

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Regulation of Health and Adult Social Care Services

Chapter 3 – Licensing

Enforcement

Schedule 11 - Further provision about enforcement powers

Part 1 - Discretionary requirements

Procedure

829. The procedure for discretionary requirements follows that laid down in section 43 of the Regulatory Enforcement and Sanctions Act 2008.
830. [Paragraph 1](#) requires Monitor to give notice to a person of its intention to impose a discretionary requirement on them. The notice must provide specified details, including the grounds for the proposal to impose the requirement, and the notice period within which the person could make written representations, which must be at least 28 days, except where Monitor considers a shorter period is necessary to avoid or minimise further breaches of licence conditions. In these circumstances, Monitor may shorten the notice period, but not to less than five days. A shorter period might be necessary to, for example, require a provider of services subject to continuity of service conditions who had stopped providing those services, to restore them, where continuity of those services was required.
831. [Paragraph 2](#) provides that where, following expiry of the notice period, Monitor decides to impose a requirement, a second and final notice must be given to the person involved. This must include information about why the requirement is being imposed, the implications of failure to comply with the requirement, details of how any monetary penalty is to be paid and of the rights of appeal.
832. If Monitor wishes to impose a variable monetary penalty, it must give notice of this under paragraph 1 within five years of the breach occurring.
833. A person on whom Monitor imposes a discretionary requirement is able to appeal to the First-tier Tribunal ([paragraph 3](#)). During an appeal, the duty to fulfil the discretionary requirement(s) being appealed is suspended. There are a number of grounds for appeals:
- that the decision was based on a factual error;
 - that the decision was wrong in law;
 - that the amount of a variable monetary penalty was unreasonable;

*These notes refer to the Health and Social Care Act 2012
(c.7) which received Royal Assent on 27 March 2012*

- that action required by Monitor was unreasonable (in the case of either compliance requirements or restoration requirements);
 - that the decision was unreasonable for any other reason.
834. Paragraph 3(4) specifies the measures the First-tier Tribunal may take following the appeal. It could confirm or withdraw the requirement in question, or vary it. Alternatively, the Tribunal has the same powers to act in relation to the breach(es) that gave rise to the appeal as Monitor has in relation to them. The third option is for the First –tier tribunal to remit the decision, or any matter relating to it, to Monitor for reconsideration.
835. Paragraph 4 gives Monitor specific powers to withdraw or amend discretionary requirements that it has imposed.

Non-compliance penalties

836. Paragraph 5 gives Monitor the power to impose a monetary penalty (a “non-compliance penalty”) on a person who fails to comply with a compliance or restoration requirement, and to determine the amount of the monetary penalty. When proposing to impose such a penalty, Monitor must serve a “non-compliance notice” on the person concerned. This must include details of the monetary penalty and how and when it was to be paid, the grounds for imposing the penalty, the consequences of failing to pay the penalty and the right of appeal.
837. The period for payment must not be less than 28 days from the day after the date on which the notice is received. If the person on whom the notice was served complied with the compliance requirement within that period, the payment would cease to be due. If the person does not pay the fine within the specified payment period, Monitor may increase the non-compliance penalty by no more than 50%.
838. The grounds on which a person served with a non-compliance penalty could appeal to the First-tier tribunal are set out in paragraph 6(2). Penalties are suspended whilst an appeal was in progress. The Tribunal may confirm, change or withdraw a non-compliance penalty, or remit the decision to Monitor for reconsideration.

Recovery of financial penalties and payments of penalties etc. into Consolidated Fund

839. Both variable monetary penalties and non-compliance penalties are recoverable summarily as a civil debt (paragraph 7). Monitor must pay money it received from penalties into the Consolidated Fund: it would not retain any element of the fines it imposed (paragraph 8).