

EXPLANATORY MEMORANDUM TO
THE NHS COUNTER FRAUD AUTHORITY (ESTABLISHMENT, CONSTITUTION,
AND STAFF AND OTHER TRANSFER PROVISIONS) ORDER 2017

2017 No. 958

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health (DH) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument establishes with effect on 1 November 2017 a new special health authority, the NHS Counter Fraud Authority (the “NHSCFA”), to carry out the Secretary of State’s counter fraud functions in respect of the health service in England. It provides for the constitution of the NHSCFA and appointment of its members, and for the transfer from the NHS Business Services Authority (“the BSA”) of staff and property concerned in delivering the Secretary of State’s counter fraud functions prior to 1 November 2017. It also makes provision for abolition of the NHSCFA in three years’ time as required by section 28A of the National Health Act 2006 (“the 2006 Act”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Section 105 of the Deregulation Act 2015 is relied on to combine enabling powers to include provisions in this Order which would otherwise require to be made in the form of regulations.

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 The Order establishes a new special health authority, the NHSCFA, in relation to England on 1 November 2017. The NHSCFA is to carry out the Secretary of State’s counter fraud functions in relation to the health service in England. Such functions were exercised by the BSA prior to that date. The Order provides for the constitution and governance of the NHSCFA, and its functions, which are to be exercised subject to and in accordance with Directions of the Secretary of State. The Order also provides for the transfer of staff, property (which includes rights) and liabilities from the BSA to the new special health authority, for continuity in relation to documents and records of, acts or omissions of, and things in the process of being done by, the BSA in respect of the Secretary of State’s counter fraud functions that the NHSCFA is to exercise on its establishment.

Related instruments

- 4.2 Two related instruments will be made which come into force on the same day as this Order. The NHS Counter Fraud Authority (Investigatory Powers and Other Miscellaneous Amendments) Order 2017 (SI 2017/960) amends other legislation (mostly secondary) to provide the NHSCFA with certain investigatory powers and to provide for other duties falling to the BSA in respect of counter fraud functions before 1 November 2017 to be undertaken by the NHSCFA from that date. The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017 (SI 2017/959) amends the statutory functions of the BSA to omit counter fraud functions in relation to England and Wales, and security management service functions in relation to England. That amending Order is made as a composite order with Welsh Ministers. Separate Explanatory Memoranda are laid in respect of both those instruments, which cross-refer to this one.
- 4.3 Directions are intended to be issued by the Secretary of State to the NHSCFA about the exercise of its functions, planned to come into force on 1 November 2017 and supplementary amending directions to the BSA and NHS bodies are also planned. (Directions will be published on the Department's website.)

Transfer provisions and continuity, applying in relation to England only

- 4.4 This instrument applies in relation to England only: counter fraud functions are devolved and the enabling powers, which extend to England and Wales (see section 278 of the 2006 Act), are limited in application to England (see section 271 of that Act).
- 4.5 The staff transferring under the provisions of this Order are staff engaged prior to 1 November 2017 by the BSA as part of its division known as NHS Protect (and also known as the Counter Fraud and Security Management Services Division). This division was established in relation to England only, by Directions to the BSA given in 2006 (now revoked) and continued most recently under Directions of the Secretary of State given in 2016. The staff transfer and arrangements for continuity in respect of such transfers are therefore considered to be matters that apply in relation to England. The BSA's functions included a counter fraud function in relation to Wales exercisable subject to and in accordance with directions of Welsh Ministers, but in practice, no direction was given by Welsh Ministers in relation to the exercise of that function: instead NHS Protect carried out limited functions in relation to Wales under arrangements made with the BSA by Welsh Ministers pursuant to section 83 of the Government of Wales Act 2006.
- 4.6 Likewise, provision for the transfer of property and liabilities from the BSA to the NHSCFA, and for continuity in respect of these, is similarly made in this Order in relation to England only, reflecting the fact that these were held in respect of the work of NHS Protect, established in relation to England.
- 4.7 No provision for continuity has been made in the other instruments mentioned in paragraph 4.2. The Department considers that the provisions in this instrument in relation to things done and things in the process of being done, etc., meet any need for continuity that might arise in relation to, in particular, the exercise of certain investigatory and other functions by the NHSCFA which were previously exercisable by the BSA.

