



# **NHS Standard Contract**

**Fair deal for staff pensions**

**Draft template schedule 7 and  
accompanying guidance**

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## **Fair Deal for Staff Pensions**

### **Draft Template Schedule 7 and Accompanying Guidance**

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## Introduction

Schedule 7 is designed to implement HM Treasury guidance published in October 2013 entitled “Fair Deal for staff pensions: staff transfer from central government”. That guidance is referred to as “Fair Deal for Staff Pensions” in the Schedule and the remainder of this guidance

The Schedule will be required in any new Contract where as a result of the award of that Contract, there is a transfer of staff under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and EC Council Directive 77/187 (as amended) (or staff are treated as having so transferred under the Cabinet Office Statement of Practice Staff Transfers in the Public Sector published in January 2000 (defined as “COSOP” in the General Conditions)).

The Schedule is designed to protect, and therefore is only required where, the transferring staff have originated from an NHS Body or other employer with a right to membership of the NHS Pension Scheme and remain employed in connection with outsourced public Services for more than 50% of their employed time with their new employer. These staff may have been through several changes of employer but they have been and remain continuously employed for more than 50% of their employed time in connection with the Services. These protected staff are referred to in the Schedule as “Eligible Employees”. If there is no such transfer of staff, the Schedule is not appropriate or necessary. In particular, staff recruited to work on the Services but who did not originate from an NHS Body or other employer which participates automatically in the NHS Pension Scheme, may be offered “access” to the NHS Pension Scheme by way of separate negotiation between the Commissioners, the independent sector provider and NHS Business Services Authority. However, those staff do not enjoy the protection conferred by Fair Deal for Staff Pensions which this Schedule is intended to implement.

The following table illustrates when the Schedule is required.

**TUPE transfer of “Eligible Employees”**

Transferor: Outgoing provider	Transferee: Incoming provider	Is Schedule 7 required?
<p><b>NHS Body</b> e.g. - NHS trust - NHS foundation trust or other employer which is required to provide the NHS Pension Scheme e.g. NHS general practitioners</p>	<p><b>Independent sector provider</b> offering the NHS Pension Scheme or a Broadly Comparable pension scheme (under specific circumstances if access to the NHS Pension Scheme is not possible)</p>	<p><b>YES</b></p>
<p><b>Independent sector provider</b> offering a Broadly Comparable pension scheme or the NHS Pension Scheme</p>	<p><b>Independent sector provider</b> offering the NHS Pension Scheme or a Broadly Comparable pension scheme (under specific circumstances if access to the NHS Pension Scheme is not possible)</p>	<p><b>YES</b></p>
<p><b>Independent sector provider</b> offering a Broadly Comparable pension</p>	<p><b>NHS Body</b> or other employer which participates automatically in the</p>	<p><input checked="" type="checkbox"/> <b>YES</b> <b>but the Schedule will require significant tailoring.</b></p>

scheme	NHS Pension Scheme	For example, Paragraph 9 (PENSIONS ON TRANSFER OF EMPLOYMENT ON EXIT) will need to be tailored to protect the onward transfer of any staff who did not originally transfer from the outgoing provider and so are not “Eligible Employees” but who are engaged by the NHS Body or other employer which participates automatically in the NHS Pension Scheme, to work on the Services for more than 50% of their employed time. Such staff are entitled to Fair Deal for Staff Pensions protection when they TUPE to a new provider at the end of the Contract.
<b>Independent sector provider</b> offering the NHS Pension Scheme	<b>NHS Body</b> or other employer which participates automatically in the NHS Pension Scheme	<b>NO</b>
<b>NHS Body</b> or other employer which participates automatically in the NHS Pension Scheme	<b>NHS Body</b> or other employer which participates automatically in the NHS Pension Scheme	<b>NO</b>

### It is important to note that:

1. It may be necessary for NHS England to update the template Schedule in due course to reflect further development of both Fair Deal for Staff Pensions and the guidance issued in February 2014 by the Department of Health in respect of the impact of Fair Deal for Staff Pensions on NHS Pension Scheme participation. The Department of Health guidance is available at:  
  
<https://www.gov.uk/government/publications/fair-deal-policy-and-nhs-pension-scheme>
2. The law is in any event subject to change and as a result the Schedule may become outdated.
3. For these reasons Commissioners should ensure that only the most up-to-date version of the Schedule (available via the NHS England website <http://www.england.nhs.uk/>) is incorporated in relevant Contracts,
4. The areas covered by the Schedule are technical. Commissioners MUST take legal advice before using the Schedule in any Contract.
5. The Schedule contains drafting notes where considered helpful to the Commissioners. These must be deleted from the Schedule before it is used in any Contract.

