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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**

**Capital limit**

**110.** For the purposes of paragraph 6(1)(b) of Schedule 1 to the Act as it applies to an income-related allowance (no entitlement to benefit if capital exceeds prescribed amount), the prescribed amount is £16,000.

**Calculation of capital**

**111.**—(1) For the purposes of [F<sup>1</sup>sections 1(2)] and 4 of, and Part 2 of Schedule 1 to, the Act as it applies to an income-related allowance, the capital of a claimant to be taken into account is, subject to paragraph (2), to be the whole of the claimant's capital calculated in accordance with this Part and any income treated as capital under regulation 112 (income treated as capital).

(2) There is to be disregarded from the calculation of a claimant's capital under paragraph (1) any capital, where applicable, specified in Schedule 9.

**Textual Amendments**

**F1** Words in reg. 111(1) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), 8(7)

**Income treated as capital**

**112.**—(1) Any bounty derived from employment to which regulation 43(1)(e) and paragraph 12 of Schedule 7 apply and paid at intervals of at least one year is to be treated as capital.

(2) Any amount by way of a refund of income tax paid in respect of, or deducted from, profits or income chargeable to tax under the provisions in Part 2 of the Income Tax (Trading and Other Income) Act 2005 <sup>F2</sup> or Part 2 of the Income Tax (Earnings and Pensions) Act 2003 <sup>F3</sup> is to be treated as capital.

(3) Any holiday pay which is not earnings under regulation 95(1)(d) (earnings of employed earners) is to be treated as capital.

(4) Except any income derived from capital disregarded under paragraph 1, 2, 4 to 8, 10, 16, 43 or 44 of Schedule 9, any income derived from capital is to be treated as capital but only from the date it is normally due to be credited to the claimant's account.

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(5) In the case of employment as an employed earner, any advance of earnings or any loan made by the claimant's employer is to be treated as capital.

(6) Any payment under section 30 of the Prison Act 1952 <sup>F4</sup> (payments for discharged prisoners) or allowance under section 17 of the Prisons (Scotland) Act 1989 <sup>F5</sup> (allowances to prisoners on discharge) is to be treated as capital.

(7) Any charitable or voluntary payment which is not made or not due to be made at regular intervals, other than one to which paragraph (8) applies, is to be treated as capital.

(8) This paragraph applies to a payment which is made under [<sup>F6</sup>or by] the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No. 2) Trust, the Fund, the Eileen Trust<sup>F7</sup>, MFET Limited<sup>F8</sup>, the Skipton Fund, the Caxton Foundation] or [<sup>F9</sup>the Independent Living Fund (2006)].

(9) Any arrears of subsistence allowance which are paid to a claimant as a lump sum are to be treated as capital.

#### Textual Amendments

- F2** 2005 c. 5.
- F3** 2003 c. 1.
- F4** 1952 c. 52. Section 30 was substituted by the [Criminal Justice Act 1967 \(c. 80\)](#), **section 66(3)**.
- F5** 1989 c. 45.
- F6** Words in reg. 112(8) inserted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(5)(b)**
- F7** Words in reg. 112(8) inserted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(3)(c)**
- F8** Words in reg. 112(8) inserted (31.10.2011) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2011 \(S.I. 2011/2425\)](#), regs. 1(2), **23(8)**
- F9** Words in reg. 112(8) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), **8(5)**

#### Calculation of capital in the United Kingdom

**113.** Capital which a claimant possesses in the United Kingdom is to be calculated at its current market or surrender value less—

- (a) where there would be expenses attributable to sale, 10%; and
- (b) the amount of any incumbrance secured on it.

#### Calculation of capital outside the United Kingdom

**114.** Capital which a claimant possesses in a country outside the United Kingdom is to be calculated—

- (a) in a case in which there is no prohibition in that country against the transfer to the United Kingdom of an amount equal to its current market or surrender value in that country, at that value;
- (b) in a case where there is such a prohibition, at the price which it would realise if sold in the United Kingdom to a willing buyer,

less, where there would be expenses attributable to sale, 10% and the amount of any incumbrance secured on it.

## 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>F10</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 paragraph (5), 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

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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 paragraph (5) 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>[F11]</sup>or by] the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No. 2) Trust, the Fund, the Eileen Trust<sup>[F12]</sup>, MFET Limited<sup>[F13]</sup>, the Independent Living Fund (2006)], the Skipton Fund<sup>[F14]</sup>, the Caxton Foundation] 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>[F15]</sup>(ba) in respect of a person's participation in <sup>[F16]</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.

