (forfeiture of rights to benefits)(50)	3.J.7(5)(c) (forfeiture of rights to benefits)(80)
51 & 81		2.J.9(5) (interest on late payment of benefits and refunds of contributions)(51)	3.J.9(5) (interest on late payment of benefits and refunds of contributions)(81)

These regulations amend provisions in both schemes that cover the payment of a death benefit lump sum when a scheme pensioner (including a person entitled to a pension credit following a pension sharing order) dies within five years of retirement.

HMRC ³ rules will not permit the payment of a lump sum on death in respect of pensioners whose death occurs over the age of 75 years. Therefore any lump sum due in these circumstances will be converted into a pension using factors provided by the Scheme Actuary. The pension will be paid to the person (or shared between persons) who would otherwise be entitled to the

³ The Finance Act 2004

lump sum on death or may be assigned by the member’s Legal Personal Representatives as part of the distribution of the estate. The pension will be paid from the day after the member’s death until the fifth anniversary of the day the member’s pension became payable. Consequential amendments are also made to allow for the payment of interest if the pension is paid late and for the pension to be forfeited if the intended beneficiary is convicted of the murder, manslaughter or other offence linked to the unlawful killing of the member.

(9) Amount of a member’s cash equivalent transfer value

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation amended	2008 Scheme “Practitioner” regulation amended
12	M3 (amount of member’s cash equivalent)		
40 & 72		2.F.6 (calculating amounts of transfer value payments)(40)	3.F.6 (calculating amounts of transfer value payments) (72)

The amendments in these regulations are made as a consequence of new regulations introduced by the Department for Work and Pensions (DWP) from 1 October 2008. The new ⁴DWP regulations require the ⁵Scheme Manager to be responsible for the calculation and verification of cash equivalent transfer values (after taking advice from the Scheme Actuary).

⁴ The Occupational Pension Schemes (Transfer Values) (Amendment) Regulations 2008

⁵ The Secretary of State is the Scheme Manager of the NHS Pension Scheme

(10) Pensioning of authorised unpaid leave

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation amended	2008 Scheme “Practitioner” regulation amended
14	P2 (other leave of absence)		
27 & 56(a)(ii) and (b)		2.A.4 (pensionable service: breaks in service)(27)	3.A.4(pensionable service: breaks in service)(56)(a)(ii) and (b))
29(c) and 59(c)		2.A.9 (pensionable pay: breaks in service)(29(c))	3.A.8 (pensionable earnings: breaks in service)(59(c))

From 1 April 2008 members may choose to pay contributions for up to the first six months of a period of authorised unpaid leave. If they so choose, contributions must also be paid by their employer. The period of absence will count as pensionable service for so long as the member makes contributions to the scheme in respect of the period of absence under whichever of regulations 2.C.1 or 3.C.1 apply.

The further amendments introduced by the above regulations extend that provision. A member who pays contributions for the first six months may continue to contribute to the scheme during a longer period of authorised unpaid leave for a further period up to a maximum of eighteen months. During this period the member is required to pay both their own contributions and the contributions due from their employer.

(11) Requirement that pensioners who work again in the NHS must provide information about their new NHS pay

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation amended	2008 Scheme “Practitioner” regulation amended

15	S2 (reduction of pension on return to NHS employment)		
46 & 78		2.H.2 (information)(46)	3.H.2 (information)(78)

These amendments are made so that pensioners from either scheme who may be subject to a reduction to their benefits on return to NHS employment are required to provide information about their new NHS pay to the Secretary of State or other persons that the Secretary of State specifies.

(12) Determinations by Medical Practitioners and medical examinations

Amending Regulations	1995 Scheme regulation amended	2008 Scheme “Officer” regulation amended	2008 Scheme “Practitioner” regulation amended
21	U1A (determinations by medical practitioners)		
52(a)(ii) and (b) & 82(a)(ii) and (b)		2.J.11(determinations by medical practitioners)(52(a)(ii) and (b))	3.J.11(determinations by medical practitioners)(82(a)(ii) and (b))

Determinations by Medical Practitioners

These amendments extend the decisions that may be made by Medical Practitioners on behalf of both schemes to include a decision on whether a member has a life expectancy of less than one year (this would enable benefits to be commuted into a lump sum). A further amendment is made to the 1995 scheme only so that Medical Practitioners may also make a decision on whether ill health is preventing a nominated partner from being capable of earning a living.