## Explanation of key provisions in the Schedule

**Paragraph 2.1 (*Continued membership of the NHS Pension Scheme*)** sets out the Fair Deal for Staff Pensions requirement. It obliges the independent sector provider to obtain what is called a “Direction Letter” and/or a “Determination (in respect of “Eligible Employees” who are active members or are eligible to be active members in the 2015 Section of the NHS Pension Scheme) from NHS Pensions. A Direction Letter and/or a Determination will not be issued until after the Transfer Date for the relevant employees, as NHS Pensions (who process the applications on behalf of the Secretary of State) require a confirmed TUPE transfer list of “Eligible Employees” and that can only be supplied on or after the Transfer Date.

The Direction Letter or Determination enables the independent sector provider to participate in the NHS Pension Scheme in respect of “Eligible Employees”. In other words, those transferring staff who are active or eligible to be active members of the NHS Pension Scheme (or a Broadly Comparable pension scheme) immediately before the transfer because they continue to work on the Services that are being transferred under the Contract for more than 50% of their employed time for their new employer. It means that the staff can continue to pay contributions and accrue benefits in the NHS Pension Scheme in the same way they did before the transfer and that their past benefits will remain in (or in the case of a Broadly Comparable pension scheme provided pre-transfer, can be transferred back into) the NHS Pension Scheme. Any independent sector provider must be made aware that the regular monthly employer contributions due under the Direction Letter/Determination do not cover the additional pension liabilities which arise on redundancy, retirement

for business efficiency nor injury benefits, all of which are payable under legislation or contractual arrangements which are separate to the core NHS Pension Scheme.

**Paragraph 2.2 (Broadly Comparable Pension Benefits)** gives the Commissioners the flexibility, where a Direction Letter cannot be obtained for any of the reasons explained below, to allow the independent sector provider instead to provide transferring staff with benefits under a Broadly Comparable pension scheme. The reasons are (i) if the contracting authority would be unable to offer a “level playing field” for the retendered contract without allowing that option and/or (ii) if an incumbent provider intending to bid on the retendering has a contractual obligation to staff to provide a Broadly Comparable pension scheme and is unable to renegotiate that obligation.

The aim of a Broadly Comparable pension scheme is to ensure that members of staff have pension benefits which are comparable to the benefits they would have accrued had they remained in the NHS Pension Scheme, so that those staff will not suffer any detriment overall. Accordingly, the Broadly Comparable pension scheme must be assessed against the NHS Pension Scheme available at that time (as set out in regulations) for comparable employees in the NHS Pension Scheme. For example, in relation to staff with final salary benefits and subsequently career average benefits under the 2015 scheme, the assessment must allow for the provision of final salary benefits to March 2015 and career average benefits from April 2015 under NHS Pension Scheme. The Broadly Comparable requirement will also be subject to any transitional protections that apply to members of the NHS Pension Scheme.

Paragraph 2.2 (Broadly Comparable Pension Benefits) will not be relevant and may be deleted where the Provider and/or any relevant Sub-Contractor(s) either participate as of right in the NHS Pension Scheme or have each secured a letter of comfort relating to obtaining a Direction Letter / Determination in respect of all Eligible Employees by the time the Contract is entered into. It is anticipated that Direction Letter(s) / Determination(s) will be secured in the vast majority of cases.

**Paragraphs 2.3 (Transfer Option) and 2.4 (Calculation of Transfer Amount)** will continue to be relevant when an outgoing provider operates a Broadly Comparable pension scheme in respect of the Eligible Employees. This is because Eligible Employees, if they have past benefits in that scheme, must still be offered the “Transfer Option” which is explained further below.

When a Broadly Comparable pension scheme is offered by the Provider/Sub-Contractor(s), the Schedule requires the Broadly Comparable pension scheme to be in place and supporting evidence provided in the form of a certificate of broad comparability prepared by a qualified actuary before the transfer of staff takes place. The certificate must be prepared on the basis set out in Annex A of Fair Deal for Staff Pensions. Where relevant, or potentially relevant, this should be made an additional Condition Precedent under Schedule 1A to the Contract.

Annex B of Fair Deal for Staff Pensions is relevant as this provides detail on how Fair Deal for Staff Pensions is implemented in relation to the transferring staff’s past benefits in the NHS Pension Scheme. The key point is that staff must have the option to retain the link between their accrued pensionable service in the NHS

Pension Scheme and future salary increases. Therefore, in accordance with **Paragraph 2.3** of the Schedule, transferring staff must be offered the Transfer Option (i.e. the option to transfer their accrued rights into the NHS Pension Scheme from the independent contractor's pension scheme on a year-for-year day-for-day service credit or actuarially equivalent basis). If any staff do not take up the Transfer Option within the given timescale, their past benefits will be preserved in the ceding pension scheme (meaning the original scheme which the staff are forced to leave as a result of their transfer of employment) unless they transfer those benefits to the NHS Pension Scheme later on an individual basis, which will usually be a less generous basis for the member.