- 4.8 No provision is made for continuity or transfers of staff, property or liabilities in respect of security management functions of the Secretary of State exercisable by the BSA prior to 1 November 2017 (and removed from the BSA's statutory remit by SI 2017/959 mentioned in paragraph 4.2 above). These functions will be retained by the Secretary of State and are not being conferred on the NHSCFA (nor on any other special health authority). Paragraph 7.11 below provides relevant policy background in respect of these functions.
- 4.9 The enabling powers in section 28 of the 2006 Act require consultation with bodies representing officers likely to be transferred or affected by transfers in pursuance of the Order. Paragraph 4 of Schedule 6 to the 2006 Act also requires consultation with persons affected by the provisions under paragraph 3 of that Schedule, concerning officers (which includes powers used in this Order that enable provisions for the transfer of officers from one special health authority to another, and for the appointment of officers including the chief executive and other prescribed descriptions). The Department has consulted with trade union and staff representatives to obtain the views of staff affected by the creation of the NHSCFA and a formal consultation process has been carried out by the BSA with its staff.
- 4.10 By virtue of section 28A of the 2006 Act, an order made under section 28 establishing a new special health authority on or after 1 April 2013 must include provision for the abolition of the new special health authority within three years from its establishment. Schedule 3 to this Order makes provision accordingly.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The instrument applies in relation 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

Transfer of Secretary of State's counter fraud functions to new special health authority

- 7.1 The Secretary of State's counter fraud functions in relation to the health service exercisable by the BSA before 1 November 2017 are, on that date, being conferred on a new special health authority called the NHS Counter Fraud Authority. The establishment of a special health authority focused entirely on counter fraud activities is intended to provide the independence and practical accountability that is required to deliver effective anti-fraud services across the health service. The creation of the NHSCFA will provide the necessary independence from other NHS bodies and establish a solid governance structure that is directly accountable for delivery of the Secretary of State's counter fraud functions in relation to the health service.
- 7.2 Since 1998, the Secretary of State's function to protect the health service from fraud has been carried out by a number of organisations. The Department of Health set up the Directorate of Counter Fraud Services (the "DCFS") in 1998, to have overall responsibility for all work to counter fraud and corruption in the NHS. In 1999, NHS

Counter Fraud Operational Service (CFOS) provided an investigative capacity. The Counter Fraud and Security Management Service (the "NHS CFSMS"), a special health authority resulting from the reorganisation of both bodies, came into effect in January 2003 by virtue of the Counter Fraud and Security Management Service (Establishment and Constitution) Order 2002 (SI 2002/3039). This placed responsibility on the NHS CFSMS for policy and operational matters related to the prevention, detection and investigation of fraud and corruption, alongside the management of security, in the NHS.

- 7.3 In 2005, the NHS Business Services Authority (BSA) was created as a special health authority to undertake the activities of NHS CFSMS and certain other Arm's Length Bodies. As a result, NHS CFSMS was abolished and its staff and property were transferred to the BSA (*see* SI 2006/635), with provision for continuity in the exercise of functions also being made as between the BSA and the abolished CFSMS. Directions given by the Secretary of State in relation to England established the NHS Counter Fraud and Security Management Services Division, as a division of the BSA with responsibility for the prevention, detection and investigation of fraud and management of security. In 2011, that division became known as "NHS Protect".
- 7.4 Since that time the BSA's statutory remit and operations have developed. The BSA is responsible for providing the corporate services necessary for the delivery of a number of health provisions including dental, pharmaceutical and optical services and the administration of NHS pensions.
- 7.5 Similarly, NHS Protect's counter fraud function has expanded beyond fraud investigation through the development and delivery of the Department's anti-fraud strategy and its role in the Cabinet Office counter fraud cross government initiatives. In addition, as mentioned in paragraph 4.5 above, NHS Protect provides the Welsh Assembly Government with counter fraud services pursuant to a section 83 arrangement under the Government of Wales Act 2006.
- 7.6 The wide responsibilities held by the BSA means it faces particular challenges in that it must allocate resources amongst a range of functions based on projected activity, whilst still seeking to direct appropriate resources to a counter fraud function intended to provide a comprehensive counter fraud service across the whole of the health service in England. In addition, as a division within the BSA, NHS Protect may risk a potential conflict of interests, whether real or perceived, should it have to conduct an investigation within its own organisation.
- 7.7 In order to mitigate these issues, NHS Protect has in practice obtained its strategic lead and direction from the Department of Health rather than the BSA. NHS Protect operates as a distinct division within the BSA (in accordance with Directions of the Secretary of State dated 1st June 2016¹). This has resulted in the BSA having accountability for NHS Protect's counter fraud service without the practical management oversight. A standalone body focused on delivery of the counter fraud service was therefore identified as being needed to resolve the issues of accountability and independence. An independent counter fraud organisation also supports the Cabinet Office's policy of development of the counter fraud profession across