Medical Examinations

The amendments are also made so that when considering an application for benefits where the health of the claimant is central to the claim, the Secretary of State may require a person to attend for a medical examination by a doctor of his choosing. If the Secretary of State does require the person to attend a doctor of his choosing he must also offer that person the opportunity to submit a report from his own medical adviser and must also take that report into account before making any decision relating to the member's or other claimant's health.

7.8 Regulations that amend the 1995 Scheme only

(1) Regulation 3(c) amends regulation A2 (Interpretation) to remove obsolete reference to 'piloted services' from the definition of 'employing authority'

(2) Regulation 5(b) amends paragraph (2Q)(a) of regulation D1 (contributions by members) so that an incorrect reference to the scheme year 2007 to 2008 is replaced by a correct reference to 2008 to 2009.

(3) Regulation (9) amends regulation **H5 (member dies with preserved pension)** that deals with the child allowance payable when a deferred member dies, so that an incorrect cross reference to regulation H3(2) is replaced with the correct reference to H3(2A). The amendment also removes two unnecessary references to paragraph (3) from paragraphs (4) and (5). (This is already covered by the reference in those paragraphs to paragraphs (2) to (3A))

(4) Regulation 16 amends regulation **S4 (benefits on death in pensionable employment after pension under regulation E2 becomes payable)** This regulation covers the benefits that are payable if a member who retired

under old ill health rules (regulation E2), re-joins the scheme and dies whilst still paying contributions. The amendments made do not apply to pensioners in this category.

However, this regulation also applies to ⁶re-employed pensioners who have stopped paying contributions because they have breached the scheme's limits but who die whilst still employed in the NHS. The amendments modify regulation S4 in respect of pensioners in this category so that benefits are still paid on a combination of death 'on pension' (for the previous service) and death 'in service' (for the later service). But, in the case of the latter, because the pensioner was not paying contributions when he died, references to pensionable pay and benefits are altered to references to pay and benefits before the member stopped paying contributions.

The amendments also take account of re-employed pensioners who are subject to the old upper pensionable age of ⁷70 and the new upper pensionable age of ⁸75.

(5) Regulation 17 amends regulation S4A (benefits on death in pensionable employment after pension under regulation E2A becomes payable) This regulation covers the benefits that are payable if a member who retired under new ill health rules (regulation E2A), re-joins the scheme and dies whilst still paying contributions. The amendments made do not apply to pensioners in this category.

However, this regulation also applies to ⁹re-employed pensioners who have stopped paying contributions because they have breached the scheme's limits but who die whilst still employed in the NHS. The amendments

⁶ In receipt of an old style ill health pension but able to re-join the 1995 scheme under age 50

⁷ Those who stopped paying contributions on or before 1st April 2008 and are subject to pre- 1 April 08 death benefit rules

⁸ Those who stopped paying contributions on or after 2 April 2008 and are subject to post 1 April 08 death benefit rules

⁹ In receipt of a new style tier 1 ill health pension but able to re-join the 1995 scheme under age 50

modify regulations S4A in respect of pensioners in this category so that those benefits are still paid on a combination of death ‘on pension’ (for the previous service) and death ‘in service’ (for the later service). But, in the case of the latter, because the pensioner was not paying contributions when he died, references to pensionable pay and benefits are altered to references to pay and benefits before the member stopped paying contributions.

(6) Regulation 19 amends regulation T6 (loss of rights to benefits).

Pensions for nominated surviving partners were introduced from 1 April 2008. The amendment to T6(1A) (a) prevents a pension being paid to a nominated surviving partner if that partner is convicted of the murder, manslaughter or other offence in connection with the unlawful killing of the member.

The amendment to T6(1A)(c) takes account of the amendments to regulation F5 that were also made from 1 April 2008 by replacing the current cross reference to F5(3A) to F5.

