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STATUTORY INSTRUMENTS

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**2008 No. 794**

**The Employment and Support Allowance Regulations 2008**

**PART 10**

**INCOME AND CAPITAL**

**CHAPTER 7**

**Capital**

**Notional capital**

**115.**—(1) A claimant is to be treated as possessing capital of which the claimant has deprived himself or herself for the purpose of securing entitlement to an employment and support allowance or increasing the amount of that allowance, or for the purpose of securing entitlement to, or increasing the amount of, income support or a jobseeker's allowance except—

- (a) where that capital is derived from a payment made in consequence of any personal injury and is placed on trust for the benefit of the claimant;
- (b) to the extent that the capital which the claimant is treated as possessing is reduced in accordance with regulation 116 (diminishing notional capital rule);
- (c) any sum to which paragraph 43(2)(a) of Schedule 9 (capital to be disregarded) applies which is administered in the way referred to in paragraph 43(1)(a); or
- (d) any sum to which paragraph 44(a) of Schedule 9 refers.

(2) Except in the case of—

- (a) a discretionary trust;
- (b) a trust derived from a payment made in consequence of a personal injury;
- (c) any loan which would be obtainable only if secured against capital disregarded under Schedule 9;
- (d) a personal pension scheme;
- (e) an occupational pension scheme or a payment made by the Board of the Pension Protection Fund where the claimant [<sup>F1</sup>has not attained the qualifying age for state pension credit]; or
- (f) any sum to which paragraph 43(2)(a) of Schedule 9 (capital to be disregarded) applies which is administered in a way referred to in paragraph 43(1)(a); or
- (g) any sum to which paragraph 44(a) of Schedule 9 refers,

any capital which would become available to the claimant upon application being made but which has not been acquired by the claimant is to be treated as possessed by the claimant but only from the date on which it could be expected to be acquired were an application made.

(3) Any payment of capital, other than a payment of capital specified in [<sup>F2</sup>paragraph (5) or (5A)], made to a third party in respect of a single claimant or the claimant's partner (but not a member of the third party's family) is to be treated—

- (a) in a case where that payment is derived from—
  - (i) a payment of any benefit under the benefit Acts;
  - (ii) a payment from the Armed Forces and Reserve Forces Compensation Scheme;
  - (iii) a war disablement pension, war widow's pension or war widower's pension; or
  - (iv) a pension payable to a person as a widow, widower or surviving civil partner under any power of Her Majesty otherwise than under an enactment to make provision about pensions for or in respect of persons who have been disabled or who have died in consequence of service as members of the armed forces of the Crown,
 as possessed by that single claimant, if it is paid to that claimant, or by the claimant's partner, if it is paid to that partner;
- (b) in a case where that payment is a payment of an occupational pension, a pension or other periodical payment made under a personal pension scheme or a payment made by the Board of the Pension Protection Fund, as possessed by that single claimant or, as the case may be, by the claimant's partner;
- (c) in any other case, as possessed by that single claimant or the claimant's partner to the extent that it is used for the food, ordinary clothing or footwear, household fuel, rent for which housing benefit is payable or any housing costs to the extent that they are met under regulation 67(1)(c) and 68(1)(d) (housing costs) of that single claimant or, as the case may be, of the claimant's partner, or is used for any council tax or water charges for which that claimant or partner is liable.

(4) Any payment of capital, other than a payment of capital specified in [<sup>F3</sup>paragraph (5) or (5A)] made to a single claimant or the claimant's partner in respect of a third party (but not in respect of another member of the claimant's family) is to be treated as possessed by that single claimant or, as the case may be, the claimant's partner, to the extent that it is kept or used by that claimant or used by or on behalf of the claimant's partner.

(5) Paragraphs (3) and (4) will not apply in respect of a payment of capital made—

- (a) under [<sup>F4</sup>or by] the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No. 2) Trust, the Fund, the Eileen Trust [<sup>F5</sup>, MFET Limited][<sup>F6</sup>, the Independent Living Fund (2006)], the Skipton Fund [<sup>F7</sup>, the Caxton Foundation][<sup>F8</sup>, the Scottish Infected Blood Support Scheme][<sup>F9</sup>, an approved blood scheme][<sup>F10</sup>, the London Emergencies Trust, the We Love Manchester Emergency Fund ][<sup>F11</sup>, the National Emergencies Trust][<sup>F12</sup>, the Victims of Overseas Terrorism Compensation Scheme] or the London Bombings Relief Charitable Fund;
- (b) pursuant to section 2 of the Employment and Training Act 1973 in respect of a claimant's participation—
  - (i) in an employment programme specified in regulation 75(1)(a)(ii) of the Jobseeker's Allowance Regulations;
  - (ii) in a training scheme specified in regulation 75(1)(b)(ii) of those Regulations; or
  - (iii) in the Intensive Activity Period specified in regulation 75(1)(a)(iv) of those Regulations; or
  - (iv) in a qualifying course within the meaning specified in regulation 17A(7) of those Regulations;
- [<sup>F13</sup>(ba) in respect of a person's participation in [<sup>F14</sup>a scheme prescribed in regulation 3 of the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013] or the Mandatory Work Activity Scheme;]

- (c) under an occupational pension scheme, in respect of a pension or other periodical payment made under a personal pension scheme or a payment made by the Board of the Pension Protection Fund where—
- (i) a bankruptcy order has been made in respect of the person in respect of whom the payment has been made or, in Scotland, the estate of that person is subject to sequestration or a judicial factor has been appointed on that person's estate under section 41 of the Solicitors (Scotland) Act 1980;
  - (ii) the payment is made to the trustee in bankruptcy or any other person acting on behalf of the creditors; and
  - (iii) the person referred to in paragraph (i) and that person's partner (if any) does not possess, or is not treated as possessing, any other income apart from that payment.

