

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE (PERFORMERS LISTS) (ENGLAND)
(AMENDMENT) REGULATIONS 2015

2015 No. 362

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations amend the National Health Service (Performers Lists) Regulations 2013 (S.I. 2013/335) (“the 2013 Regulations”) so that if a medical, dental, or ophthalmic practitioner is the subject of an interim suspension order from their respective regulatory body (the General Medical Council, the General Dental Council and the General Optical Council) NHS England (previously known as the NHS Commissioning Board – “the Board”) does not have to remove the practitioner from the performers list, which the Board and the Department have agreed is a disproportionate act. Instead, the Board must suspend them. These Regulations also amend the 2013 Regulations so a person applying for inclusion in a performers list need not disclose a protected caution or protected conviction, this change being made as a consequence of amendments made to the Rehabilitation of Offenders Act 1974 (Exceptions Order) 1975 following a Court of Appeal judgment in 2013.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The 2013 Regulations came into force on 1 April 2013, replacing the National Health Service (Performers Lists) Regulations 2004. In April 2013, much of the Health and Social Care Act 2012 came into force. The changes to the health service included the abolition of Primary Care Trusts (PCTs), which had been responsible for the management of the performers lists. From April 2013, the responsibility for the management of the lists transferred to the Board. The 2013 Regulations were primarily made to reflect this change.

4.2 The professional regulators may make interim orders for suspension from the registers they maintain where a concern about a registrant’s fitness to practise has been raised. These suspension orders are short-term measures to protect members of the public, patients, the practitioner and the service in general while the facts around an issue are investigated. Interim orders panels, or other committees who make interim orders, do not make findings of fact

and their orders are not intended to punish. The imposition of an interim suspension order is a neutral act.

4.3 The 2013 Regulations require the Board to remove practitioners from a performers list where they have been suspended by their professional regulator. This includes where the practitioner is subject to an interim order for suspension. Under the 2004 Regulations, PCTs were not required to take any action where a performer was made the subject of an interim order for suspension.

4.4 The Department of Health has reviewed the 2013 Regulations and considers the requirement to remove a practitioner from a performers list while that practitioner is subject to a regulator's interim suspension order is disproportionate. The imposition of an interim suspension order is intended to be a neutral act. Therefore, this should not result in removal from the performers lists. The Department has discussed this with the Board, which agrees the 2013 Regulations should be amended to remove the requirement to remove a practitioner from the performers list when an interim suspension order is in place.

4.5 The Regulations also amend the 2013 Regulations to provide that a person applying for inclusion in a performers list need not disclose a protected caution or a protected conviction. The 2013 Regulations include the requirement for applicants for inclusion in a performers list to disclose all cautions and convictions. This amendment is required as a consequence of amendments to the Rehabilitation of Offenders Act 1974 (Exceptions Order) 1975 ("the 1975 Order")¹ made following a Court of Appeal judgment in 2013².

5. Territorial Extent and Application

5.1 This instrument applies to England.

5.2 The NHS Performers List system only operates in England and this instrument does not replicate legislation which already exists in another part of the United Kingdom.

¹ A protected caution or protected conviction is one which is not 'listed' and, in respect of a person who was under 18 years at the date of the caution or conviction two years have passed from the date of the caution or five years and six months have passed in the case of a conviction. Where the person concerned was 18 years or above at the date of the caution or conviction, six years have passed from the date of the caution or 11 years have passed in the case of a conviction. In addition, a conviction will be protected only if no custodial sentence was imposed and only if the person has no other convictions. (see article 2A of the Rehabilitation of Offender Act 1974 (Exceptions) Order 1975 (S.I. 1975/1023)): The National Archives. [The Rehabilitation of Offenders Act 1974 \(Exceptions\) Order 1975 \(Amendment\) \(England and Wales\) Order 2013](#) (viewed on 16 January 2015).

² The Courts and Tribunals Judiciary. [R \(on the application of\) T -v- Chief Constable of Greater Manchester and others](#) (viewed on 16 January 2015).

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 In order to provide NHS primary care services in England GPs, dentists and ophthalmic practitioners must be on a performers list managed by the Board. The 2013 Regulations set out the procedures to manage the admission to the lists, and also mechanisms to impose conditions, suspend and remove practitioners from the list. They also set out appeal procedures.

7.2 The performers list system is intended to provide an extra reassurance for the public that GPs, Dentists and Opticians who practise in the NHS are suitably qualified, have up to date training, have appropriate English language skills and have passed other relevant checks such as with the Disclosure and Barring Service and the NHS Litigation Authority. It does this by giving the Board powers over admission, suspension and removal from its lists and the maintenance of the performers lists.

7.3 Although the Board has no employment relationship with these practitioners, it does have contractual relationships with the practitioners who are providing NHS primary care services. The performers lists are an important mechanism for the Board in this respect, assuring it that the services it is commissioning are safe. The lists also support the Board in its compliance with its duty to seek continuous improvement in the quality of health services (see Section 13E of the National Health Service Act 2006).

