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SCOTTISH STATUTORY INSTRUMENTS

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**2004 No. 162**

**NATIONAL HEALTH SERVICE**

**The Primary Medical Services (Sale of Goodwill and Restrictions on Sub-contracting) (Scotland) Regulations 2004**

<i>Made</i>	- - - -	<i>30th March 2004</i>
<i>Laid before the Scottish Parliament</i>	- - - -	<i>30th March 2004</i>
<i>Coming into force</i>	- -	<i>1st April 2004</i>

The Scottish Ministers, in exercise of the powers conferred by sections 17E, 17N, 35(1)(c), 105(7) and 108(1) of, and paragraph 1(3) of Schedule 9 to, the National Health Service (Scotland) Act 1978(1), and of all other powers enabling them in that behalf, hereby make the following Regulations:

**Citation and commencement**

1. These Regulations may be cited as the Primary Medical Services (Sale of Goodwill and Restrictions on Sub contracting) (Scotland) Regulations 2004 and shall come into force on 1st April 2004.

**Interpretation**

2.—(1) In these Regulations—

“the 1978 Act” means the National Health Service (Scotland) Act 1978;

“core hours” means the period beginning at 8 a.m. and ending at 6:30 p.m. on any day apart from Saturday, Sunday, Christmas Day, New Year’s Day and any other public or local holiday which is agreed in writing between the Health Board and the provider or performer;

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(1) 1978 c. 29. Section 17E was inserted by the National Health Service (Primary Care) Act 1997 (c. 46) (“the 1997 Act”), section 22(2) and amended by the Health Act 1999 (c. 8) (“the 1999 Act”), Schedule 4, paragraph 47 and the [Primary Medical Services \(Scotland\) Act 2004 \(asp 1\)](#) (“the 2004 Act”), section 2(4); section 17N was inserted by the 2004 Act, section 4; section 35 was substituted by the 1997 Act, section 34(2) and amended by the schedule to the 2004 Act, paragraph 1(14); section 105(7) was amended by the Health Services Act 1980 (c. 53), Schedule 6, paragraph 5 and Schedule 7, the Health Social Services and Social Security Adjudications Act 1983 (c. 41), Schedule 9, paragraph 24 and the 1999 Act, Schedule 4, paragraph 60; section 108(1) defines “prescribed” and “regulations”; Schedule 9, paragraph 1(3) was amended by the [Public Appointments and Public Bodies etc. \(Scotland\) Act 2003 \(asp 4\)](#), schedule 4, paragraph 5(18)(b). The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c. 46)

“default contract” means a contract entered into pursuant to an order made under section 7 of the Primary Medical Services (Scotland) Act 2004(2) (ancillary provision);

“enhanced services”, with regard to—

- (a) a GMS contractor, has the meaning given in regulation 2(1) of the GMS Contracts Regulations (interpretation);
- (b) any other performer or provider of primary medical services, means services which, if performed or provided by a GMS contractor, would be enhanced services within the meaning given in regulation 2(1) of the GMS Contracts Regulations;

“essential services” means the services described in regulation 15(3), (5), (6) and (8) of the GMS Contracts Regulations (essential services) or services that are equivalent to those services;

“GMS contractor” means a person with whom a Health Board has entered into a general medical services contract or a default contract;

“GMS Contracts Regulations” means the National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004(3);

“goodwill factor” means the difference between the value of the share when the goodwill of the performer’s or provider’s medical practice is taken into account and the value of the share when the goodwill of the performer’s or provider’s medical practice is not taken into account;

“HBMS contractor” means a person with whom a Health Board has made arrangements under section 2C(2) of the 1978 Act(4) (functions of Health Boards: primary medical services) for the provision of primary medical services, but does not include a GMS contractor or a section 17C provider;

“Section 17C Agreements Regulations” means the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004(5); and

“section 17C provider” means a person with whom a Health Board has entered into section 17C arrangements.

(2) For the purposes of these Regulations, a performer or provider has a registered patient list if there are patients—

- (a) recorded by a Health Board as being on the performer’s or provider’s list of patients or the Health Board’s list of patients in respect of the performer or provider; and
- (b) to whom the performer or provider must provide essential services during core hours other than under an arrangement to provide enhanced services.

### **Prohibition on the sale of goodwill in certain primary medical services practices**

3.—(1) The following performers or providers of primary medical services:—

- (a) a GMS contractor;
- (b) a section 17C provider that has a registered patient list;
- (c) an HBMS contractor that has a registered patient list; and
- (d) a medical practitioner with a registered patient list who is a performer of essential services during core hours, other than—
  - (i) solely under arrangements to provide enhanced services;

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(2) 2004 asp 1.

(3) S.S.I. 2004/115.

(4) Section 2C was inserted by the Primary Medical Services (Scotland) Act 2004 (asp 1), section 1(2).

(5) S.S.I. 2004/116.

- (ii) solely as a locum; or
  - (iii) only under arrangements to provide enhanced services and as a locum,
- may not sell the goodwill of their medical practices in any circumstances (and no other person may sell that goodwill in their stead).
- (2) A performer or provider of primary medical services who is a shareholder in a company—
- (a) which is, or part of which is, all or part of the performer’s or provider’s medical practice; and
  - (b) which is—
    - (i) a GMS contractor;
    - (ii) a section 17C provider that has a registered patient list; or
    - (iii) a HBMS contractor that has a registered patient list,
- may not sell a share in that company that includes a goodwill factor that relates to the performer’s or provider’s medical practice in any circumstances (and no other person may sell that share in the performer’s or provider’s stead).

