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## STATUTORY INSTRUMENTS

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# 2017 No. 958

## The NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017

### PART 1

#### Introductory

#### Citation, commencement and application

1.—(1) This Order may be cited as the NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017 and comes into force on 1st November 2017.

(2) This Order applies in relation to England only.

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#### Commencement Information

**11** Art. 1 in force at 1.11.2017, see [art. 1\(1\)](#)

#### Interpretation

2. In this Order—

**F1**  
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“the Authority” means the NHS Counter Fraud Authority established pursuant to article 3;

“the BSA” means the NHS Business Services Authority<sup>(1)</sup>;

“changes in the workforce” includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the Employment Rights Act 1996<sup>(2)</sup>);

“counter fraud functions” means, in relation to the Authority, the functions the Authority is to exercise pursuant to article 4(1), (3) and (4);

“the NHS Act” means the National Health Service Act 2006;

“the transfer date” means 1st November 2017;

“the transitional period” means the period beginning on 1st November 2017 and ending immediately before 1st November 2018.

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(1) The NHS Business Services Authority is a Special Health Authority established by the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) Order 2005, [SI 2005/2414](#). That Order has effect as if made under section 28 of the National Health Service Act 2006 in relation to England, and section 22 of the National Health Service (Wales) Act 2006 ([c. 42](#)) in relation to Wales, by virtue of section 4 of, and paragraphs 1 and 2 of Part 1 of Schedule 2 to, the National Health Service (Consequential Provisions) Act 2006 ([c. 43](#)).

(2) [1996 c. 18](#). There are no relevant amendments to section 139.

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#### Textual Amendments

- F1** Words in [art. 2](#) omitted (1.7.2022) by virtue of [Health and Care Act 2022 \(c. 31\)](#), [ss. 86\(2\)\(a\)](#), [186\(6\)](#); [S.I. 2022/734](#), [reg. 2\(a\)](#), [Sch.](#) (with [regs. 13, 29, 30](#))
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#### Commencement Information

- I2** Art. 2 in force at 1.11.2017, see [art. 1\(1\)](#)

## PART 2

### Establishment and Constitution

#### Establishment

**3.** The special health authority to be known as the NHS Counter Fraud Authority is established by and in accordance with this Order.

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#### Commencement Information

- I3** Art. 3 in force at 1.11.2017, see [art. 1\(1\)](#)

#### Functions

**4.—(1)** The Authority is to exercise the functions of the Secretary of State in respect of counter fraud which are identified in paragraph (2), subject to and in accordance with this article and directions to the Authority given by the Secretary of State.

(2) The counter fraud functions the Authority is to exercise are—

- (a) taking action for the purpose of preventing, detecting or investigating fraud, corruption or other unlawful activities, carried out against or otherwise affecting the health service in England;
- (b) taking action for the purpose of preventing, detecting or investigating fraud, corruption or other unlawful activities against or otherwise affecting the Secretary of State in relation to his responsibilities for the health service in England;
- (c) operational matters relating to the functions described in (a) and (b);
- (d) providing advice to bodies and persons identified in directions given by the Secretary of State to the Authority about matters relevant to counter fraud.

(3) Schedule 1 has effect, providing for directions to the Authority as to the exercise by the Authority and its senior officers of the Secretary of State’s functions under sections 197(3) (notice requiring production of documents) and 198 (production of documents) of the NHS Act (“delegated functions”) and making further provision pursuant to section 199(4) in connection with the exercise of those delegated functions.

(4) The Authority has the function of assisting and providing information to the Secretary of State when requested in relation to matters relevant to counter fraud.

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(3) Section 197 was amended by section 55(1) of, and paragraph 105 of Part 9 of Schedule 4 to, the Health and Social Care Act 2012.

(5) Nothing in this Order prevents the Authority from undertaking activity in accordance with arrangements made with it by Welsh Ministers pursuant to section 83 of the Government of Wales Act 2006(4).

(6) In this article—

“counter fraud” refers to the actions which may be taken in performance of the Secretary of State’s counter fraud functions described in section 195(2) of the NHS Act;

“investigating” has the meaning given in section 195(5) of the NHS Act.

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#### Commencement Information

**I4** Art. 4 in force at 1.11.2017, see [art. 1\(1\)](#)

### Constitution and Governance

5.—(1) Subject to paragraph (2), the Authority is to consist of—

- (a) a chairperson;
- (b) in addition to the chairperson, not less than three members who are not officers of the Authority; and
- (c) at least two but not more than three members who are officers of the Authority, and those officer members must include the persons who for the time being hold the offices of chief executive and director of finance.