7.4 In October 2012, the Department of Health conducted a consultation on the changes to the performers lists entitled, Performers Lists Regulations 2013: consultation document. This document set out the changes that needed to be made due to the Health and Social Care 2012 Act, primarily the transfer of the performers lists to the Board and establishment of national lists. A number of additional changes were considered. These came from the report of the 2009 Tackling Concerns Locally review of the performers lists and also the 2010 report of the GP out-of-hours services review.

7.5 The Department published its response to the consultation in February 2013 accompanied by a copy of the draft 2013 Regulations. The 2013 Regulations came into force on 1 April 2013, replacing the National Health Service (Performers Lists) Regulations 2004 (SI 2004 No.585) (“the 2004 Regulations”).

7.6 In April 2013, much of the Health and Social Care Act 2012 came into force. Included within the changes to the health service was the abolition of Primary Care Trusts (“PCTs”). PCTs had been responsible for the management of the performers lists under the 2004 Regulations. From April

2013, the responsibility for the management of the lists transferred to the Board. In practice, the responsibility for the day-to-day management of the national lists rests with the Board's 27 Area Teams.

7.7 The 2013 Regulations require the Board to remove practitioners from a performers list where they have been suspended by their professional regulator. This includes where the performer is the subject of an interim order for suspension. Under the 2004 Regulations, PCTs were not required to take any action where a performer was made the subject of an interim order for suspension.

7.8 Interim suspension orders are designed as short-term measures to protect members of the public, patients, the practitioner and the service in general while the facts around an issue are investigated. Interim orders panels do not make findings of fact and their orders are not intended to punish. Thus, where the Board is required to remove a performer subject to an interim suspension order from its list, this appears to be at odds with the intention behind such an order. By removing a practitioner from the list, the Board is, in effect, imposing a sanction. This is punitive, requiring the practitioner to reapply for inclusion when the interim suspension order ends.

7.9 By virtue of a Determination made under the 2004 Regulations, where a practitioner was suspended from the performers list (but was not subject to a final suspension order by the regulator) the PCT had discretion to make payments to that practitioner. Under the 2013 Regulations, because automatic removal of the practitioner from the performers list also removes the Board's discretion to suspend, such practitioners are not eligible for payments under a Determination made under equivalent powers in the 2013 Regulations..

7.10 The Department of Health has reviewed the 2013 Regulations and considers the removal of a practitioner from a performers list when the practitioner is subject to a regulator's interim suspension order has a disproportionate impact. Because the imposition of an interim suspension order is intended to be a neutral act, this should not result in removal from the performers lists. The Department has discussed this with the Board, which agrees the 2013 Regulations should be amended to remove the requirement to remove a practitioner from the performers list when an interim suspension order is in place and favours reverting to the position under the 2004 Regulations.

7.11 Maintaining the current position, where the Board is required to remove practitioners from a performers list when subject to an interim suspension order by the regulator, is likely to be problematic. There is a greater risk of litigation as the removal is automatic. It does not give the practitioner the right to make representations, or the Board to consider the facts before making a final decision. We think this is unfair and we consider removal from the performers lists is a disproportionate response in these circumstances.

7.12 There is little impact on patient safety, because the practitioner is not permitted to practise when suspended by a regulator. However, practitioners subject to this procedure have to reapply to join the list, which would cause a delay to their returning to practise following the cessation of an interim suspension order.

7.13 Two Determinations made by the Secretary of State under the 2013 Regulations set out the circumstances where the Board may make payments to doctors and dentists suspended from a performers lists. Maintaining the current position also precludes payments being made to practitioners under the Determinations, because the practitioner will have to be removed from the performer's lists. The Department will amend the Determinations to enable payments to a practitioner where they have been suspended from the performers list when subject to an interim suspension order by the regulator.

7.14 Maintaining this position is not feasible or desirable.

7.15 The Regulations also amend the 2013 Regulations to provide that a person applying for inclusion in a performers list need not disclose a protected caution or a protected conviction. The 2013 Regulations include the requirement for applicants for inclusion in a performers list to disclose all cautions and convictions. This amendment is required as a consequence of amendments to the Rehabilitation of Offenders Act 1974 (Exceptions Order) 1975 ("the 1975 Order") made following a Court of Appeal judgment in 2013³. The Court of Appeal held that, where the 1975 Order applied, the blanket disclosure of all convictions and cautions was a disproportionate means of achieving a legitimate aim of protecting employers, children and vulnerable adults and that this might unjustly interfere with a person's rights under article 8 of the Human Rights Act 2000.