¹ The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) Directions 2016 are published at https://www.nhsbsa.nhs.uk/sites/default/files/2017-02/Section_2_-_B1_NHSBSA_Directions_2016.pdf. Postal copies are also available from the Department of Health Correspondence Unit, Richmond House, 79 Whitehall, London SW1A 2NS.

government, as an appropriate environment to grow counter fraud capability, skill and expertise.

- 7.8 The creation of the new NHSCFA meets the tests for the establishment of a separate body applied by the Cabinet Office Public Bodies Reform Team and the Treasury's Classification Branch as it will perform a technical function (anti-fraud work requires technical knowledge and skill and is carried out by nationally accredited counter fraud specialists). In addition, the new body needs to act independently to establish facts and to act with impartiality which are the fundamental requirements for fraud investigations and counter fraud recommendations.
- 7.9 A number of options were considered for the organisational structure for the counter fraud service and it was concluded that a special health authority offered the best "fit". Special health authorities are usually set up to provide a service to, or otherwise discharge a function for the benefit of, the whole of the NHS. Special health authorities are often concerned with improving the ability of other parts of the NHS to deliver effective health care and handling large operational activities oriented towards the NHS. The existing counter fraud service is health service-wide, and its intelligence, investigation and quality assurance work involve large scale operational activities aimed at improving the ability of the health service to tackle fraud and fits well with the role of a special health authority.
- 7.10 As the existing service is delivered by a special health authority, conferring the counter fraud functions on a new single-focus special health authority means the re-organisation will create minimal disruption to both the service and staff. The creation of the new counter fraud organisation as a special health authority will allow the Department to retain a direct sponsorship role for the new body at the same time as providing independence from other health service bodies. It is intended that the new special health authority will build on the existing relationships and structure so that intelligence flows will continue alongside the ability of the new organisation to influence counter fraud activities in the wider health service. Establishing the new body as a special health authority has enabled issues of accountability and independence in the delivery of the service mentioned above to be promptly resolved, as its establishment can be created by the Secretary of State using secondary legislation powers.

Security management functions

- 7.11 The need for a single-focus, central organisation to effectively tackle fraud in the health service contrasts with position with security management, which by its nature is most effective when tailored to local circumstances. The Secretary of State has statutory responsibility for health service security management functions under the 2006 Act. In practice, security management in the NHS is carried out at a local level in order to effectively respond to threats to patients, staff and property rather than being centrally managed and directed. The BSA's security management role was the preparation and dissemination of guidance, which is now in place. NHS bodies themselves appoint suitably qualified security management specialists to implement a security management strategy, with associated policies, procedures and physical security measures approved by the body concerned as appropriate. As standards are now regarded by the Department as being embedded within the practices of NHS bodies, the Department considers that those organisations themselves are best placed to further develop and apply security management policies and practices taking account of local circumstances to deal with security matters in the most effective way.

For these reasons, the new special health authority is not being given security management functions.