**Paragraph 2.4 (*Calculation of Transfer Amount*)** deals with calculation of the assets relating to the past benefits with a view to transferring them into a Broadly Comparable pension scheme or, more likely, or the NHS Pension Scheme. The ceding scheme is unlikely to have any issues with the ability to make a transfer of assets and liabilities, the issue will be around the basis for the calculation (see the explanatory paragraph immediately below) – in particular that there may be a shortfall liability to meet at this point. However, the incoming independent sector provider will not wish to assume the risk of any such liability in respect of pensionable service with the Transferring Staff's former employers. Accordingly, if the outgoing contractor has not agreed to meet that liability the staff may still be able to transfer their past benefits but will not receive benefits in the incoming Provider's scheme on a no detriment basis. To avoid staff suffering such a detriment, and to comply with Fair Deal for Staff Pensions, the Commissioners should request the incoming Provider to meet the liability and pass on the cost of doing so in negotiated prices for Services with the Commissioners, to the extent that those prices are negotiable or variable. Commissioners must take their own legal and actuarial advice in these circumstances to ensure this requirement is compatible with the Commissioners' obligations under procurement legislation to secure a level playing field between new and incumbent bidders.

Under some previous versions of the NHS Standard Contract (eg versions 11/12, 13/14), there is an explicit obligation on the outgoing contractor to comply with the earlier guidance issued by HM Treasury in June 2004 (Fair Deal for Staff Pensions: Procurement of Bulk Transfer Agreements and Related Issues). This 2004 guidance (in its paragraph 29) provides that the scheme receiving a bulk transfer and/or the outgoing contractor should be tied into providing funds for an onward bulk transfer value sufficient at least to match the value for members which would be generated by replicating the terms of the agreement under which the scheme received the inward bulk transfer at the beginning of the contract.

Fair Deal for Staff Pensions (as defined above) provides more detail on how the bulk transfer should be calculated. In terms of NHS Pension Scheme service, as a matter of fairness, the Commissioners will wish the ceding scheme to use the same actuarial principles (but with assumptions which are determined by reference to an earlier staff transfer date updated to those determined by reference to the latest staff transfer date) in calculating the Transfer Amount (and any allowance for a shortfall adjustment or shortfall payment) as were used when the ceding scheme received the assets and liabilities in respect of that service, or if it produces a more favourable result, the funding requirements of the ceding scheme. This information will be set out in an Actuary's letter connected to the previous transfer.



**In Paragraph 2.4**, the Co-ordinating Commissioner will use “reasonable endeavours” to make the outgoing provider’s pension scheme pay the Transfer Amount. The financial protection for the incoming provider is that it will not have to give full credits in its pension scheme if it does not receive this Transfer Amount (first line of **Paragraph 2.6**). Reasonable endeavours, in this context, means the Co-ordinating Commissioner must request and take such steps as it reasonably can to ensure the co-operation of the outgoing provider (having regard to any contractual obligations on the part of the outgoing provider) but is under no obligation to do any more than this.

If the outgoing provider, the incoming Provider and Co-ordinating Commissioner cannot agree the terms for calculating the Transfer Amount, the Transfer Option cannot be offered and the past benefits may be preserved in the outgoing provider’s scheme. Staff will still be protected (1) as the incoming Provider must offer the NHS Pension Scheme or a Broadly Comparable pension scheme in terms of future benefits and (2) in terms of past benefits, the outgoing provider’s scheme should augment a member’s deferred benefits to a level commensurate with existing benefits on an on-going basis – basically, the loss of future salary increases on accrued benefits is translated into a one-off augmentation to preserved benefits which normally only then increase in line with price inflation or a lower measure based on price inflation. This undertaking by the outgoing provider is a condition of being awarded the Certificate of Broad Comparability. If bulk transfer terms are agreed and a Transferring Employee is offered a Transfer Option and does not take it up, there is no requirement to augment their preserved benefits.

If the outgoing provider becomes insolvent and there is a funding deficit, accrued benefits in the outgoing provider’s scheme may need to be reduced. Any benefits would be payable by the outgoing provider’s scheme (or by the Pension Protection Fund if it takes over the scheme) and no transfer of assets or liabilities will then be possible. In that case, compliance with Fair Deal for Staff Pensions in its entirety will not be possible for these exceptional reasons. The incoming provider will not be concerned by this situation as no liability will pass to it in respect of past benefits. In terms of future service, the incoming provider will seek a Direction Letter / Determination or place staff in a Broadly Comparable scheme, in the normal way. In this scenario staff are likely to receive lower benefits (though at or above Pension Protection Fund levels) than they would otherwise have received for past service, but accrue future benefits at the expected rate in the incoming Provider’s scheme.