(2) During the transitional period, the Authority need consist only of—

- (a) a chairperson;
- (b) one other member who is not an officer of the Authority;
- (c) an officer member appointed to act as chief executive of the Authority;
- (d) an officer member appointed to act as director of finance of the Authority.

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#### Commencement Information

**I5** Art. 5 in force at 1.11.2017, see [art. 1\(1\)](#)

### Appointments and tenure, etc

6. Schedule 2 has effect in respect of the appointment and tenure of the chairperson and other members of the Authority, of the appointment and tenure of officers of the Authority, including the making of certain temporary appointments in respect of the transitional period, and as to procedural matters relating to the conduct of the Authority’s business.

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#### Commencement Information

**I6** Art. 6 in force at 1.11.2017, see [art. 1\(1\)](#)

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(4) 2006 c. 32. Section 83(1)(c) was amended by section 4(2)(a) of the Wales Act 2014 (c. 29).

## PART 3

Transfer of Staff and Property etc from the NHS Business Service Authority and provisions for continuity in relation to the work of NHS Protect and the Authority

### Interpretation

7.—(1) In this Part—

- (a) “liabilities” do not include criminal liabilities (other than in paragraph (2));
- (b) “NHS Protect” means the division within the BSA known as the Counter Fraud and Security Management Service Division, and also known as NHS Protect, maintained by the BSA in accordance with directions of the Secretary of State given on 1st June 2016<sup>(5)</sup>.

(2) This Part does not apply to transfer, or provide for continuity in relation to, criminal liabilities of the BSA or proceedings arising from such liabilities.

### Commencement Information

I7 Art. 7 in force at 1.11.2017, see [art. 1\(1\)](#)

### Transfer of officers from the BSA to the Authority

8.—(1) This article applies to any person who—

- (a) immediately before the transfer date is employed by the BSA within NHS Protect; and
- (b) has been notified in writing by the BSA before the transfer date that they are to be transferred to the employment of the Authority on the transfer date.

(2) Any person to whom paragraph (1) applies is, on the transfer date, transferred to the employment of the Authority.

(3) The contract of employment of a person whose employment transfers to the Authority under paragraph (2)—

- (a) is not terminated by the transfer; and
- (b) has effect from the transfer date as if originally made between that person and the Authority.

(4) Without prejudice to paragraph (3)—

- (a) all the rights, powers, duties and liabilities of the BSA under, or in connection with, the contract of employment of any person whose employment transfers under paragraph (2), are to transfer to the Authority on the transfer date;
- (b) any act or omission before the transfer date of or in relation to the BSA, in respect of that person, or that person’s contract of employment, is deemed to have been an act or omission of or in relation to the Authority.

(5) Paragraphs (2) to (4) do not operate to transfer the contract of employment of a person to whom paragraph (1) applies, or any rights, powers, duties and liabilities under, or in connection with that contract, if, before the transfer date, that person informed the BSA that the person objects to becoming employed by the Authority.

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(5) The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) Directions 2016, a copy of which can be found at: [https://www.nhsbsa.nhs.uk/sites/default/files/2017-02/Section\\_2\\_-\\_B1\\_NHSBSA\\_Directions\\_2016.pdf](https://www.nhsbsa.nhs.uk/sites/default/files/2017-02/Section_2_-_B1_NHSBSA_Directions_2016.pdf), or may be obtained by writing to the Department of Health Correspondence Unit, Richmond House, 79 Whitehall, London SW1A 2NS.

(6) Where a person to whom paragraph (1) applies has objected to the transfer of that person's contract of employment to the Authority as described in paragraph (5), this article operates so as to terminate that person's contract of employment with the BSA on the transfer date.

(7) Subject to paragraph (8), a person whose contract of employment is terminated in accordance with paragraph (6) is not to be treated, for any purpose, as having been dismissed by the BSA.

(8) Where the transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose employment is or would have transferred under paragraph (2), that person may treat the contract of employment as having been terminated, and that person is to be treated for any purpose as having been dismissed by the employer.

(9) No damages are to be payable by an employer as a result of a dismissal falling within paragraph (8) in respect of any failure by the employer to pay wages to a person in respect of a notice period which the person has failed to work.