Establishment and functions

- 7.12 The intention is that the range of counter fraud functions provided by NHS Protect will be assumed by the NHSCFA without interruption to the conduct of the Secretary of State's counter fraud functions. The scope of the functions being conferred on the NHSCFA cover action to prevent, detect and investigate fraud and corruption affecting the health service or affecting the responsibilities of the Secretary of State for the health service in England; associated operational activities, advice to other NHS bodies and provision of assistance to the Secretary of State generally in respect of his counter fraud functions under the 2006 Act. Directions will provide the detail of the tasks and responsibilities the NHSCFA is to take on. As part of this, in delivering the Secretary of State's counter fraud function the NHSCFA will carry out the role of central intelligence-gathering and national investigation of complex and high value fraud cases.
- 7.13 Under the 2006 Act, the Secretary of State has powers to require compulsory disclosure of information in connection with health service fraud matters. These are provided for in sections 197 and 198 of the 2006 Act, and may be delegated to a special health authority in accordance with section 199 of that Act. Schedule 1 to the Order makes provision for this, setting out the criteria and processes for the authorisation of senior officers to exercise these delegated powers. Schedule 1 broadly provides for the same processes and requirements in respect of the exercise of powers under sections 197 and 198 as were provided for in respect of NHS Protect. There is a small change in respect of the meaning of accreditation in relation to financial investigators to reflect the wider range of financial investigation training providers who may provide accreditation.
- 7.14 In order that the NHSCFA can use investigation powers historically available to the body carrying out counter fraud functions in relation to the health service, certain investigatory powers in other legislation are being conferred on the NHSCFA by the amendments made by SI 2017/960, mentioned in paragraph 4.2, which also remove, where appropriate, references to predecessor bodies. These are explained in more detail in the Explanatory Memorandum accompanying that Order.

Constitution, governance, appointments and tenure, including transitional arrangements

- 7.15 The provision made in this Order for the NHSCFA's governance and the appointment of its members is intended to help support the integrity and accountability of the NHSCFA, and its establishment and development as an organisation which is, and is seen to be, trustworthy and independent. The Department regards these as fundamental for the effective operation of a health service counter fraud body. Article 5 of and Schedule 2 to the Order provide for these constitutional and governance requirements.
- 7.16 Provision is made in that Schedule for a minimum of seven members, including chairperson. The policy intention is that this will provide a diversity of views and challenge, proportionate to the role and size of the NHSCFA. The NHSCFA's membership will comprise a chairperson and at least 3 non-officer members appointed by the Secretary of State, and up to 3 members who will be officers of the NHSCFA, including the chief executive and the finance director. Apart from during the

transitional period (as to which, see next), officer members are appointed by the chairperson, acting with the agreement of the other non-officer members. The terms and conditions of the appointments of such officer members will be subject to approval of the Secretary of State.

- 7.17 As the NHSCFA is a new organisation, a transitional period from 1 November 2017 to 30 October 2018 is provided for to facilitate the transition between the work of the BSA and the assumption of Secretary of State counter fraud functions by the NHSCFA. During this time, the membership of the NHSCFA need consist only of the chairperson and one other non-officer member, an interim chief executive and an interim director of finance. (Rules as to conduct of business provide for a casting vote by the person presiding at meetings of NHSCFA members – see paragraph 13(9) of Schedule 2 to the Order.)
- 7.18 The appointments of the interim chief executive and interim finance director are required by paragraph 2 of Schedule 2. Unlike other appointments of officer members (described in paragraph 7.16 above), the interim chief executive and interim finance director appointments require the consent of the Secretary of State. Interim appointments will end no later than 1 November 2018, unless the chairperson, with approval of the Secretary of State, agrees with the post holder to extend the term to enable the NHSCFA to effectively carry out its functions. Where the interim appointments are terminated earlier than 1 November 2018, substantive appointments may be made, or a further interim appointment made (which must terminate by 1 November 2018). In the event that an interim officer member leaves his or her post during the transitional period, the chairperson may make such further interim appointments during that time as he or she considers necessary, with the consent of the Secretary of State. Interim members may apply for permanent appointment through the same process of open and fair competition as all other candidates. Where an interim appointee resigns the Secretary of State, or chairperson as appropriate, may appoint a further interim member.
- 7.19 The chairperson may also appoint an additional officer member of the NHSCFA (both during and after the transitional period). Where a chief executive is suspended from his or her position, he or she is also suspended from acting as member of the NHSCFA. To enable the NHSCFA to continue to carry out its functions effectively, during the suspension period the person acting as chief executive in place of the suspended chief executive will also act as member of the NHSCFA in his or her place. Appointments by the chief executive of officers who are not members of the NHSCFA require the agreement of the chairperson for appointments at Agenda for Change grade 8b and above.
- 7.20 Appointments (other than interim appointments) will necessarily end upon the abolition of the NHSCFA. The date provided for this is 31 October 2020 – see further explanation about abolition below, in paragraph 7.49). The chairperson and other non-officer members may resign at any time during their term of office by giving written notice to the Secretary of State (see paragraph 5(1) of Schedule 2 to the Order).

