<u>Frequently asked questions about the application of "New Fair Deal" in the NHS for independent providers</u>

<u>When is New Fair Deal commencing for the NHS?</u>

Q1 - When will the New Fair Deal announced by Her Majesty's Treasury (HMT) on 4th July 2012 commence?

A – On 7 October 2013 HMT published: *Fair Deal for staff pensions: staff transfer from central government* which sets out the detail of how the New Fair Deal policy will operate. This guidance confirmed that commencement dates will vary across the public sector schemes.

The Department of Health (DH) has since published guidance in relation to the NHS pension scheme at:
https://www.gov.uk/government/publications/fair-deal-policy-and-nhs-pension-scheme

DH had previously indicated that April 2012 would be the commencement date for the application of new Fair Deal to the NHSPS. New Fair Deal participation by employers from April 2012 has been considered by DH on a case-by-case basis taking into account procurement, contracting and value for money considerations, among other factors.

In connection with ongoing contracts, the new Fair Deal policy applies to retenders of contracts involving compulsory transfers of staff who were transferred out of the public sector under old Fair Deal. However, the policy also recognises that there may be circumstances apart from the retender of existing contracts where employers and contracting authorities consider there is an opportunity for such staff to return to the public service pension scheme. In such circumstances, a request may be made to DH to allow eligible staff to return to the NHSPS under a Direction Letter to the employer.

Who is covered under these arrangements?

Q2 - Which staff are covered by New Fair Deal?

A – Staff covered by New Fair Deal includes people transferred out of the public sector under TUPE and other compulsory transfers, such as those to a public service mutual, or another new model of public service delivery. This includes staff who are involved in contracts subsequently renegotiated and where eligible staff are involved in a second generation transfer. Eligible staff being those who are transferred as a result of sub-contracting or termination of a sub-contract, or cease work on the transferred NHS function, but move to other NHS work for that employer for which employees are eligible for NHSPS.

In all cases, where the employer is a non-NHS organisation, a Pension Direction will be issued by NHSPS in respect of eligible staff. An NHS Pension Direction authorised in respect of new Fair Deal will be a 'closed' document i.e. its application will be restricted to those staff listed in the official direction document.

The whole-time or part-time employees named in a Pension Direction under new Fair Deal will be eligible for the NHSPS provided that their minimum engagement time on the transferred NHS function amounts to more than 50% of their employed time for the relevant employer. This 'more than 50% condition' does not have to be met on any one day or week but must be met overall in respect of any complete scheme year. Where employment with the new Fair Deal employer is for less than a scheme year, the 'more than 50% condition' must be met overall in respect of the part year.

Employees named in a Pension Direction who cease work on the transferred NHS function, but move to other NHS work for that employer, can also remain eligible for the NHSPS on the above basis.

If an individual feels they should be included within the scope of the new Fair Deal policy, they need to talk to their employer in the first instance. The employer will need to contact the administrator of the NHS Pensions Scheme, the NHS Business Services Authority (NHS BSA).

New Fair Deal does not apply to transfers within the public sector, such as machinery of government changes, which involve the transfer of staff from one part of Government to another. Those transfers are covered by the Cabinet Office Statement of Practice (COSOP) on staff transfers – the Government is currently reconsidering the COSOP guidance in the light of the reforms to the main public service pension schemes.

Q3 - What action should an employer take if they are receiving staff who are protected under the New Fair Deal?

A – Once you are aware of a TUPE/compulsory transfer situation where employment is being transferred outside the public sector (or any subsequent transfers, as a result of subcontracting or termination of a sub contract) your employees should be able to retain membership of the NHS pension scheme as long as they remain wholly or mainly engaged in NHS work as outlined in the HMT guidance.

Staff transferring from the NHS will be able to retain access to the NHSPS through 'closed' NHS Pension Directions, which are legal documents granted under *Section 7(2) of the Superannuation (Miscellaneous Provisions) Act 1967.* Providers apply for a direction by contacting the NHS BSA. More information, including an application pack is available at the following weblink: http://www.nhsbsa.nhs.uk/2806.aspx

The cost savings generated from being able to access the NHSPS as opposed to the "broadly comparable" route should be agreed and reflected in the final contract price.

How will it be managed and what does it offer?

Q4 – How will HMT and DH know that private sector organisations are applying this to public service work only?

A – The NHSPS is managed through directions and regulations. Training and guidance from the NHS BSA will make clear the control mechanisms that will be required to be in place to ensure that the pension scheme membership entitlement is applied correctly and not used to subsidise private sector work. This will include a legal requirement for employers to declare [annually] which staff continue to be eligible for the NHSPS supported by an audit process.

Q5 - What else will I have to do as an employer in the NHSPS (admin/information requirements, etc)?