Both amendments are effective retrospectively from 1 April 2008

(7) Regulation 22 amendment of Schedule 2 (Medical and Dental Practitioners)

Sub-paragraph (2) removes obsolete references to ‘Local Health Group’ and ‘Primary Care Group’ from paragraph 1 (additional definitions used in this Schedule)

Sub-paragraph (3) inserts a reference to ‘Local Health Board’ in sub-paragraph (1) of paragraph 2 (application of regulations with modifications)

Sub-paragraph (4)

(a) amends sub-paragraph (2)(a)(vii), of paragraph 3 (meaning of pensionable earnings) so that income from OOH services provided by a Trust may be pensionable,

(b) corrects a misspelling of ‘ophthalmic’ in sub-paragraph (2)(a)(viii),

(c) replaces sub-paragraph (2B)(a)(ii) of that paragraph so that a duplicate reference to ‘parental leave’ is removed

Sub-paragraph (5) inserts a reference to ‘Local Health Board’ in sub-paragraphs (4), (5) and (6) of **paragraph 5 (elections relating to calculation of pensionable earnings in medical partnerships)**

Sub-paragraph (6) inserts a reference to ‘Local Health Board’ in sub-paragraph (3) of **paragraph 8 (limit on pensionable earnings – dental practitioners)**

Sub-paragraph (7)

(a) removes obsolete references to ‘principal practitioners’ and ‘piloted services’ from sub-paragraph (1) of **paragraph 9 (officer service treated as practitioner service)**

(b) Sub-paragraph (3)(aa) is omitted and an obsolete reference to ‘principal practitioner’ is removed from sub-paragraph (b)

(c) removes the words “(early retirement pension on the grounds of ill-health)” from sub-paragraph (5) so that the paragraph reads correctly as “...any increase in the member's service by virtue of regulation E2 or E2A...”-

(d) removes an obsolete reference to ‘principal practitioner’ from sub-paragraph (5A)(a) and an obsolete reference to ‘piloted service’ in (5A)(b).

(e) Removes obsolete paragraph (5AA)

(f) Removes obsolete references to ‘principal practitioners’ and ‘piloted services’ and unnecessary references to dental practitioners who are employed or engaged by a GDS or PDS contractor but who are neither partners in, nor directors of, the contractor

(g) Removes obsolete references to ‘principal practitioners’ and ‘piloted services’

Sub-paragraph (8)

(a) amends sub-paragraphs (2L) and (2U) of paragraph 10 (contributions to the scheme) so that a member who is due to pay contributions under those regulations¹⁰ will pay contributions for his later employment at the same rate as he was paying for his earlier employment.

(b) changes the age to which contributions must be paid from age 70 to age 75 in sub-paragraph (3)(a) (this change applies retrospectively from 1 April 2008)

(c) corrects a grammatical error in sub-paragraph (9)

Sub-paragraph (9)

(a) is covered at 7.7(3) (Practitioners with an agreement or contract with more than one Primary Care Trust (PCT) or Local Health Board (LHB))

(b) Replaces outdated references to ‘Inland Revenue’ with references to ‘HM Revenue and Customs’

¹⁰ A member who has ceased to be a Dental Performer and started work as a GP or Non- GP provider (and vice versa)

7.9 Amendments to the 2008 Scheme only

(1) Regulation 26(a) corrects the cross reference in paragraph (6), line 3 of **regulation 2.A.2 (meaning of pensionable service)** from 2.D.5 (8) (a) to 2.D.5 (9) (a).

(2) Regulations 28(b) and 57(b) and (c) respectively amend regulations 2.A.5 and 3.A.5 (meaning of qualifying service) so that if a former 1995 scheme member takes a refund of those contributions but joins the 2008 scheme within one month of leaving the 1995 scheme, the earlier 1995 scheme service will be counted as qualifying service in the 2008 scheme. The changes made by regulations 28(b) and 57(b) apply retrospectively from 1 April 2008.

(3) Regulation 29 amends regulation 2.A.9 (pensionable pay: breaks in service) to clarify the differences for officer members of the scheme who are non-GP providers.

Paragraph (a) amends paragraph (2) so that it is subject to paragraph (7) of the regulation (in the case of a non-GP provider) in addition to paragraph (3).

Paragraph (b) clarifies that paragraph (3) applies only to officer members other than non-GP providers.

Paragraph (c) is related to the pensioning of authorised unpaid leave and is included at paragraph 7.7(10) of this EM.