**Paragraph 2.5 (Payment of Transfer Amount) and paragraph 2.6 (Credit for Transfer Amount)** are procedural.

**Paragraph 3 (Premature Retirement Rights)** reflects the operation of TUPE (as confirmed by European case law). It confirms that the independent contractor must provide early retirement and injury benefits as if the individual had remained employed by an NHS Body or other employer which participates as of right in the NHS Pension Scheme. Regular monthly employer contributions to the NHS Pension Scheme do not cover these costs and independent sector providers must recognise that these are additional liabilities which must be settled if and when they arise.

**Paragraph 4 (Cancellation of Any Direction Letter/Determination and Right of Set-Off)** contains protections for the Commissioners (and in turn the Transferred

Staff) should the independent sector provider not pay its NHS Pension Scheme contributions. There is both a right of set-off and a right to terminate the Contract.

**Paragraph 5 (*Compensation*)** will only apply in exceptional circumstances, for example where the independent sector provider has not previously been involved in public services, is unable to secure a Direction Letter/Determination from the NHS Pension Scheme, does not have its own existing defined benefit pension scheme and the group of staff transferring is too small (less than 5) to justify the expense of setting one up. This facility for the independent sector provider to make an approach to staff and agree compensation for loss of pension protection is available only with the Commissioners' advance written consent. In other words, it is a flexibility owned entirely by the Commissioners and is additional to the Commissioners' right to terminate the Contract. Before providing consent, the Commissioners must consider that the independent sector provider has used its best endeavours to secure a Direction Letter/Determination and has been unable to do so. Actuarial advice would need to be taken by or evidenced to the Commissioners on the calculation of any compensation and Paragraph 5 provides that this cost must be borne by the independent sector provider. Any compensation should normally be in the form of employer pension contributions to a defined contribution (money purchase) pension scheme set up by either the employer or the employee.

**Paragraph 6 (*Indemnity Regarding Pension Benefits and Premature Retirement Rights*)** protects the Commissioners, and any new provider at the end of the Contract, against any claims by transferring staff that they have not been provided with benefits in accordance with Fair Deal for Staff Pensions.

**Paragraph 7 (*Sub-contractors*)** obliges the independent sector provider to ensure that any relevant Sub-Contract also reflects Fair Deal for Staff Pensions requirements.

**Paragraph 8 (*Direct Enforceability by the Eligible Employees*)** is required by Fair Deal for Staff Pensions, and gives the Eligible Employees a right to enforce the Schedule against the independent sector provider (i.e. the Provider/Sub-Contractors).

**Paragraph 9 (*Pensions on Transfer of Employment on Exit*)** deals with the orderly transition of Services from the Provider to any new provider or the resumption of the provision of the Services by an NHS Body (such as an NHS trust or NHS foundation trust) or other employer which participates automatically in the NHS Pension Scheme. In summary, the former independent sector provider must co-operate with the new provider to pay a Transfer Amount (calculated on the funding basis used by the former independent sector provider's scheme, except that the proportion attributable to a previous bulk transfer under the Fair Deal requirements must be no less favourable than the terms for that bulk transfer including any allowance for a shortfall adjustment or shortfall payment that was agreed with the former provider except that any assumptions which are determined by reference to an earlier staff transfer date will be updated by reference to the latest staff transfer date) to the new provider's Broadly Comparable pension scheme or the NHS Pension Scheme as appropriate.

## SCHEDULE 7 – PENSIONS

### 1. Definitions

- 1.1 Terms not defined at the end of this Schedule are to be interpreted in accordance with the Definitions and Interpretation section of the Contract.

### 2. Pension Protection For Eligible Employees

#### 2.1 Continued membership of the NHS Pension Scheme

- 2.1.1 In accordance with Fair Deal for Staff Pensions, the Provider and/or each Sub-Contractor to which the employment of any Eligible Employee compulsorily transfers as a result of the award of this Contract, if not an NHS Body or other employer which participates automatically in the NHS Pension Scheme, must each secure a Direction Letter/Determination to enable the Eligible Employees to retain either continuous active membership of or eligibility for, the NHS Pension Scheme, for so long as they remain employed in connection with the delivery of the Services under this Contract.
- 2.1.2 Where it is not possible for the Provider and/or each Sub-Contractor (if relevant) to secure a Direction Letter/Determination on or before the Transfer Date, the Provider must secure a Direction Letter/Determination as soon as possible after the Transfer Date, and in the period between the Transfer Date and the date the Direction Letter/Determination is secure, the Provider must ensure that:
- 2.1.2.1 all employer's and Eligible Employees' contributions intended to go to the NHS Pension Scheme are kept in a separate bank account; and
  - 2.1.2.2 the Pension Benefits and Premature Retirement Rights of Eligible Employees are not adversely affected.
- 2.1.3 The Provider must supply to the Co-ordinating Commissioner a complete copy of each Direction Letter/Determination within 5 Business Days of receipt of the Direction Letter/Determination.
- 2.1.4 The Provider (or its Sub-Contractor if relevant) will comply with the terms of the Direction Letter/Determination (including any terms which change as a result of changes in legislation) in respect of the Eligible Employees until the day before the Exit Transfer Date for so long as they are employed on the delivery of the Services.
- 2.1.5 Where any member of Staff omitted from the Direction Letter/Determination supplied in accordance with paragraph 2.1.3 above is subsequently found to be an Eligible Employee, the Provider (or its Sub-Contractor if relevant) will ensure that that person is treated as an Eligible Employee from the Transfer Date so that their Pension Benefits and Premature Retirement Rights are not adversely affected.