#### **Amendment of the GMS Contracts Regulations**

4.—(1) In paragraph 62 of Schedule 5 to the GMS Contracts Regulations (sub contracting of clinical matters), after sub paragraph (9) insert—

“(10) The contractor shall not sub contract any of its rights or duties under the contract in relation to the provision of essential services to a company or firm—

- (a) owned wholly or partly by the contractor, or by any former or current employee of, or partner or shareholder in, the contractor;
- (b) formed by or on behalf of the contractor, or from which it derives or may derive a pecuniary benefit; or
- (c) formed by or on behalf of a former or current employee of, or partner or shareholder in, the contractor, or from which such a person derives or may derive a pecuniary benefit,

where that company or firm is or was formed wholly or partly for the purpose of avoiding the restrictions on the sale of goodwill of a medical practice in section 35 of the Act or any regulations made wholly or partly under that section.”.

(2) After paragraph 102 of Schedule 5 to the GMS Contracts Regulations (other grounds for termination by the Health Board) insert—

#### **“Termination by the Health Board for unlawful sub contracting**

**102A.** If the contractor breaches the condition specified in paragraph 62(10) and it comes to the Health Board’s attention that the contractor has done so, the Health Board shall serve a notice in writing on the contractor—

- (a) terminating the contract forthwith; or
- (b) instructing it to terminate the sub contracting arrangements that give rise to the breach forthwith, and if it fails to comply with the instruction, the Health Board shall serve a notice in writing on the contractor terminating the contract forthwith.”.

### **Amendment of the Section 17C Agreements Regulations**

5.—(1) In paragraph 32 of Schedule 1 to the Section 17C Agreements Regulations (sub contracting of clinical matters), after sub paragraph (9) insert—

“(10) The provider, if it has a provider’s list of patients, shall not sub contract any of its rights or duties under the agreement in relation to the provision of essential services to a company or firm—

- (a) owned wholly or partly by the provider or a party to the agreement, or by any former or current employee of the provider, or any partner or shareholder in a party to the agreement;
- (b) formed by or on behalf of the provider or a party to the agreement, or from which the provider or a party to the agreement derives or may derive a pecuniary benefit; or
- (c) formed by or on behalf of a former or current employee of the provider, or a partner or shareholder in a party to the agreement, or from which such a person derives or may derive a pecuniary benefit,

where that company or firm is or was formed wholly or partly for the purpose of avoiding the restrictions on the sale of goodwill of a medical practice in section 35 of the Act or any regulations made wholly or partly under that section.”.

(2) After paragraph 67 of Schedule 1 to the Section 17C Agreements Regulations (other grounds for termination by the Health Board), insert—

#### **“Termination by the Health Board for unlawful sub contracting**

**67A.** If the provider breaches the condition specified in paragraph 32(10) and it comes to the Health Board’s attention that the provider has done so, the Health Board shall serve notice in writing on the provider—

- (a) terminating the agreement forthwith; or
- (b) instructing the provider to terminate the sub contracting arrangements that give rise to the breach forthwith, and if it fails to comply with the instruction, the Health Board shall serve a notice in writing on the provider terminating the agreement forthwith.”.

### **Transitional arrangements**

6. For all purposes, a default contract shall apply as if it includes the terms set out in regulation 4 above for general medical services contracts.

### **Certificate that a transaction does not involve a sale of goodwill**

7. A certificate issued under paragraph 1(3) of Schedule 9 to the 1978 Act shall be in the form set out in the Schedule to these Regulations.

St Andrew’s House, Edinburgh  
30th March 2004

*MALCOLM CHISHOLM*  
A member of the Scottish Executive

## SCHEDULE

Regulation 7

WHEREAS \_\_\_\_\_ has applied to \_\_\_\_\_ Health Board (“the Health Board”) under paragraph 1(2) of Schedule 9 to the National Health Service (Scotland) Act 1978(a) for its opinion as to whether the proposed transaction or series of transactions described in the schedule to this certificate, which sets out all the material circumstances disclosed to the Health Board, involves the giving of valuable consideration in respect of the goodwill of a medical practice (in contravention of section 35(1) of that Act, read with the Primary Medical Services (Sale of Goodwill and Restrictions on Sub-contracting) (Scotland) Regulations 2004):

AND WHEREAS the Health Board has considered the application:

NOW THEREFORE the Health Board hereby certifies that it is satisfied that the transaction or series of transactions does not involve the giving of valuable consideration in respect of the goodwill of the medical practice.

Signed by or on behalf of the Health Board

Dated \_\_\_\_\_

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(a) Paragraph 1(2) of Schedule 9 was substituted by the National Health Service (Primary Care) Act 1997 (c.46), Schedule 2, paragraph 59(3) and amended by the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4), schedule 4, paragraph 5(18)(a).

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations prohibit the sale of goodwill by certain performers or providers of primary medical services in all circumstances (regulation 3). They also amend the National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004 and the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004 to, in effect, prohibit certain forms of sub contracting of clinical services by general medical services contractors and providers of primary medical services under agreements pursuant to section 17C of the National Health Service (Scotland) Act 1978 (c. 29) (“the Act”) (regulations 4 and 5). Regulation 6 is a transitional provision which imports the contractual terms specified in regulation 4 into default contracts, which are transitional arrangements for primary medical services providers who are entitled to enter into general medical services contracts. Regulation 7 and the Schedule set out the form of a certificate issued under paragraph 1(3) of Schedule 9 to the Act relating to a proposed transaction or series of transactions which might amount to a sale of goodwill.