Paragraph (d) corrects the cross-reference in line 2 of paragraph (7) in this regulation. This change is made retrospectively from 1 April 2008.

Paragraph (e) replaces paragraph (8) with an expanded paragraph (8) and new paragraph (8A), to clarify how pensionable pay is calculated for non-GP providers.

Paragraph (f) makes a consequential amendment to the cross-reference in line 1 of paragraph (9).

Paragraph (g) makes consequential amendments to paragraph (10) to make it clear that the paragraph applies to all members under Part 2 of the regulations.

Paragraphs (h) and (i) make further consequential amendments.

(4) Regulation 31(a) corrects the misspelling of the word “partial” in paragraph (1) (a) of regulation **2.B.2 (Restrictions on eligibility: general)**.

(5) Regulation 33(b) amends regulation 2.C.5 (contributions by employing authorities: general) by inserting a new paragraph (6). This new paragraph provides for employer contributions due to the Secretary of State pursuant to the Regulations to be recovered from the transferee or successor of a person’s employing authority in the event of any NHS re-organisation. This change is made retrospectively from 1 April 2008.

(6) Regulation 35 and 67 respectively amend regulations **2.D.10 (Early Retirement on ill health (deferred members))** and **3.D.9 (Early Retirement on ill health (deferred members))** by rectifying an omission in paragraph (1)(a) of those regulations so that ‘permanently’ is inserted before incapable. The term ‘impairment’ in respective paragraphs (2)(a)(ii) is replaced by ‘infirmity’ so that the latter is used uniformly across all ill health related regulations. The term ‘impairment’ is also removed from

paragraph (2) of **regulations 2.J.11 and 3.J.11 (determinations by medical practitioners)** by amending regulations **52(a)(i) and 82(a)(i)** respectively. All the above amendments are made retrospectively to 1 April 2008.

(7) Regulations 36 and 68 respectively amend regulations **2.E.10 (Amount of children’s pension under regulation 2.E.8: deceased active members) and 3.E.10 (Amount of children’s pension under regulation 3.E.8: deceased active members)** by correcting cross-references in those regulations. These amendments are made retrospectively from 1 April 2008.

(8) Regulations 41(d) and 73(d) respectively amend **paragraph (4)(a)(ii) of regulations 2.F.8 and 3.F.8 (right to apply for acceptance of a transfer value payment from another scheme)** to replace a cross reference to the Income and Corporation Taxes Act with a cross reference to the Finance Act 2004. These amendments are made retrospectively from 1 April 2008.

(9) Regulation 47 amends regulation 2.H.5 (meaning of “previous pay”: general) and regulation 48 amends regulation 2.H.7 (application of this Chapter to part-time employment). These amendments clarify the rules on reduction of a pension on return to NHS employment so that a member’s previous pay (to be compared with the member’s pension plus new NHS earnings) in the case of a part time member is the pay earned rather than the pay the member would have earned had they worked whole time. These amendments are made retrospectively to 1 April 2008.

(10) Regulation 53(a) amends regulation **2.J.14 (Employing authority record keeping and contribution estimates)** to make the regulation heading consistent with the equivalent 3.J.14 regulation heading in Part 3 of these regulations.

(11) Regulation 56(a)(i) amends regulation 3.A.4 (pensionable service-breaks in service) so that an unnecessary cross reference to paragraph (5) is removed.

(12) Regulation 58 amends paragraph **(2) (a) (vii) of regulation 3.A.7 (meaning of pensionable earnings)** to clarify the pensionable earnings of a type 1 medical practitioner performing OOH services.

(13) Regulation 59 paragraphs (a) and (b) bring the cross-reference in line 2 of paragraph (2) (a) of regulation **3.A.8 (pensionable earnings: breaks in service)** into line with its equivalent in regulation 2.A.9 (2) and corrects the cross-reference in line 2 of paragraph (8). The changes at paragraph (b) are made retrospectively from 1 April 2008.

(14) Regulation 62 amends regulation 3.B.5 (7) (opting out of the scheme). Paragraph (a) clarifies that a practitioner who opts out of one or more such employments must do so in respect of all their practitioner employments.