**[DRAFTING NOTE: The Paragraph below, 2.2 (Broadly Comparable Pension Benefits) will not be relevant and may be deleted where the Provider and/or any relevant Sub-Contractor(s) either participate automatically in the NHS Pension Scheme or have each secured a letter of comfort relating to obtaining a Direction Letter/Determination in respect of all Eligible Employees by the time the Contract is entered into. If the Provider is not automatically an employer in the NHS Pension Scheme, it is anticipated that Direction Letter/Determination(s) will be secured in the vast majority of cases.]**

## **2.2 Broadly Comparable Pension Benefits**

2.2.1 If the Co-ordinating Commissioner in its sole discretion (having considered the exceptional cases provided for in Fair Deal for Staff Pensions) agrees that the Provider (or any Sub-Contractor) need not provide the Eligible Employees with access to the NHS Pension Scheme, the Provider (or any Sub-Contractor) must ensure that, with effect from the Transfer Date until the day before the Exit Transfer Date, the Eligible Employees are offered access to a scheme under which the Pension Benefits are Broadly Comparable to those provided under the NHS Pension Scheme.

2.2.2 The Provider must supply to the Co-ordinating Commissioner details of its (or its Sub-Contractor's) Broadly Comparable scheme and provide a full copy of the valid certificate of Broad Comparability covering all Eligible Employees, as soon as it is able to do so and in any event no later than [28] days<sup>1</sup> before the Transfer Date.

## **2.3 Transfer Option**

As soon as reasonably practicable and in any event no later than [20 Operational Days]<sup>2</sup> after the Transfer Date, the Provider must provide the Eligible Employees with the Transfer Option, where the former provider offered, or the Provider offers, a Broadly Comparable scheme.<sup>3</sup>

## **2.4 Calculation of Transfer Amount<sup>4</sup>**

2.4.1 The Commissioners will use reasonable endeavours to procure that [20 Operational Days]<sup>5</sup> after the Transfer Option Deadline, the Transfer Amount is calculated by the former provider's Actuary<sup>6</sup> on the following basis and notified to the Provider along with any appropriate underlying methodology.

2.4.1.1 If the former provider offers a Broadly Comparable scheme to Eligible Employees:

2.4.1.1.1 the part of the Transfer Amount which relates to benefits accrued in that Broadly Comparable scheme other than

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<sup>1</sup> 28 days is a suggested timescale. Please select a timescale which is in accordance with the circumstances of your particular Contract.

<sup>2</sup> This is a suggested timescale bearing in mind that the whole process for the bulk transfer should take no more than 6 months.

<sup>3</sup> This Paragraph 2.3 can be deleted if neither the former provider nor the Provider nor any Sub-Contractor offered/are offering a Broadly Comparable scheme. In these circumstances Paragraphs 2.4 – 2.6 can also be deleted.

<sup>4</sup> In accordance with B.4 of Fair Deal for Staff Pensions, the terms of the bulk transfer should be determined by the former provider's Actuary at the outset of the procurement process.

<sup>5</sup> This is a suggested timescale. It is not unreasonable if all the data is available and agreed well in advance of the Transfer Date.

<sup>6</sup> If the former provider is an NHS Employer within the meaning of the NHS Pension Scheme Regulations, the former provider's Actuary will be the NHS Pension Scheme Actuary (currently the Government Actuary's Department).

<sup>7</sup> The principles should be set out in a formal bulk transfer note issued on behalf of the NHS Pension Scheme. Where a shortfall applied, further principles should be set out in a separate note that is subject to the terms of the contract for services with the former provider.

those in sub-paragraph 2.4.1.1.2 below must, as a minimum, be aligned to the funding requirements of that scheme; and

- 2.4.1.1.2 the part of the Transfer Amount which relates to benefits accrued in the NHS Pension Scheme (having been previously bulk transferred into the former provider's Broadly Comparable scheme), must be aligned to whichever of (a) the funding requirements of the former provider's Broadly Comparable scheme; or (b) the principles<sup>7</sup> under which the former provider's Broadly Comparable scheme received a bulk transfer payment from the NHS Pension Scheme (together with any shortfall payment)<sup>8</sup>, gives the higher figure,

provided that where the principles require the assumptions to be determined as at a particular date, that date will be the Transfer Date.