[<sup>F15</sup>(5A) Paragraphs (3) and (4) do not apply in respect of [<sup>F16</sup>any of the following payments of income—

- (a) a Grenfell Tower payment;
- (b) a child abuse payment;
- (c) a Windrush payment.]
- [ a Post Office compensation payment;
- <sup>F17</sup>(d)
- (e) a vaccine damage payment.]]

(6) Where a claimant stands in relation to a company in a position analogous to that of a sole owner or partner in the business of that company, the claimant is to be treated as if that claimant were such sole owner or partner and in such a case—

- (a) the value of the claimant's holding in that company, notwithstanding regulation 111 (calculation of capital), is to be disregarded; and
- (b) the claimant will, subject to paragraph (7), be treated as possessing an amount of capital equal to the value or, as the case may be, the claimant's share of the value of the capital of that company and the foregoing provisions of this Chapter are to apply for the purposes of calculating that amount as if it were actual capital which the claimant does possess.

(7) For so long as the claimant undertakes activities in the course of the business of the company, the amount which the claimant is treated as possessing under paragraph (6) is to be disregarded.

(8) Where a claimant is treated as possessing capital under any of paragraphs (1) to (6), the foregoing provisions of this Chapter are to apply for the purposes of calculating its amount as if it were actual capital which the claimant does possess.

(9) For the avoidance of doubt a claimant is to be treated as possessing capital under paragraph (1) only if the capital of which the claimant has deprived himself or herself is actual capital.

#### Textual Amendments

- F1** Words in reg. 115(2)(e) substituted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(6)**
- F2** Words in reg. 115(3) substituted (15.7.2020) by [The Social Security \(Income and Capital\) \(Miscellaneous Amendments\) Regulations 2020 \(S.I. 2020/618\)](#), regs. 1, **7(5)(a)**
- F3** Words in reg. 115(4) substituted (15.7.2020) by [The Social Security \(Income and Capital\) \(Miscellaneous Amendments\) Regulations 2020 \(S.I. 2020/618\)](#), regs. 1, **7(5)(b)**
- F4** Words in reg. 115(5)(a) inserted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(5)(c)**

- F5** Words in reg. 115(5)(a) inserted (6.4.2010) by The Social Security (Miscellaneous Amendments) (No. 2) Regulations 2010 (S.I. 2010/641), regs. 1(1), **12(3)(d)**
- F6** Words in reg. 115(5)(a) substituted (27.10.2008) by The Employment and Support Allowance (Miscellaneous Amendments) Regulations 2008 (S.I. 2008/2428), regs. 1(2), **8(8)**
- F7** Words in reg. 115(5)(a) inserted (31.10.2011) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2011 (S.I. 2011/2425), regs. 1(2), **23(9)**
- F8** Words in reg. 115(5)(a) inserted (3.4.2017) by The Social Security (Scottish Infected Blood Support Scheme) Regulations 2017 (S.I. 2017/329), regs. 1, **8(3)(c)**
- F9** Words in reg. 115(5)(a) inserted (23.10.2017) by The Social Security (Infected Blood and Thalidomide) Regulations 2017 (S.I. 2017/870), regs. 1, **8(3)(c)**
- F10** Words in reg. 115(5)(a) inserted (19.6.2017) by The Social Security (Emergency Funds) (Amendment) Regulations 2017 (S.I. 2017/689), regs. 1, **8(3)(c)**
- F11** Words in reg. 115(5)(a) inserted (15.7.2020) by The Social Security (Income and Capital) (Miscellaneous Amendments) Regulations 2020 (S.I. 2020/618), regs. 1, **7(5)(c)**
- F12** Words in reg. 115(5)(a) inserted (27.10.2023) by The Social Security (Habitual Residence and Past Presence, and Capital Disregards) (Amendment) Regulations 2023 (S.I. 2023/1144), regs. 1(1), **8(3)(b)**
- F13** Reg. 115(5)(ba) inserted (5.8.2011) by The Social Security (Miscellaneous Amendments) (No. 2) Regulations 2011 (S.I. 2011/1707), regs. 1, **4(6)(7)**
- F14** Words in reg. 115(5)(ba) substituted (12.2.2013) by The Jobseeker s Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 (S.I. 2013/276), regs. 1, **15(b)**
- F15** Reg. 115(5A) inserted (15.7.2020) by The Social Security (Income and Capital) (Miscellaneous Amendments) Regulations 2020 (S.I. 2020/618), regs. 1, **7(5)(d)**
- F16** Words in reg. 115(5A) substituted (1.1.2022) by The Social Security (Income and Capital Disregards) (Amendment) Regulations 2021 (S.I. 2021/1405), regs. 1, **7(5)**
- F17** Reg. 115(5A)(d)(e) inserted (9.7.2023) by The Social Security (Income and Capital Disregards) (Amendment) Regulations 2023 (S.I. 2023/640), regs. 1(1), **7(5)**

**Changes to legislation:**

There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008, Section 115.