Disqualification from appointment and suspension of a chairperson or other non-officer member

- 7.21 Provisions are made in paragraph 3 of Schedule 2 to the Order to disqualify individuals from appointment as chairperson or other non-officer member of the

NHSCFA in certain circumstances. Disqualification criteria are intended to promote the recruitment and retention as members of persons of the highest honesty, probity and integrity, and to foster confidence in the work of the NHSCFA in tackling fraud in the health service.

- 7.22 The recruitment process for officer members (and staff generally) will involve appropriate background and security checks intended to assure the trustworthiness, integrity and reliability of appointees. For the chairperson and other non-officer members, statutory disqualification criteria relate to the character and competency of office holders, and take into account potential for conflicts of interest with other organisations involved in the health service, bearing in mind the cross-cutting role of the NHSCFA in counter fraud throughout the health service. The ensuing paragraphs explain some of the key disqualifications provided for in paragraph 3 of Schedule 2 to the Order.
- 7.23 There are two disqualifications in respect of criminal convictions which have not been successfully appealed or otherwise quashed. (It should be noted that in respect of an office or employment which concerns the investigation of fraud in the health service, there are certain exceptions to the statutory protections generally provided for the rehabilitation of offenders.)
- 7.24 One such disqualification concerns convictions for offences involving fraud, theft or bribery or offences in the nature of market distortion or abuse of dominant position under competition legislation committed on or after the person attained 18 years. This disqualification is intended to reflect the high expectations for the standards required for membership of a fraud governance body. However, as this disqualification is broad and applies regardless of how long ago the offence occurred, to ensure fairness and proportionality in applying the disqualification, the Secretary of State may exercise discretion to overlook a theft or fraud conviction by considering mitigating factors such as how young the person was at the time it was committed and the impact of the offence.
- 7.25 The other disqualification of this type relates to convictions in the past five years for offences not mentioned in paragraph 7.24 which resulted in a custodial sentence (whether or not suspended). Five years is considered to be a reasonable time period balancing the nature of the NHSCFA and rehabilitation of offenders considerations.
- 7.26 Regulatory based disqualifications include restrictions relating to bankruptcy and disqualification as a company director under UK legislation; removal by order or disqualification as a charity trustee; and exclusion from the NHS Performers List for reasons of probity or honesty (under regulations concerning eligibility to provide NHS primary care).
- 7.27 Disqualifications in relation to employment matters are included to take account of competence and potential bias against a former employer. These include: dismissal in the previous five years (excluding for reasons of redundancy) from paid employment with a health service body or other health services provider; termination of appointment on certain grounds as chairperson, member, director, or governor of a health service body or provider of health services. The grounds mentioned are intended to go to the probity and effectiveness of the person in carrying out the duties of office and, in relation to past appointments to health service bodies, the interests of the health service.

- 7.28 Disqualification on the grounds of bankruptcy or as disqualified director ceases when the relevant order or restriction expires. (In practice, aside from the statutory requirements, the Secretary of State would consider past conduct in this regard in considering the suitability of an applicant to hold office.) Under paragraph 4 of Schedule 2 to the Order, those disqualified on the grounds mentioned in paragraph 7.27 above, or by reason of removal or disqualification as a charity trustee or in relation to the NHS Performers List, may apply to the Secretary of State to revoke their disqualification after a period of two years from the date of that of the disqualifying event. If the Secretary of State decides against revocation, the individual may make a further request no earlier than two years from the Secretary of States' decision.
- 7.29 An individual who holds an office (as chairperson, member, officer, governor or director) or who is employed or contracted to provide services to a health service body or organisation which provides services to the health service, is disqualified from appointment as a member of the NHSCFA. The policy intention here is to avoid a perceived or actual conflict of interest and so preserve the integrity of the NHSCFA. Organisations which are health service bodies for these purposes are listed in Schedule 2 (paragraph 3(2)). The disqualification applies to the appointment of the chairperson where the person is engaged or contracted with any health service body, but non-officer members are not disqualified if the "health service body" they are employed or appointed by is an NHS trust or foundation trust (see paragraph 3(3) of Schedule 2 to the Order). This is intended to support a wide range of views and current health service experience across the NHSCFA membership.