- 2.4.1.2 If the former provider offers the NHS Pension Scheme to Eligible Employees, the Transfer Amount will be calculated by the NHS Pension Scheme's Actuary on the basis applicable for bulk transfer terms from the NHS Pension Scheme set by the Department of Health from time to time<sup>9</sup>.

- 2.4.2 Each party will promptly provide to any Actuary calculating or verifying the Transfer Amount any documentation and information which that Actuary may reasonably require.

## 2.5 **Payment of Transfer Amount**

Subject to:

- 2.5.1 the period for acceptance of the Transfer Option having expired; and
- 2.5.2 the Provider having (and/or having procured that any relevant Sub-Contractor has) provided the trustees or managers of the former provider's pension scheme (or NHS Business Services Authority, as appropriate) with completed and signed forms of consent in a form acceptable to the former provider's pension scheme from each Eligible Employee in respect of the Transfer Option; and
- 2.5.3 the calculation of the Transfer Amount in accordance with Paragraph 2.4 (*Calculation of Transfer Amount*); and
- 2.5.4 the trustees or managers of the Provider's (or any Sub-Contractor's) Broadly Comparable scheme (or NHS Business Services Authority, as appropriate) having confirmed in writing to the trustees or managers of the former provider's pension scheme (or NHS Business Services Authority, as appropriate) that they are ready, willing and able to receive the Transfer Amount and the bank details of where the Transfer Amount should be sent, and not having revoked that confirmation,

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<sup>8</sup> B8 to B14 inclusive of Fair Deal for Staff Pensions which deal with price adjustments/shortfall requirements are relevant here and are discussed in section 2 of Stage 2 of the guidance issued in February 2014 by the Department of Health in respect of the impact of Fair Deal for Staff Pensions on NHS Pension Scheme participation.

<sup>9</sup> Commissioners should obtain a signed note from the NHS Pension Scheme Actuary during the procurement specifying the bulk transfer terms that apply.

the Co-ordinating Commissioner will use reasonable endeavours to procure that the former provider's pension scheme (or the NHS Pension Scheme, as appropriate) will, on or before the Payment Date, transfer to the Provider's (or Sub-Contractor's) Broadly Comparable scheme (or NHS Pension Scheme) the Transfer Amount in cash, together with any cash or other assets which are referable to additional voluntary contributions (if any) paid by the Eligible Employees which do not give rise to salary-related benefits.

## 2.6 Credit for Transfer Amount

Subject to prior receipt of the Transfer Amount (and any shortfall payable),<sup>10</sup> by the trustees or managers of the Provider's (or Sub-Contractor's) Broadly Comparable scheme (or NHS Business Services, as appropriate), the Provider must procure that year-for-year day-for-day service credits are granted in the Provider's (or Sub-Contractor's) Broadly Comparable scheme (or NHS Pension Scheme), or an actuarial equivalent agreed by the Commissioners' Actuary (and NHS Pension Scheme Actuary) in accordance with Fair Deal for Staff Pensions as a suitable reflection of the differences in benefit structure between the NHS Pension Scheme and the Provider's (or Sub-Contractor's) pension scheme.

## 3. Premature Retirement Rights

- 3.1 From the Transfer Date until the day before the Exit Transfer Date, the Provider must provide (and/or must ensure that any relevant Sub-Contractor must provide) Premature Retirement Rights in respect of the Eligible Employees that are the same as the benefits they would have received had they remained employees of an NHS Body or other employer which participates automatically in the NHS Pension Scheme.

## 4. Cancellation of any Direction Letter/Determination(s) and Right of Set-Off

- 4.1 If the Co-ordinating Commissioner is entitled to terminate this Contract under GC17.10.16 (*Termination: Provider Default*), the Co-ordinating Commissioner may in its sole discretion instead of exercising its right under GC17.10.16 (*Termination: Provider Default*) permit the Provider (or the relevant Sub-Contractor, as appropriate) to offer Broadly Comparable Pension Benefits, on such terms as decided by the Co-ordinating Commissioner.
- 4.2 If any Commissioner is notified by NHS Business Services Authority of any NHS Pension Scheme Arrears, the Commissioners will be entitled to deduct all or part of those arrears from any amount due to be paid by that Commissioner to the Provider having given the Provider 5 Operational Days' notice of its intention to do so, and to pay any sum deducted to NHS Business Services Authority in full or partial settlement of the NHS Pension Scheme Arrears. This set-off right is in addition to and not instead of the Co-ordinating Commissioner's right to terminate the Contract under GC17.10.16 (*Termination: Provider Default*).