A - Like other NHS employers there will be a requirement to comply with the NHSPS Regulations referred to in the Employer's Charter, available at the following weblink: http://www.nhsbsa.nhs.uk/3542.aspx Consideration is being given to a programme of training that can be provided to support independent providers.

Q6 - What other restrictions will there be?

A - HMT has indicated that there will be a need for each public service pension scheme to put in place sensible control mechanisms. This may include measures such as a requirement to provide indemnities, guarantees or bonds to ensure that the taxpayer is protected from liabilities associated with an organisation becoming insolvent and being unable to pay the required contribution costs.

For the NHSPS, the Department of Health will ensure this risk is properly reflected in the NHS standard contracts, general contract and direction documentation – however, NHSPS will normally only require a bond from participating independent sector employers if financial or administrative issues are encountered, e.g. late or non-payment of scheme contributions or a prior history of such problems.

Further details of this are provided in the DH new Fair Deal Guidance for NHS PS and through scheme regulations.

Q7- What is the legal relationship between NHSPS membership and the contract?

A - The contractor will be covered, through regulations and supporting directions, to provide the NHSPS membership to those employed staff defined upon transfer to deliver the access to the NHSPS. This is covered in the 1995 and 2008 main scheme regulations together with Directions made by Secretary of State under sections 7(1) and 7(2) of the Miscellaneous Provisions Act 1967. In addition the DH new Fair Deal Guidance for NHS PS and NHS standard contracts provide further detail to ensure compliance with New Fair Deal and proper reflection in the contractual arrangements.

Q8 – If you do not have a "broadly comparable" pension scheme, can you bid for NHS work on the basis of the New Fair Deal now?

A – Yes. It is expected that organisations will now be bidding for NHS work on the basis of the New Fair Deal, thus the previous barrier that existed has been removed for some potential providers for transferring staff. The HMT guidance also clarifies that where broadly comparable arrangements are currently in place there will be an opportunity to use the NHSPS in the future when those contracts are retendered. This will be clarified further in additional NHSPS New Fair Deal guidance from NHS BSA.

Q9 – Does New Fair Deal cover other terms and conditions other than the basic NHS pension?

A - Yes, access and payment of the standard employer and employee contributions normally confers entitlement to the full range of NHSPS personal and dependents benefits including redundancy benefits, subject to the prior payment of employer early payment charges.

Will there be training?

Q10 – Will there be training provided to inform independent providers what would be required from employers from the NHSPS administration.

A – DH are currently working with the NHS BSA and HMT on the training requirement for New Fair Deal. Certainly, the Employers Charter sets out the roles and responsibilities for both NHS BSA and any employer who has staff in the NHSPS. This is a very useful starting point. Discussion with the Independent Sector Review Group at DH will also consider the training requirement further. NHS BSA are developing a training pack to support organisations who have not previously had access to the NHSPS. This will be made available via their website.

What are the financial implications for our organisation?

Q11 - How much will the NHSPS cost the organisation?

A - Offering access to the NHSPS will actually reduce the costs for TUPE'd/compulsorily transferred staff. Currently a "broadly comparable scheme" adds circa 12% to employers' pensions contributions (over and above the employers' contributions to the NHS pensions scheme). The NHSPS scheme is an unfunded scheme backed by HM Government – which means that the liability is covered by employer and employee contribution rates. The current employer contribution rate is 14%. There should normally be no other liabilities, provided that the organisation remains within the regulatory control mechanisms being set out in regulations.

Q12 – What are the contribution rates for employers and employees?

A - The contribution rates will be the same as those for NHS employers. The employer contribution rate is currently 14%, while the employee contribution rates from April 2014 are based on a tiered approach as set out below -:

Full-time equivalent pensionable pay	Contribution rate
Up to £15,278	5.0%
£15,279 to £21,175	5.6%
£21,176 to £26,557	7.1%
£26,558 to £48,982	9.3%
£48,983 to £69,931	12.5%
£69,932 to £110,273	13.5%
Over £110,273	14.5%

These rates may change from April 2015. The employee rates are currently under consideration and trade unions and employers are involved in that discussion.

Q13 – How might the employer contribution change over time?

A – The valuation outcome has provisionally identified an uplift to 14.3% for the employer contribution from April 2015.

The contribution rates in the NHSPS are set through an actuarial valuation process. Like other NHS employers, there will be a requirement for independent sector providers to comply with any future changes in employer and employee contribution rates based on the process.

Except in relation to NHS commissioning contracts, there is an expectation that any changes in employer contribution rates will be passed through to the contracting authority by way of an adjustment to the service charges due from the contracting authority to the contractor under the relevant contract. Relevant NHS standard contracts will be updated to reflect this requirement.

