

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

817. Sections 104 to 110 provide Monitor with the necessary powers to enforce the licensing regime. Whilst the Monitor and the Care Quality Commission will work jointly in relation to the licensing procedure, the two organisations have separate enforcement responsibilities. However, they are obliged to share information about relevant enforcement actions taken. Monitor’s enforcement powers are modelled on the set of civil sanctions for regulatory regimes laid down in Part 3 of the Regulatory Enforcement and Sanctions Act 2008.

Section 104 - Power to require documents and information

818. Subsection (1) provides Monitor with a power to require persons listed in subsection (2) to provide to Monitor any information that it needs to carry out its regulatory functions (as specified in subsection (4)). This power would apply to commissioners, applicants for licences, licensees, providers of NHS services exempted from holding a licence, or providers operating without a licence when they should have one. Its purpose is to allow Monitor to obtain the information it would need to operate effectively and fulfil its functions. For example, Monitor could require a provider to submit information about its financial situation to support regulatory work to protect continuity of services, or about its prices to support tariff calculation.

819. Information might be needed from providers who are currently exempted from licensing if, for example, Monitor and the NHS Commissioning Board decided to extend the scope of tariff pricing to a new service, and needed information on the prices of these services to do so.

Section 105 - Discretionary requirements

820. ‘Discretionary requirements’ are obligations which Monitor may place upon a provider of NHS services if it breached a licence condition, or failed to hold a licence when it is required to; or on any person who failed to provide Monitor with information under the previous section. Discretionary requirements are intended to act as an incentive to comply and a means of rectifying any problems.

821. Subsection (2) outlines the types of discretionary requirements that Monitor may impose. They are:

- a monetary penalty of such amount as Monitor may determine, up to 10% of turnover of the person in England (‘variable monetary penalty’);

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

- action to cease the breach in question, or make sure it did not continue or happen again ('compliance requirement'). An example of this might be a requirement that a provider cease plans to dispose of an asset that was needed for the provision of a service, the continuity of which was required, or to take action to mitigate financial risk (in breach of a condition relating to financial viability) that would threaten the continuity of such services;
 - action to restore the position to what it was before the breach occurred ('restoration requirement'). For example, Monitor could require that a provider re-open a service that it had closed in breach of a licence condition.
822. The Secretary of State is given power by regulations to prescribe how turnover would be calculated for the purposes of the 10% limit on variable monetary penalties (*subsection (4)*).
823. *Subsection (3)* provides that Monitor must not impose discretionary requirements on a provider on more than one occasion in relation to the same breach, but Monitor may, however, take action to enforce the discretionary requirements it has imposed on a provider to remedy such a breach.
824. *Subsection (5)* provides that a penalty imposed under this section that is not paid in full accrues interest, but the total amount of interest charged may not exceed the amount of the penalty itself.

Section 106 - Enforcement undertakings

825. 'Enforcement undertakings' are settlements offered by a person to rectify one or more breaches for which Monitor would otherwise be able to impose a discretionary requirement. Monitor could choose whether to accept the offered settlement, based on whether it was likely to constitute an appropriate remedy. This alternative to discretionary requirements provides an incentive for providers and others to take responsibility for proposing solutions to problems, and thus to be proactive about remedying breaches.
826. *Subsection (3)* specifies what types of enforcement undertakings Monitor may accept:
- action to cease the breach or to prevent the breach continuing or happening again;
 - action to restore the position to what it would have been before a breach occurred, so far as is possible;
 - action to benefit any licence holder or commissioner affected by a breach, which could be payment of money; or
 - other action as may be specified in regulations.
827. Once Monitor accepts an enforcement undertaking, it may only impose a discretionary requirement or revoke a licence if the licensee fails to comply with the undertaking, or any part of it (*subsection (4)*). *Subsection (5)* provides that where a provider has partially complied with an undertaking, Monitor must take the partial compliance into account when deciding whether to take further enforcement action.

Section 107 - Further provision about enforcement powers

828. This section gives effect to Schedule 11, which provides further detail about both discretionary requirements and enforcement undertakings.

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;
 - 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).

Part 2 – Enforcement undertakings

Procedure

840. Paragraphs 9 and 10 stipulate that Monitor must consult upon and then publish a procedure for entering into enforcement undertakings. It may revise that procedure but it would have to publish any revision. Monitor must also publish details of each enforcement undertaking it accepted, but with any commercial information or information that Monitor considered would or might harm any person's legitimate business or personal interests redacted (paragraph 10).

Variation of terms

841. A person giving an enforcement undertaking and Monitor may agree to vary the terms of an enforcement undertaking. This is intended to provide the flexibility to alter the agreement if necessary if, for example, a provider had good reasons for taking longer to carry out a remedial measure than was originally planned and agreed.

Compliance certificates

842. If it is satisfied that a person had complied with an enforcement undertaking, Monitor must issue a compliance certificate (paragraph 12). Someone who had given an enforcement undertaking may apply for a certificate at any time.
843. Paragraph 13 provides that an appeal to the First-tier Tribunal may be made against a decision of Monitor to refuse an application for a compliance certificate, on the grounds that the decision was based on an error in fact, was wrong in law, or was unfair or unreasonable. The Tribunal may confirm Monitor's decision or decide that it did not have effect.

Inaccurate, incomplete or misleading information

844. If Monitor is satisfied that information supplied by a person in relation to an enforcement undertaking is inaccurate, misleading or incomplete, Monitor may treat the person as having failed to comply with the undertaking. If it did this, Monitor would have to revoke any compliance certificate given to that person in connection with the particular undertaking.

Section 108 - Guidance as to use of enforcement powers

845. This section requires Monitor to consult on and publish guidance about the way in which it will exercise its powers to impose discretionary requirements and to accept enforcement undertakings (*subsection (1)*). *Subsection (5)* provides that Monitor must have regard to the published guidance in exercising those powers. Guidance would give licensees and others a better understanding of the enforcement action that Monitor is likely to take in particular circumstances.
846. *Subsection (4)* provides that the guidance must include details of when Monitor is likely to impose a discretionary requirement and when it may not impose one, how it will decide the amount of variable monetary penalties, and how decisions may be appealed.

Section 109 - Publication of enforcement action

847. *Subsection (1)* provides that Monitor must include information in its annual report on discretionary requirements it has imposed and enforcement undertakings it has accepted during the financial year that the report covers. Under *subsection (2)* Monitor is not able to include information if it is satisfied that publication of it would or might significantly harm the legitimate business or personal interests of the person to whom the information relates.
848. *Subsection (3)* provides that Monitor is not to include in the report information about discretionary requirements that have been overturned on appeal.

Section 110 - Notification of enforcement action

849. This section provides that Monitor must notify the NHS Commissioning Board, affected CCGs and other relevant regulators of discretionary requirements it imposes and enforcement undertakings it accepts. This provision is designed to ensure that information about provider performance, which may be relevant to the duties and functions of commissioners and other regulators, is shared appropriately.