Termination and suspension of appointment

- 7.30 As mentioned above, the chairperson and non-officer members may resign at any time by giving written notice to the Secretary of State. The Secretary of State may terminate the tenure of the chairperson and non-officer members where it is in the interests of the good management of the Authority or of the health service, where the appointee becomes disqualified, in certain cases of failure to attend meetings, or where there has been a failure to disclose or withdraw on account of a pecuniary interest from NHSCFA business. Termination is also provided for where it appears that a person was disqualified at the time of appointment.
- 7.31 Where the Secretary of State becomes aware of the circumstances mentioned in paragraph 7.30, he may suspend the person from office to allow for time to consider whether the person is or was disqualified under paragraph 3 of Schedule 2 to the Order, or whether to terminate the office holder's appointment on the other grounds. In practice, during this period the Secretary of State will carry out a review to determine these matters, and in any event must review the matter after three months from the initial suspension if requested by the office holder. Representations made by the appointee must be taken into account in the review. The three month window is to allow sufficient time for evidence gathering. Suspension may last for no more than six months in the first instance, but may be extended in certain circumstances. Where the Secretary of State decides at any time that there are no grounds to remove the chairperson or non-officer member, he must revoke the suspension. Otherwise, when the suspension ends, the Secretary of State will either have decided to terminate the appointment or that the person should continue to hold office.
- 7.32 As part of the normal business of the NHSCFA, the chairperson and non-officer members may appoint one of the non-officer members to act as vice-chairperson (see

paragraph 8 in Schedule 2 to the Order in relation to appointment, and paragraph 9 in relation to the role of the vice-chairman). The policy intent here is to ensure continuity in the conduct of the NHSCFA's business in circumstances where the chairperson cannot perform the duties of chair, or where the chairperson has died.

- 7.33 Where a chairperson is suspended from office, under paragraph 7 of Schedule 2, there are special provisions for the appointment of vice-chairperson: any existing vice-chairperson appointment ceases to have effect and the Secretary of State must appoint a non-officer member as a vice-chairperson to carry out the duties of the chairperson for the period of the suspension (or if shorter, for the remainder of the member's term of office). The Secretary of State may choose to re-appoint the existing vice-chairperson or alternatively, appoint another non-officer member. Where the term of the vice-chairperson appointed in these circumstances expires, the same person may be reappointed, or the Secretary of State may choose to appoint another non-officer member. A vice-chairperson may give written notice of resignation to the Secretary of State at any time, and the Secretary of State may terminate the person's appointment as vice-chairperson in the interests of the Authority.

Conduct of Authority business

- 7.34 Part 2 of Schedule 2 to the Order permits the NHSCFA to appoint committees to carry out its functions, subject to directions which may be given by the Secretary of State, and for such committees to appoint sub-committees, subject to directions of the NHSCFA. Committees may consist exclusively of members of the NHSCFA, or a mix of members and persons who are not members of the NHSCFA, for example NHS staff, or be composed entirely of non-members. Likewise, sub-committees may consist of persons who are committee members, or a mix of committee members and other persons who are not committee members or members of the NHSCFA, or may consist entirely of such other persons. The disqualification criteria mentioned in paragraphs 7.21 to 7.29 above apply equally to committee and sub-committee members. The policy intent here is to ensure the integrity of the NHSCFA's committees and to provide the appropriate knowledge, skills and experience for it to carry out its functions.
- 7.35 Paragraphs 12 to 14 of Schedule 2 to the Order relate to procedural requirements for the conduct of the NHSCFA's business. This includes provision requiring the NHSCFA to make standing orders to regulate the conduct of its business, subject to directions which may be given by the Secretary of State, and to the other procedural requirements in Schedule 2. The standing orders may permit virtual attendance at meetings, for example via video conferencing where the identity of the attendee can be clearly established. The NHSCFA may also make standing orders about the quorum, business and location of meetings in relation to committees and sub-committees. Committees and sub-committees may determine their own proceedings, subject to such standing orders as the NHSCFA may make.
- 7.36 The convening of meetings falls to the chairperson, but there is a procedure for a meeting to be called by members. Where a meeting is called by members, rather than the chairperson, only the business specified in the meeting notification may be considered at the meeting.
- 7.37 Members should receive notification of the meeting signed by the chairperson or authorised officer, with details of the purpose of the meeting but, decisions taken by the NHSCFA would not be invalidated should a member fail to receive notice of the

meeting concerned. The vice-chairperson will preside in the absence of the chairperson and if both are absent, the members of the NHSCFA may choose which of the non-officer members should chair the meeting.