In the context of NHS commissioning contracts there will be no requirement for any adjustment mechanism to be built into contracts, as it is anticipated that changes in employer contribution rate will be reflected in national tariffs and adjustment factors.

There are governance arrangements in place currently for the NHSPS – these will change over time in line with the requirements of the Public Service Pensions Act 2013 and a Scheme Advisory Board and Pension Board are due to be in place in “shadow” form from June 2014. One of the requirements of the Act, and in line with Lord Hutton’s recommendation, an employer cost cap will be introduced that will provide an automatic mechanism to reduce the employer contribution rate if certain elements of scheme costs increase by more than 2 percentage points. While in practice not all employer costs will be captured by this cap – and so the employer contribution rate may rise by more than 2 percentage points - the contribution rate is still very likely to remain well below the cost of providing a "broadly comparable scheme".

Q14 - I am a social enterprise that has access to the NHSPS via the closed direction, what does this mean in the context of the New Fair Deal?

A - Directions will remain in place as long as they are valid – however going forward where there are compulsory transfers from the NHS they will be covered through the New Fair Deal policy and accompanying DH Guidance and will be provided access under those provisions.

Q15 - How do the New Fair Deal and NHS pension access scheme differ?

A - The New Fair Deal arrangements replace the broad comparability and bulk transfer approach under 'old' Fair Deal, which no longer applies. The New Fair Deal applies to all members of public service pension schemes that transfer out of the public sector under TUPE, and to staff that have previously transferred out of the public sector, and who have remained eligible for the 'old' Fair Deal protection. This includes NHS staff with entitlement to contribute to the NHSPS. Staff that are subsequently transferred to a new employer are also protected under New Fair Deal.

The terms of access to the NHS Pension Scheme was developed in partnership with the Trades Unions, Independent Sector and NHS Employers and builds on the New Fair Deal. It covers the terms of access for non-NHS organisations providing NHS Clinical Services (IPs), where they are delivering services under an APMS contract or a NHS Standard Contract - including services procured under ‘Any Qualified Provider’ and covers both clinical and non-clinical staff delivering the clinical service.

Under the arrangements, IPs can choose from two levels of access or maintain the default position where they comply with the New Fair Deal only as outlined above:
Level 1: Access for existing members: IPs are required to auto-enrol into the NHSPS:

- from the date of commencement as a NHSPS employing authority, all existing eligible staff who were entitled to participate in the NHSPS at any time in the previous 12 months, and
- from the date of recruitment, all new eligible staff who were entitled to participate in the NHSPS at any time in the 12 months before joining

the IP. Staff should be ‘wholly or mainly’ engaged in NHS work to retain access

Level 2: Access for all eligible staff: IPs are required to offer access to all staff who are eligible to join the NHSPS and are ‘wholly or mainly’ engaged in NHS work.

Q16) Will Directions held by Independent providers cease to exist, with employees who were previously covered by them maintaining their membership under the New Fair Deal arrangements?

A - No there will continue to be directions to support Fair Deal policy.

Q17) Will access to public sector schemes for employees under New Fair Deal provide equitable benefits to those employed by public sector employers? For example Independent Providers with closed Direction status cannot currently access some injury benefits and compensation arrangements offered to members of the NHS Pension Scheme employed by NHS Employers.

A - New Fair Deal is about Pension provision – other terms like Injury Benefit and Compensation arrangements will need separate consideration. Injury Benefit provisions are now in agenda for change contractual terms – so it depends on the T&C’s TUPE’d across – however the injury benefit sunset clause would cover for any injury that may have occurred before 1 April 2013. In terms of compensation arrangements - please see the template BSA direction on the BSA website.

Q18) If an employee TUPE transferred from a public body to an independent provider before New Fair Deal was introduced, could staff claim membership of the relevant public sector pension scheme with immediate effect or only if at some point in the future the service is re tendered?

A - The HMT guidance clarifies that changes should happen upon re-tender - and any changes need to be reflected in contract prices.

Q19) Can membership be backdated in any circumstances?

A - This is not usual practice, clarity on the pension position of staff should happen at the point of transfer and be understood by staff and fully reflected in the procurement process and contractual terms/prices. However, there is potential to backdate for 12 month period in exceptional and unique circumstances.

Q20) If so, are there any conditions attached to allowing someone to backdate membership? For example;

i) Must the employer agree to pay Employers contributions to cover the backdated period? Do they have a right to refuse?

Ai) NHS PS membership places certain requirements on the employer laid out in the Employer Charter based on the regulatory requirements. This includes a 14% employer contribution. So yes for any pension entitlement the 14% employer contribution is required and that is a legal requirement not an option.

ii) Will they be able to backdate membership if they were in a broadly comparable occupational pension scheme offered by the employer?