(10) Paragraphs (2), (3) and (5) to (8) are without prejudice to any right of a person arising apart from this article to terminate that person's contract of employment without notice in acceptance of a repudiatory breach of contract by the employer.

(11) Records of the BSA's relating to the employment of officers within NHS Protect whose contracts of employment are to transfer to the Authority pursuant to this article are to transfer to the Authority on the transfer date.

(12) Where a person whose contract of employment is transferred by this article is dismissed by the Authority, that person is to be treated, for the purposes of Part 10 of the Employment Rights Act 1996<sup>(6)</sup> (unfair dismissal) as having been unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

(13) This paragraph applies where the sole or principal reason for a person's dismissal is an economic, technical or organisational reason entailing changes in the workforce of the Authority after the transfer.

(14) Where paragraph (13) applies, paragraph (12) does not apply and, without prejudice to section 98(4) of the Employment Rights Act 1996 (test of fair dismissal)<sup>(7)</sup>, for the purposes of sections 98(1) (reason for dismissal) and 135 (the right to a redundancy payment) of that Act—

- (a) the dismissal is to be regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
- (b) in any other case, the dismissal is to be regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position that the employee held.

(15) Paragraph (12) does not apply in relation to a dismissal of an employee if the application of section 94 of the Employment Rights Act 1996 (right not to be unfairly dismissed) to that dismissal is excluded by or under any provision of that Act, the Employment Tribunals Act 1996<sup>(8)</sup> or the Trade Union and Labour Relations (Consolidation) Act 1992<sup>(9)</sup>.

(16) The following provisions apply only for purposes of giving effect to a transfer under paragraph (2), as read with paragraphs (3) and (4), and are subject to paragraphs (5) to (10) and (12) to (15)—

- (a) anything (including legal proceedings) which, immediately before the transfer date, is in the process of being done by, or in relation to, the BSA in connection with the employment

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<sup>(6)</sup> 1996 c. 18.

<sup>(7)</sup> Section 98 was amended by sections 9 and 44 of, and paragraphs 5 and 15 of Schedule 4 and table 2 of Schedule 9 to, the Employment Relations Act 1999 (c. 26); by section 53 of, and paragraphs 24 and 32 of Schedule 7 to, the Employment Act 2002 (c. 22); by section 57(1) of, and paragraph 30 of Schedule 1 to, the Employment Relations Act 2004 (c. 24); and by SI 2006/1031 and 2011/1069.

<sup>(8)</sup> 1996 c. 17.

<sup>(9)</sup> 1992 c. 52.

of persons whose employment transfers under paragraph (2) is deemed to have effect as if done by, or in relation to, the Authority, and may be continued by, or in relation to, the Authority;

- (b) any instrument made by, or in relation to, the BSA in connection with the employment of persons whose employment transfers under paragraph (2) continues in force until it is varied or revoked by the Authority;
- (c) any form supplied by NHS Protect in connection with the employment of persons whose employment transfers under paragraph (2) continues to be valid until it is varied or revoked by the Authority and as if any reference in that form to NHS Protect or the BSA (in respect of that employment) were a reference to the Authority;
- (d) any reference to NHS Protect or the BSA in any contract, arrangement, agreement, instrument or other document in connection with the employment of persons whose employment transfers under paragraph (2) is to be treated as a reference to the Authority.

#### Commencement Information

**I8** Art. 8 in force at 1.11.2017, see [art. 1\(1\)](#)

#### Transfer of property from the BSA to the Authority

**9.—(1)** Subject to paragraph (4), the items of property of the BSA identified in the document entitled “*The NHS Business Services Authority Transfer of Property to the NHS Counter Fraud Authority Agreement 2017*” and signed on behalf of the BSA and of the Secretary of State on 26th September 2017, are to be transferred to the Authority on the transfer date.

(2) All liabilities (actual or contingent) of the BSA relating to the property referred to in paragraph (1) are to be transferred to the Authority on the transfer date.

(3) Any right relating to the property referred to in paragraph (1) that was immediately before the transfer date enforceable by or against the BSA is, on or after the transfer date, to be enforceable by or against the Authority.