Paragraph (b) clarifies that a practitioner who opts out of all such employments may, nevertheless, maintain membership of the scheme in respect of any officer employment

These changes are made retrospectively from 1 April 2008.

(15) Regulation 63(b),(c) and (d) amends paragraphs (8),(9) and (14) of regulation 3.C.2 (member's contribution rate) so that a member who is due to pay contributions under those paragraphs in respect of a later employment will pay contributions in that employment at the same rate as he was paying in his earlier employment.

(16) Regulation 65 corrects the heading of regulation **3.D.6 (Increase in pensionable earnings following exercise of option under regulation 3.D.5)** to reflect an increase in “level of engagement” rather than of pensionable earnings

(17) Regulation 76 amends regulation 3.F.11 (Calculation of transferred-in pensionable service)

Paragraph (a) replaces paragraph (2) so that the pensionable earnings resulting from a transfer payment will be credited in the financial year the member joins the scheme, even if payment is received more than 12 months after the date of joining, provided the conditions in paragraph (4) are met.

Paragraphs (b) and (c) correct the term “final year’s pensionable pay” to “reckonable pay”. This change is made retrospectively from 1 April 2008.

Paragraph (d) corrects the cross-reference in line 1 of paragraph (4) to match the replaced paragraph (2).

(18) Regulation 84 simplifies the definition of “type 1 practitioner” in **4.A.2 (interpretation: general)** by removing unnecessary references to dental practitioners who are employed or engaged by a GDS or PDS contractor but who are neither partners in, nor directors of, the contractor.

(19) Regulation 86 amends regulation 4.D.2 (applications, claims and notices) This amendment updates the table of applications or claims for benefits under regulations in Part 2 that will also be treated automatically as a claim for a benefit under an equivalent regulation in Part 3.

7.10 Amendments to the Injury Benefit Scheme

(1) Regulation 87 clarifies that an alphanumerical reference in Part 3 of the SI is a reference to the National Health Service (Injury Benefits) Regulations 1995

(2) Regulation 88 removes from **regulation 2(1) (interpretation)** a duplicate definition of “PMS practice”. This amendment is made retrospectively to 1 April 2008.

(3) Regulation 89 amends **regulation 4 (Scale of benefits)**

This amendment to Injury Benefits regulation 4 (6) (a), extends the disregard of certain reductions of pension under a relevant pension scheme, to any reduction in the amount of specified NHS Scheme pensions under the 1995 or 2008 arrangements, where members opt for a reduced pension in favour of an increased lump sum retiring allowance.

The purpose of this change is to ensure that members cannot increase their tax-free injury benefit (and consequent cost to the chargeable employer) by choosing to take more of their pension scheme benefits in lump sum form.

(4) Regulation 90 amends **regulation 4A (recovery of costs)** so that where a claimant is employed by more than one employing authority the Secretary of State may direct what proportion (if any) of the contribution due under regulation 4A is to be made by each.

(5) Regulation 91 amends **regulation 18A (claims for benefits)** to provide that Injury Benefit claims must be made in writing within 6 months of entitlement.

(6) Regulation 92 inserts **new regulation 21B (Notification requirements)** so that an employing authority must notify the scheme administrator when Temporary Injury Allowance is awarded under regulation 4(5), and a claimant must notify the Secretary of State if damages are recovered in relation to their injury (for the purpose of regulation 17 of the Injury Benefit Regulations).

7.11 **Option to persons detrimentally affected by these Regulations**

(1) Regulation 93 provides for a deferred member, or a member in receipt of a relevant benefit, whose position under these regulations would be worsened by any retrospective provision, to elect that that provision will not apply to them.

Consultation on the proposal for treatment of 1995 Scheme deferred members

7.12 Key stakeholders were directly involved in the development of scheme policy in relation to the treatment of 1995 scheme deferred members. The proposal that deferred members should be allowed to return to the 1995 (normal pension age 60) scheme within five years of leaving was included in the wider public consultation exercise led by NHS Employers leading up to the implementation of the 2008 Scheme on 1 April 2008 (consultation ran from 1st September 2007 to 30th November 2007). Of the options included in the consultation exercise this option was supported by the majority of respondents.