## 5. Compensation

- 5.1 If the Provider (or any Sub-Contractor) is unable to provide the Eligible Employees with either:
- 5.1.1 membership of the NHS Pension Scheme (having used its best endeavours to secure a Direction Letter/Determination); or
  - 5.1.2 a Broadly Comparable scheme,

the Commissioners may in their sole discretion permit the Provider to (or procure that the relevant Sub-Contractor) compensate the Eligible Employees in a manner that is Broadly Comparable or equivalent in cash terms, the Provider (or Sub-Contractor as relevant) having

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<sup>10</sup> In terms of shortfalls, please see section 2 of Stage 2 of the guidance issued in February 2014 by the Department of Health in respect of the impact of Fair Deal for Staff Pensions on NHS Pension Scheme participation.

consulted with a view to reaching agreement any recognised trade union or, in the absence of such body, the Eligible Employees. The Provider must (or must procure that the relevant Sub-Contractor) meets the costs of the Commissioners in determining whether the level of compensation offered is reasonable in the circumstances.

- 5.2 This flexibility for the Commissioners to allow compensation in place of Pension Benefits is in addition to and not instead of the Co-ordinating Commissioner's right to terminate the Contract under GC17.10.16 (*Termination: Provider Default*).

## **6 Provider Indemnities Regarding Pension Benefits and Premature Retirement Rights**

- 6.1 The Provider must indemnify and keep indemnified the Commissioners and any new provider against all Losses arising out of any claim by any Eligible Employee that the provision of (or failure to provide) Pension Benefits and Premature Retirement Rights from the Transfer Date, or the level of such benefit provided, constitutes a breach of his or her employment rights.
- 6.2 The Provider must indemnify and keep indemnified the Commissioners, NHS Business Services Authority and any new provider against all Losses arising out of the Provider (or its Sub-Contractor) allowing anyone who is not an Eligible Employee to join or claim membership of the NHS Pension Scheme at any time during the Contract Term.
- 6.3 The Provider must indemnify the Commissioners, NHS Business Services Authority and any new provider against all Losses arising out of its breach of this Schedule 7 and/or the terms of the Direction Letter/Determination.

## **7 Sub-contractors**

- 7.1 If the Provider enters into a Sub-contract it will impose obligations on its Sub-Contractor in the same terms as those imposed on the Provider in relation to Pension Benefits and Premature Retirement Benefits by this Schedule 7, including requiring that:
- 7.1.1 If the Provider has secured a Direction Letter/Determination, the Sub-Contractor also secures a Direction Letter/Determination in respect of the Eligible Employees for their future service with the Sub-Contractor as a condition of being awarded the Sub-Contract; or
- 7.1.2 If the Provider has offered the Eligible Employees access to a pension scheme under which the benefits are Broadly Comparable to those provided under the NHS Pension Scheme, the Sub-Contractor either secures a Direction Letter/Determination in respect of the Eligible Employees or provides Eligible Employees with access to a scheme with Pension Benefits which are Broadly Comparable to those provided under the NHS Pension Scheme and in either case the option for Eligible Employees to transfer their accrued rights in the Provider's pension scheme into the Sub-Contractor's Broadly Comparable scheme (or where a Direction Letter/Determination is secured by the Sub-Contractor, the NHS Pension Scheme) on the basis set out in Paragraph 2.6 (*Credit for Transfer Amount*), except that the Provider or the Sub-Contractor as agreed between them, must make up any shortfall in the transfer amount received from the Provider's pension scheme.

## **8 Direct Enforceability by the Eligible Employees**

- 8.1 Notwithstanding GC29 (*Third Party Rights*), the provisions of this Schedule may be directly enforced by an Eligible Employee against the Provider and the Parties agree that the Contracts (Rights of Third Parties) Act 1999 will apply to the extent necessary to ensure that any Eligible Employee will have the right to enforce any obligation owed to him or her by the Provider under this Schedule in his or her own right under section 1(1) of the Contracts (Rights of Third Parties) Act 1999.
- 8.2 Further, the Provider must ensure that the Contracts (Rights of Third Parties) Act 1999 will apply to any Sub-Contract to the extent necessary to ensure that any Eligible Employee will

have the right to enforce any obligation owed to them by the Sub-Contractor in his or her own right under section 1(1) of the Contracts (Rights of Third Parties) Act 1999.

## **9 Pensions on Transfer of Employment on Exit**

9.1 In the event of any termination or expiry or partial termination or expiry of this Contract which results in a transfer of the Eligible Employees, the Provider must (and if offering a Broadly Comparable scheme, must use all reasonable efforts to procure that the trustees or managers of that pension scheme must):

9.1.1 not adversely affect pension rights accrued by the Eligible Employees in the period ending on the Exit Transfer Date;

9.1.2 within 30 Operational Days of being requested to do so by the new provider, (or if the new provider is offering Eligible Employees access to the NHS Pension Scheme, by NHS Business Services Authority), provide a transfer amount calculated in accordance with Paragraph 2.4 (*Calculation of the Transfer Amount*); and

9.1.3 do all acts and things, and provide all information and access to the Eligible Employees, as may in the reasonable opinion of the Commissioners be necessary or desirable and to enable the Commissioners and/or the new provider to achieve the objectives of Fair Deal for Staff Pensions.