(4) Paragraph (1)—

- (a) does not apply to transfer property taking the form of a contract of employment but does apply to transfer any other form of property listed in the document mentioned in that paragraph, including—
  - (i) an agreement or contract, including a contract for services;
  - (ii) a licence to occupy premises;
  - (iii) intellectual property including case management records and databases;
- (b) is without prejudice to any other arrangements the BSA may make with the Authority and any third parties for the transfer of property not transferred by virtue of this Order.

#### Commencement Information

**I9** Art. 9 in force at 1.11.2017, see [art. 1\(1\)](#)

#### Transfer of data, records and information from the BSA to the Authority

**10.** So far as not already transferred by virtue of article 8 or 9, any data, record or information held by NHS Protect which, before the transfer date, NHS Protect used for purposes of any of the functions that the Authority is to exercise in accordance with article 4, is to transfer to the Authority.

### Commencement Information

**I10** Art. 10 in force at 1.11.2017, see [art. 1\(1\)](#)

### Transfer of certain BSA liabilities

**11.—(1)** All liabilities (actual or contingent) of the BSA relating to relevant functions are to transfer to the Authority on the transfer date.

(2) Any right relating to a relevant function that was immediately before the transfer date enforceable by or against the BSA is, on or after the transfer date, to be enforceable by or against the Authority.

(3) In this article, “relevant function” means any function of the Secretary of State which was exercisable by NHS Protect before the transfer date and which the Authority is to exercise pursuant to article 4.

### Commencement Information

**I11** Art. 11 in force at 1.11.2017, see [art. 1\(1\)](#)

### Supplementary provisions

**12.—(1)** In this article the following matters are “relevant matters”—

- (a) the relevant functions as defined in article 11(3);
- (b) any property, rights or liabilities transferred by virtue of article 9, 10 or 11; or
- (c) any contract, arrangement or agreement entered into by the BSA in connection with any property, rights or liabilities transferred by virtue of articles 9, 10 or 11.

(2) Any act or omission of, or in relation to, the BSA before the transfer date in connection with the relevant matters is deemed to have been an act or omission of, or in relation to, the Authority.

(3) Anything (including legal proceedings) which, immediately before the transfer date, is in the process of being done by, or in relation to, the BSA in connection with the relevant matters is deemed to have effect as if done by, or in relation to, the Authority, and may be continued by, or in relation to, the Authority.

(4) Any instrument made by, or in relation to, the BSA in connection with the relevant matters continues in force until it is varied or revoked by the Authority.

(5) Any form supplied by NHS Protect in connection with the relevant matters continues to be valid until it is varied or revoked by the Authority and as if any reference in that form to the NHS Protect or the BSA (in respect of the relevant matters) were a reference to the Authority.

(6) Any reference to NHS Protect or the BSA in any contract, arrangement, agreement, instrument or other document in connection with the relevant matters is to be treated as a reference to the Authority.

(7) Where the rights and liabilities under a contract, agreement, arrangement or instrument entered into or agreed by the BSA are transferred as a consequence of this Part, that contract, agreement, arrangement or instrument is to continue to have effect on or after the transfer date as if it were originally entered into by the Authority.

(8) No right to terminate or vary a contract, agreement, arrangement or instrument is to operate or become exercisable, and no provision of any contract, agreement, arrangement or instrument is

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**Changes to legislation:** There are currently no known outstanding effects for the The NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017. (See end of Document for details)

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to operate or become exercisable or be contravened, by reason of the transfer of any property, rights or liabilities by virtue of article 9, 10 or 11.

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**Commencement Information**

**I12** Art. 12 in force at 1.11.2017, see [art. 1\(1\)](#)

**F2** PART 4

Abolition of the Authority

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**Textual Amendments**

**F2** Pt. 4 omitted (1.7.2022) by virtue of [Health and Care Act 2022 \(c. 31\)](#), [ss. 86\(2\)\(b\)](#), 186(6); S.I. 2022/734, reg. 2(a), Sch. (with regs. 13, 29, 30)

PART 5

Revocation of Regulations

**Revocation of Regulations delegating functions under Part 10 of the NHS Act 2006**

**14.** The National Health Service Delegation of Functions to the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Counter Fraud and Security Management) Regulations 2008(**10**) are revoked.

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**Commencement Information**

**I13** Art. 14 in force at 1.11.2017, see [art. 1\(1\)](#)

Signed by authority of the Secretary of State for Health.

*O'Shaughnessy*  
Parliamentary Under-Secretary of State,  
Department of Health



**Changes to legislation:**

There are currently no known outstanding effects for the The NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017.