Consultation on the draft regulations

7.13 A formal consultation exercise on the amending regulations began on the 20 June 2008 and ended on 15 August 2008.

7.14 Amongst those consulted were: NHS Staff Side representatives, NHS Employers; ¹¹NHS Pensions; other public service pension schemes; Government Actuary's Department; the National Audit Office; the devolved administrations; and HM Treasury. Comments have been received from the NHS Staff Side representatives, Pensions Division, HM Treasury and the devolved administrations. In addition, workshops were provided to allow stakeholders the opportunity to ask any questions and to make comments on the Draft SI. These were attended by NHS Staff Side representatives, representatives of the devolved administrations and NHS Business Services Authority Pensions Division (the scheme administrators) and the Government Actuaries Department.

Responses to the consultation

7.15 Four responses were received. Two were of a technical nature and appropriate adjustments to the amendments were made as a result. NHS trade unions responded to the consultation in two areas of policy:

Changes to the review periods for ill health pensioners who return to NHS employment (see 7.7(7)),

NHS trade unions would prefer to retain the existing regulations that allow a member who was awarded a lower tier one ill health pension to apply for a review (under the tier two criteria) within three years of the original decision even if they return to NHS employment. The Department has given careful consideration to the views expressed by NHS trade unions on this matter, however, in line with legal advice, and the views of NHS Employers, it does not agree that there is adequate justification for treating re-employed pensioners in this position differently from re-employed tier two pensioners who lose their

¹¹ The NHS Pensions Division of the NHS Business Services Authority

higher (tier two) rate ill health pension if they work again in the NHS for longer than one year. Hence the two periods have been brought into line.

Treatment of returning 1995 scheme members whose employment was compulsorily transferred out but who return voluntarily to the NHS (see 7.5(2))

Amendments have been made so that former members of the 1995 (normal pension age 60) scheme whose employment is compulsorily transferred out may re-join the 1995 scheme if they return to the NHS voluntarily within five years of the transfer. NHS trade unions would prefer that former members in this position are permitted to re-join the 1995 scheme if they return voluntarily within five years of TUPE ceasing to apply to the member in their new employment. The Department and NHS Employers believe that this would be a complex matter, not least because a judgment would need to be made about the circumstances which led to the transferred member leaving the external protected employment. However, the Department acknowledges that the legislative timetable for implementing the substantive changes made by this instrument did not permit the debate on this matter to reach a satisfactory conclusion from all perspectives. Therefore further discussions between the Review Partners and the Department will ensue.

Guidance for NHS Staff and NHS employers

7.16 NHS Pensions (administrators of the NHS Schemes) wrote to all 1995 Scheme deferred members (at their last known address) in December 2007 to bring the proposed changes to their attention. A further communication was sent in June 2008 reminding deferred members that significant changes were in the process of being made to the scheme and directed them to NHS Pensions website for further information. NHS Pensions is also in the process of updating all their

member booklets and other information contained in the member's suite of their website to reflect all the changes implemented by this SI.

NHS Pensions has also written to employers to notify them of the changes and is in the process of providing further detailed guidance (for issue in September).

Links to specific documents are as follows:

http://www.nhspa.gov.uk/nhspa_site/deferred_members/index.htm,

http://www.nhspa.gov.uk/nhspa_site/library/employers/scheme_administration/Library/Newsletters/TN2007/TN15-2007.pdf

Consolidation

7.17 An exercise to consolidate the 1995 regulations was due to start in October 2008, however, resource permitting, the exercise is now planned to start during 2009. This delay takes account of further planned work to offer 1.3 million active 1995 Scheme members the choice to move to the 2008 Scheme (due to start in 2009) and new work flowing from the publication of Lord Darzi's next stage review report "High Quality Care for All". An informal consolidated text of both 1995 and 2008 regulations incorporating changes up to 1 October 2008 has been made available to NHS Trade Unions and other stakeholders during the consultation period.

8. Impact

A full regulatory impact assessment has not been produced on this instrument as it has no impact on the costs of business, charities or the voluntary sector. The cost to the Public Sector is significantly below £5 million pounds and is unlikely to attract high levels of political or media interest.

9. Contact

Mrs Angie Walsh at the Department of Health Pensions Policy Team, Tel: 01253 774510 or e-mail Angie.Walsh@dh.gsi.gov.uk can answer any queries regarding the instrument.