(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

- F10** 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)**
- F11** 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)**
- F12** 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)**
- F13** 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)**
- F14** 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)**
- F15** 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)**
- F16** 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)**

#### Diminishing notional capital rule

**116.**—(1) Where a claimant is treated as possessing capital under regulation 115(1) (notional capital), the amount which the claimant is treated as possessing—

- (a) in the case of a week that is subsequent to—
- (i) the relevant week in respect of which the conditions set out in paragraph (2) are satisfied; or
  - (ii) a week which follows that relevant week and which satisfies those conditions, is to be reduced by an amount determined under paragraph (2);
- (b) in the case of a week in respect of which paragraph (1)(a) does not apply but where—
- (i) that week is a week subsequent to the relevant week; and
  - (ii) that relevant week is a week in which the condition in paragraph (3) is satisfied, is to be reduced by the amount determined under paragraph (3).

(2) This paragraph applies to a benefit week or part-week where the claimant satisfies the conditions that—

- (a) the claimant is in receipt of an income-related allowance; and
- (b) but for regulation 115(1), the claimant would have received an additional amount of an income-related allowance in that benefit week or, as the case may be, that part-week,

and in such a case, the amount of the reduction for the purposes of paragraph (1)(a) is to be equal to that additional amount.

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(3) Subject to paragraph (4), for the purposes of paragraph (1)(b) the condition is that the claimant would have been entitled to an income-related allowance in the relevant week, but for regulation 115(1), and in such a case the amount of the reduction is to be equal to the aggregate of—

- (a) the amount of an income-related allowance to which the claimant would have been entitled in the relevant week but for regulation 115(1); and for the purposes of this sub-paragraph if the relevant week is a part-week that amount is to be determined by dividing the amount of an income-related allowance to which the claimant would have been so entitled by the number equal to the number of days in the part-week and multiplying the quotient by 7;
- (b) the amount of housing benefit (if any) equal to the difference between the claimant's maximum housing benefit and the amount (if any) of housing benefit which the claimant is awarded in respect of the benefit week, within the meaning of regulation 2(1) of the Housing Benefit Regulations 2006 <sup>F17</sup> (interpretation), which includes the last day of the relevant week;
- (c) the amount of council tax benefit (if any) equal to the difference between the claimant's maximum council tax benefit and the amount (if any) of council tax benefit which the claimant is awarded in respect of the benefit week which includes the last day of the relevant week, and for this purpose “benefit week” [<sup>F18</sup>means a period of 7 consecutive days beginning on a Monday and ending on a Sunday].

(4) The amount determined under paragraph (3) is to be re-determined under that paragraph if the claimant makes a further claim for an income-related allowance and the conditions in paragraph (5) are satisfied, and in such a case—

- (a) sub-paragraphs (a) to (c) of paragraph (3) will apply as if for the words “relevant week” there were substituted the words “relevant subsequent week”; and
- (b) subject to paragraph (6), the amount as re-determined is to have effect from the first week following the relevant subsequent week in question.

(5) The conditions are that—

- (a) a further claim is made 26 or more weeks after—
  - (i) the date on which the claimant made a claim for an income-related allowance in respect of which the claimant was first treated as possessing the capital in question under regulation 115(1);
  - (ii) in a case where there has been at least one re-determination in accordance with paragraph (4), the date on which the claimant last made a claim for an income-related allowance which resulted in the weekly amount being re-determined; or
  - (iii) the date on which the claimant last ceased to be in receipt of an income-related allowance;

whichever last occurred; and

- (b) the claimant would have been entitled to an income-related allowance but for regulation 115(1).

(6) The amount as re-determined pursuant to paragraph (4) is not to have effect if it is less than the amount which applied in that case immediately before the re-determination and in such a case the higher amount is to continue to have effect.