- 7.38 The NHSCFA cannot carry out any business at a meeting unless the greater of at least three members or one third of the membership (including the chairperson) are present. Decisions are made by the NHSCFA on the basis of the majority of votes of the members present. Where the number of votes is equal, the chairperson (or person presiding) will have a second casting vote so that a decision may be reached. In order to provide a transparent record of Authority decisions and embed an audit trail, minutes of the meeting must be recorded which include details of attendees, and signed at the following meeting by the chairperson (or the person presiding).

Disability on the grounds of pecuniary interest

- 7.39 Paragraph 14 of Schedule 2 imposes a disability on the chairperson or other member where a pecuniary interest is held by him or her in relation to any item of business at a meeting of the NHSCFA. These requirements are intended to preserve the independence and integrity of the NHSCFA and its structures, by addressing conflicts of interest in a proportionate way. These requirements also apply the NHSCFA's committees and subcommittees.
- 7.40 In the case of a direct financial interest, the interest must be declared and the member concerned would not be able to participate in discussions, decisions or voting in respect of the item of business in question. A direct financial interest would cover circumstances where the member themselves would receive a financial benefit from a particular decision, for example, receiving a payment on account of a contract being awarded. Qualifications and exceptions are provided for where the interest is remote, modest, or indirect. In the case of certain modest, indirect interests (set out in paragraph 14(5) and (7) in Schedule 2 to the Order), the member concerned need only declare the interest but may otherwise participate in the decision-making process at the meeting, subject to any procedural requirements of standing rules made by the NHSCFA.
- 7.41 Pay and allowances which fall under paragraph 2 of Schedule 6 of the 2006 Act (which relates to remuneration for office holders of special health authorities) are not treated as a pecuniary interest for these purposes (paragraph 14(4) of Schedule 2 to the Order), so that the remuneration of the chairperson and members does not of itself trigger exclusion from the NHSCFA's decision-making process. (Under paragraph 2 of Schedule 6 to the 2006 Act, it is the Secretary of State, not the special health authority, who sets remuneration for the chairperson and members of a special health authority, so the business of the NHSCFA will not concern members' remuneration.) In the interests of the health service, and subject to any conditions he thinks appropriate, in any individual case the Secretary of State may remove a disability in relation to pecuniary interest should it be considered appropriate, for example to enable a committee of the NHSCFA to use consultancy services to provide particular expert knowledge or advice.

Reports by the NHSCFA

- 7.42 The NHSCFA is required to provide the Secretary of State with reports as he directs and to provide information as required by the Secretary of State from time to time. In addition where an annual report is required by directions to be published, the

NHSCFA must present the report at a public meeting within 30 days of the date of the report.