- Consolidation

7.16 These are minor amendments and the Department does not have any immediate plans for consolidation.

8. Consultation outcome

8.1 Initially, we consulted the Board about the changes it needed. To produce the options stage impact assessment the Board consulted seven of its 27 area teams. We then ran an eight week consultation, given the Board was the main stakeholder that had already been consulted. We sought views from organisations including those responsible for regulating the professions affected, the professional bodies, the trade unions, members of Parliament with a known interest in this area, patient representative groups, medical defence unions and legal firms with a known interest in this area.

8.2 The Department consulted on an England only basis, because the regulations we are seeking to amend only apply to England. The consultation ran from 31 July 2014 to 25 September 2014. It followed the Government

³ Ibid.

Code of Practice.

8.3 The consultation sought views on the provisions in the draft amendment regulations which set out:

- option one - provisions so that if a medical, dental, or ophthalmic performer were the subject of an interim suspension order, the Board would not have to remove the practitioner from the performers list (Regulations 9, 10 and 12); and
- option two - the optional provision for automatic suspension from a performers list when an interim suspension order is imposed by the regulator (Regulations 5 and 6).

8.4 The consultation invited respondents to consider eight questions. Two were in relation to the two provisions set out above and the consultation sought clarification about the costs, benefits, or any impacts as a result of these options. The consultation also asked respondents to consider any equalities issues that could result from implementing the proposals.

8.5 The Department received 53 responses to the consultation. No respondent thought the current position should continue, where the Board must remove a practitioner from the performers list, when they are subject to an interim suspension order by their regulator.

8.6 The majority of respondents (59%) supported the second option of automatic suspension. However, there was some opposition on the grounds:

- there was no additional benefit in terms of patient safety;
- there would be additional administrative burdens and costs;
- the option should remain to remove a practitioner if the circumstances required it; and
- there should be separation between regulatory body and the Board's processes.

8.7 We have addressed these issues in full in the consultation report, which is available from: <https://www.gov.uk/government/consultations/nhs-performers-list-changes-to-suspension-regulations>. In brief, in relation to costs and additional bureaucracy, current data from NCAS and the Board shows there are around 67 suspensions from the performers lists per annum. Of these, only two are suspensions by the regulator. Therefore, the difference in cost between option one and option two is negligible.

8.8 Although option two requires the Board to suspend a practitioner automatically when the regulator imposes an interim suspension order, the Board will still have the option of removing the practitioner from the performers list under the circumstances set out in Regulation 14 of the 2013

Regulations. This should give the Board sufficient flexibility should the circumstances require it.

8.9 We agree there is a difference in role between the regulator ensuring ‘fitness to practise’ and the Board ensuring ‘fitness for purpose’. However, we believe that if a regulator has concerns about a practitioner’s fitness to practise and issues an interim suspension order, then there should be equal concern about the practitioner’s ability to perform in any role. Therefore, we do not see how under these circumstances there is any conflict.

8.10 After careful consideration of the responses, the Department believes the best option to be option two - automatic suspension from a performers list where the practitioner is subject to a regulator’s interim suspension order. This is because it provides the fairest, most proportionate and consistent approach in addressing issues of those practitioners who have been suspended by an interim suspension order by their regulator.

9. Guidance

9.1 The Board is required by the regulations to maintain and publish accurate national performers lists. It is responsible for publishing guidance on the policy and standard operating procedure for governing the inclusion, movement and maintenance of medical, dental and ophthalmic performers in the Board’s national primary care performers lists⁴.

10. Impact

10.1 No impact on the private or voluntary sector is foreseen.

10.2 The impact on the public sector is estimated to be £6.9m per annum. This is based on the data collected from the Board’s area teams mentioned in 8.1, including current costs. This was compared with data from the National Clinical Assessment Service, which keeps information about the number of suspensions per year. The cost will be borne entirely by the Board.

10.3 An Impact Assessment has not been prepared for this instrument, as the impact is solely on the public sector.

10.4 We have considered this policy in the context of the public sector equality duty (s149 Equalities Act 2010), the Secretary of State for Health’s overarching duties set out in Section 1A-1G of the NHS Act 2006 and consideration has been given to the ‘Families Test’. We have concluded this policy will have two impacts and they will be only beneficial to the relevant groups identified in the above duties:

⁴ NHS England. [Policy and standard operating procedure for governing the inclusion, movement and maintenance of medical, dental and ophthalmic performers in the NHS England’s national primary care performers lists](#). (viewed on 16 January 2015).

- enabling them to potentially access payments under the Secretary of State's Determination whilst suspended from the performers list and by their regulator; and
- removing the administrative burden of reapplying to the performers list in cases where the registrant is found to be fit to practise following the implementation of an Interim Suspension Order.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Department of Health and the Board will continue to monitor the implementation of the Regulations including these amendments and the need for further amendments to take account of future developments.

13. Contact

Peter Reitler at the Department of Health Tel: 0113 254 5689 or email: Peter.Reitler@dh.gsi.gov.uk can answer any queries regarding the instrument.