## **DEFINITIONS**

**Actuary** a Fellow of the Institute and Faculty of Actuaries

**Broadly Comparable** certified by an Actuary as satisfying the condition that there are no identifiable Eligible Employees who would overall suffer material detriment in terms of their future accrual of Pension Benefits under the scheme compared with the NHS Pension Scheme assessed in accordance with Annex A of Fair Deal for Staff Pensions



<b>Eligible Employee</b>	<p>each of the Transferred Staff who immediately before the Transfer Date was a member of, or was entitled to become a member of, or but for their compulsory transfer of employment would have been entitled to become a member of, either the NHS Pension Scheme or a Broadly Comparable scheme as a result of their employment or former employment with either an NHS Body (or other employer which participates automatically in the NHS Pension Scheme) and being continuously engaged for more than 50% of their employed time with the former provider in the delivery of the Services</p> <p>For the avoidance of doubt a Staff member who is or is entitled to become a member of the NHS Pension Scheme as a result of being engaged in the Services and being covered by an “open” Direction Letter/Determination or other NHS Pension Scheme “access” facility but who has never been employed directly by an NHS Body (or other body which participates automatically in the NHS Pension Scheme) is not an Eligible Employee entitled to Fair Deal for Staff Pensions protection under this Schedule</p>
<b>Exit Transfer Date</b>	the date on which the Eligible Employees transfer their employment to a new provider at the end of the Contract Term
<b>Fair Deal for Staff Pensions</b>	the guidance issued by HM Treasury entitled 'Fair Deal for staff pensions: staff transfer from central government', October 2013
<b>NHS Pension Scheme Actuary</b>	the Government Actuary's Department or any successor Actuary
<b>NHS Pension Scheme Arrears</b>	any failure on the part of the Provider or any Sub-Contractor to pay employer's or deduct and pay across employee's contributions to the NHS Pension Scheme or meet any other financial obligations under the NHS Pension Scheme or any Direction Letter/Determination in respect of the Eligible Employees
<b>Payment Date</b>	[20 Operational Days] after the last of the conditions in Paragraph 2.5 of this Schedule ( <i>Payment of Transfer Amount</i> ) has been satisfied
<b>Pension Benefits</b>	any benefits (including but not limited to pensions related allowances and lump sums) relating to old age, invalidity or survivor's benefits provided under an occupational pension scheme

**Premature Retirement Rights**

rights to which the Transferred Staff (had they remained in the employment of an NHS Body or other employer which participates automatically in the NHS Pension Scheme) would have been or is entitled under the NHS Pension Scheme Regulations, the NHS Compensation for Premature Retirement Regulations 2002 (SI 2002/1311), the NHS (Injury Benefits) Regulations 1995 (SI 1995/866), and Section 45 of the General Whitley Council conditions of service, or any other legislative or contractual provision which replaces, amends, extends or consolidates the same from time to time

**Transfer Amount**

an amount paid in accordance with Paragraph 2.5 of this Schedule (*Payment of Transfer Amount*) and calculated in accordance with the assumptions, principles and timing adjustment referred to in Paragraph 2.4 of this Schedule (*Calculation of Transfer Amount*) in relation to those Eligible Employees who have accrued defined benefit rights in the NHS Pension Scheme or former provider's Broadly Comparable scheme and elected to transfer them to the Provider's Broadly Comparable scheme under the Transfer Option

**Transfer Date**

the Transferred Staff's first day of employment with the Provider (or its Sub-Contractor)

**Transfer Option**

an option given to each Eligible Employee with either:

- (i) accrued rights in the NHS Pension Scheme; or
- (ii) accrued rights in a Broadly Comparable scheme,

as at the Transfer Date, to transfer those rights to the Provider's (or its Sub-Contractor's) Broadly Comparable scheme or back into the NHS Pension Scheme (as appropriate), to be exercised by the Transfer Option Deadline, to secure year-for-year day-for-day service credits in the relevant scheme (or actuarial equivalent, where there are benefit differences between the two schemes)

**Transfer Option Deadline**

the first Operational Day to fall at least [3 months]<sup>11</sup> after the notice detailing the Transfer Option has been sent to each Eligible Employee

**Transferred Staff**

those employees whose employment compulsorily transfers to the Provider or a Sub-Contractor by operation of TUPE, COSOP or for any other reason, as a result of the award of this Contract

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<sup>11</sup> B.7 of Fair Deal for Staff Pensions indicates that Eligible Employees should normally be given a 3 month period in which to exercise their Transfer Option.