(7) For the purposes of this regulation—

“part-week” means a period to which Part 14 (periods of less than a week) applies;

“relevant week” means the benefit week or part-week in which the capital in question of which the claimant has deprived himself or herself within the meaning of regulation 115(1)—

- (a) was first taken into account for the purpose of determining the claimant's entitlement to an income-related allowance, a jobseeker's allowance or income support; or

- (b) was taken into account on a subsequent occasion for the purpose of determining or re-determining the claimant's entitlement to an income-related allowance, a jobseeker's allowance or income support on that subsequent occasion and that determination or re-determination resulted in the claimant's beginning to receive, or ceasing to receive, an income-related allowance, a jobseeker's allowance or income support;

and where more than one benefit week or part-week is identified by reference to paragraphs (a) and (b) of this definition the later or latest such benefit week or, as the case may be, the later or latest such part-week;

“relevant subsequent week” means the benefit week or part-week which includes the day on which the further claim or, if more than one further claim has been made, the last such claim was made.

#### Textual Amendments

**F17** S.I. 2006/213.

**F18** Words in reg. 116(3)(c) substituted (1.4.2013) by [The Council Tax Benefit Abolition \(Consequential Provision\) Regulations 2013 \(S.I. 2013/458\)](#), reg. 1, [Sch. 2 para. 8](#)

#### Capital jointly held

**117.** Except where a claimant possesses capital which is disregarded under regulation 115(6) (notional capital), where a claimant and one or more persons are beneficially entitled in possession to any capital asset they are to be treated as if each of them were entitled in possession to the whole beneficial interest therein in an equal share and the foregoing provisions of this Chapter are to apply for the purposes of calculating the amount of capital which the claimant is treated as possessing as if it were actual capital which the claimant does possess.

#### Calculation of tariff income from capital

**118.—**(1) Except where the circumstances prescribed in paragraph (3) apply to the claimant, where the claimant's capital calculated in accordance with this Part exceeds £6,000 it is to be treated as equivalent to a weekly income of £1 for each complete £250 in excess of £6,000 but not exceeding £16,000.

(2) Where the circumstances prescribed in paragraph (3) apply to the claimant and that claimant's capital calculated in accordance with this Part exceeds £10,000, it is to be treated as equivalent to a weekly income of £1 for each complete £250 in excess of £10,000 but not exceeding £16,000.

(3) For the purposes of paragraph (2) the prescribed circumstances are that the claimant lives permanently in—

- (a) a care home or an independent hospital;
- (b) an Abbeyfield Home; or
- (c) accommodation provided under section 3 of, and Part 2 of the Schedule to, the Polish Resettlement Act 1947 <sup>F19</sup> (provision of accommodation in camps) where the claimant requires personal care by reason of old age, disablement, past or present dependence on alcohol or drugs, past or present mental disorder or a terminal illness and the care is provided in the home.

(4) For the purposes of paragraph (3), a claimant is to be treated as living permanently in such home, hospital or accommodation where the claimant is absent—

- (a) from a home, hospital or accommodation referred to in sub-paragraph (a) or (b) of paragraph (3)—

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- (i) in the case of a claimant over pensionable age, for a period not exceeding 52 weeks;  
and
  - (ii) in any other case, for a period not exceeding 13 weeks;
  - (b) from accommodation referred to in sub-paragraph (c) of paragraph (3), where the claimant, with the agreement of the manager of the accommodation, intends to return to the accommodation in due course.
- (5) Notwithstanding paragraphs (1) and (2), where any part of the excess is not a complete £250 that part is to be treated as equivalent to a weekly income of £1.
- (6) For the purposes of paragraphs (1) and (2), capital includes any income treated as capital under [<sup>F20</sup>regulation 112 (income treated as capital)].

#### **Textual Amendments**

- F19** 1947 c. 19. Section 3 of and Part 2 of the Schedule to, the 1947 Act have been amended by S.I. 1968/1699, the [Supplementary Benefit Act 1966 \(c. 20\)](#), [section 39\(1\)](#) and paragraph 3 of Schedule 6, [Supplementary Benefits Act 1976 \(c. 71\)](#), [section 35\(1\)](#) and (2) and paragraph 4 of Schedule 6 and paragraph 1 of Schedule 7, the [Social Security Act 1980 \(c. 30\)](#), [sections 20](#) and 21(4) and paragraph 1 of Schedule 4 and Part 2 of Schedule 5 and the [Criminal Justice Act 2003 \(c. 44\)](#), [section 304](#) and paragraph 154 of Schedule 32.
- F20** Words in reg. 118(6) substituted (27.10.2008) by [The Employment and Support Allowance \(Miscellaneous Amendments\) Regulations 2008 \(S.I. 2008/2428\)](#), regs. 1(2), [20\(6\)](#)



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