Aii) The expectation is that any change from a broadly comparable pension arrangement would happen at re-tender stage so backdating is not expected. NHS PS specific guidance will be issued in February to support understanding of application.

Q21) Will those staff employed on zero hour contracts be able to join the Scheme?

A - Zero hour contracts are not common in the NHS other than particular situations for example bank staff and these are unlikely to transfer out. Also it is not generally good practice to offer zero hours contract. However if an individual was on a zero hours contract and they were to TUPE/Compulsory transfer out of the NHS and continue to deliver the original public sector work on the same basis, then they would continue to have access to the NHS PS. New staff would not be entitled to join the NHS PS under New Fair Deal. New Fair Deal is like a golden thread linked to a public sector worker who moves out to deliver public sector work under TUPE/Compulsory transfer in a non-public sector body. It sits with that individual and with that public sector role. It moves with them if the work transfers to another provider. It is not there for new staff who did not originate in the NHS.

Q22) How will the relevant pension administration authorities monitor whether employees continue to work wholly or mainly in transferred services? Is self-declaration the only measure?

A - There will be a spot audit provision that BSA will use on a sample number of organisation. HMT have also asked for annual returns on key data as set out in the HMT New Fair Deal guidance and they may flag where they see discrepancies in data or unexpected changes in data.

Q23) How will the amount of a required bond or guarantee be calculated?

A - Under New Fair Deal there is no routine bond requirement, except in circumstances where an organisation has shown itself to be a high risk, either by way of earlier or current contributions default. In such circumstances, the SofS may require a bond, as provided for in regulations below, in respect of some or all of its liabilities under the NHS Scheme. In addition to the specific contribution related requirement below, provision is also made in regulations for the SofS, ultimately to terminate a New Fair Deal Direction, in the event of serious non-compliance with any aspect of the NHS Scheme regulations.

Regulations (contributions etc. bond) extract

(9) The Secretary of State may require an employing authority referred to in paragraph (9A) to have in force a guarantee, indemnity or bond in a form and amount, and provided by a person approved by the Secretary of State, which provides for the payment to the Secretary of State of all of that employing authority's future liabilities under these Regulations (or such liabilities as are specified by the Secretary of State), where that authority—

(a) fails to remit or pay contributions in accordance with the provisions of this regulation, or

(b) has previously so failed to do so.

(9A) Those employing authorities are—

(a) a GMS Practice;

(b) a PMS Practice;

(c) an APMS contractor;

(d) an OOH Provider, or

(e) an employer referred to in paragraph (k) of the definition of an employing authority.

Q24) How will the amount an employer is required to pay to cover any increase in pension liability (where an employee's pay is increased in the years immediately prior to retirement) be calculated? Will the agreed limits applied to increases account for promotion, incremental increase and pay elements such as payment in lieu of annual leave?

A - The Regulations lay out clearly how this will work and be calculated. The virtual cap will be equal to the CPI declared for the Feb immediately prior to any scheme year plus 4.5% (e.g. 7.3% for 2013/14 scheme year). Each of the (up to) four final year's pay prior to retirement will be compared, to identify any increases in the last three of those years that may exceed the virtual cap. NHS Pensions will make this check in-house, by calculating a pensionable pay figure for each of the relevant years prior to retirement, using scheme year pensionable pay figures supplied by NHS PS employers in their annual pension record updates. The virtual cap limit will apply will apply to all pensionable pay, e.g. a clinical excellence award would not be excluded. If the checks reveal that pay in the member's 'best year' for benefit calculation purposes would be higher than the virtual cap described, the employer will be invoiced for the cost of benefits calculated on the excess pay only. The employer charge will be calculated by multiplying the excess pension by an age-related factor supplied by the Scheme Actuary and adding any excess lump sum entitlement. In the case of a previously deferred award involving excess pay, different factors will apply to the excess pension and the excess lump sum calculated will also be multiplied by a separate factor to take account of the period of deferment. The actuarial factors will reflect the cost of the excess benefits to [the scheme as measured using the SCAPE basis and mortality assumptions broadly consistent with those adopted for the most recent actuarial valuation. The factors will be unisex and age specific, and for retirement cases the pension factors are expected initially to range from 23 at age 55 to 17 at age 70.

Regulations (other regulatory non-compliance) extract

Where the Secretary of State is satisfied that the employer has failed to comply with any provision of the Pension Regulations (as modified in this Direction) the Secretary of State may terminate this Direction after giving three months written notice to the employer of an intention to do so.

Need to know more?

Who should I contact if there are key questions?

A –In the first instance we recommend you contact the DH pension policy team: Katie.Kennington@dh.gsi.gov.uk or Imogen.briers@dh.gsi.gov.uk