Transfer of staff, property, liabilities and provision for continuity

- 7.43 The Order provides for the transfer of staff from the BSA to the NHSCFA. The policy intention is that NHS Protect staff involved in the counter fraud functions held by the BSA before 1 November 2017 will transfer to the new special health authority. (In practice, this covers all staff working within NHS Protect, as the BSA no longer has staff working on security management matters.) All NHS Protect staff who are employed immediately before the transfer date will receive written notice that they will transfer to the NHSCFA under the Order. The principles set out in the Cabinet Office Statement of Practice on Staff Transfer in the Public Sector (COSoP) will apply. The Order will provide employment protection to staff transferring to the NHSCFA including preserving continuity of employment and transferring them on their current terms and conditions of employment. NHS Protect staff will retain membership of the NHS Pension Scheme on transferring to the NHSCFA. A consultation has been carried out with NHS Protect staff and union representatives, in accordance with section 28 of and paragraph 4 of Schedule 6 to the 2006 Act. No objections were received to the establishment of an independent special health authority to deliver the counter fraud service.
- 7.44 NHS Protect staff have the right to object to the transfer of their employment to the NHSCFA but the decision to do so would end their employment on the transfer date. This would not be treated as being a dismissal. If the transfer involves a substantial change in the working conditions to the employee's material detriment they may treat themselves as having been dismissed subject to the circumstances of each case. Where an employee's contract is terminated by the NHSCFA and the 'sole or principal' reason is the transfer then the employee's dismissal will be automatically unfair unless there is an 'economic, technical or organisational reason entailing changes in the workforce' of the NHSCFA following transfer (for example a genuine redundancy situation). In these circumstances, the dismissal would not be automatically unfair and the normal employment law test of fair dismissal would apply.
- 7.45 In order for the NHSCFA to assume all counter fraud operational activities from the day it comes into force, all property held by the BSA, including contracts and the BSA's information and systems connected with the delivery of counter fraud functions before 1 November 2017, will transfer to NHSCFA on that date. This will include records and data relating to ongoing fraud investigations and counter fraud intelligence, and corporate counter fraud knowledge such as anti-fraud standards and guidance, learning materials or tools.
- 7.46 The items of property (which do not include contracts of employment, since those are dealt with in separate provisions mentioned above) that are to transfer to the NHSCFA are identified by reference to a separate agreement between the BSA and the Secretary of State dated 26 September 2017, prepared in anticipation of the making of this Order.
- 7.47 Liabilities and rights associated with the transfers of staff, property and the discharge by the BSA of counter fraud functions that the NHSCFA is to exercise are to transfer to the NHSCFA. Historic employment liabilities remain with the BSA (that is, liabilities relating to contracts of employment with NHS Protect staff whose

employment ended before the transfer date and so who are not transferred). Criminal liabilities do not transfer under these provisions either as the enabling powers provide for transfer of such liabilities on abolition of a special health authority only.

- 7.48 Provision is made for continuity in respect of things done and in the process of being done where these relate to the transfers mentioned above. For example, documents and forms to which the provisions apply bearing reference to NHS Protect (defined in Part 3 of the Order so as to include its other operational title “Counter Fraud and Security Management Services Division”) will be taken to read as referring to the NHSCFA.

Abolition of special health authority

- 7.49 Provision is made, as required by section 28A of the 2006 Act, for the abolition of the NHSCFA and transfer of staff, property and liabilities (other than criminal liabilities – in respect of which see section 70 of the 2006 Act which excludes such liabilities from the duty on the Secretary of State to make provision on abolition of a special health authority) and historic employment liabilities, that is, liabilities relating to contracts of employment that end before abolition.
- 7.50 In the event of the abolition of the new special health authority, staff employed by the body will transfer to the Secretary of State. Schedule 3 sets out the arrangements for a transfer in these circumstances. (But as to review of the abolition provisions, see paragraph 12 below.)

Consolidation

- 7.51 Questions of consolidation do not apply as the Order is a new Order.

8. Consultation outcome

- 8.1 The Department’s consultation with trade union and staff representatives has provided a positive response. A consultation has been carried out of BSA staff working within NHS Protect on the creation of an independent special health authority to carry out the Secretary of State’s counter fraud functions and the transfer of staff working within NHS Protect to the new body. The proposal has been broadly welcomed at staff engagement events. Third party contractors whose contracts are to transfer from the BSA to the NHSCFA have also been consulted and expressed no objections.

9. Guidance

- 9.1 A stakeholder engagement plan is in place to communicate with health service stakeholders about the establishment of the NHS Counter Fraud Authority and its delivery of the counter fraud service.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The Order provides for the abolition of the NHSCFA on 31 October 2020. It is possible to extend its life by order requiring the affirmative procedure (sections 28A(5) and 272(6)(zc) of the 2006 Act). The effectiveness of the NHS Counter Fraud Authority in delivering the counter fraud functions of the Secretary of State will be monitored and reviewed with these powers in mind.
- 12.2 In the event that no such order is made to extend the life of the NHSCFA, the transfer provisions in Schedule 3 to this Order may be amended (by an order following the negative resolution procedure). The suitability of the provision made in Schedule 3 for the required transfers upon abolition, including the need for provision as to transfer of criminal liabilities as permitted under section 28A of the 2006 Act, would be reviewed at that time in light of the prevailing circumstances.

13. Contact

- 13.1 Mark Richardson at the Department of Health Telephone: 0207 972 1044 or email: mark.richardson@dh.gsi.gov.uk can answer any queries regarding the instrument.